

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(19)S
Sales Tax
June 24, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110413A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether receipts from the sales of municipally-mandated household garbage bags and leaf collection bags are subject to State and local sales and use taxes.

We conclude that Petitioner's receipts from sales of municipally-mandated household garbage bags as an agent of a political subdivision of the state are sales "of services or property of a kind not ordinarily sold by private persons" and therefore exempt from sales and use tax pursuant to Tax Law §1116(a)(1), but that receipts from sales of leaf collection bags do not qualify for such exemption and are taxable.

Facts

The towns of [REDACTED] ("Town A") and [REDACTED] ("Town B") require residents who self-haul their household garbage to town disposal facilities to purchase town-mandated garbage bags for the disposal of their household garbage. In addition, Town A requires those hiring a carting firm to haul their household garbage to purchase the town-mandated garbage bags. Both towns' mandated bags are embossed with the town's name and logo. The Town A's bags are yellow; Town B's are green. The fees for garbage disposal at town disposal facilities are incorporated into the purchase price of the bags. Town A also encourages the purchase and use of town-endorsed leaf collection bags for the disposal of leaves and brush, although their purchase is not mandated and the use and purchase of similar bags is permitted.

The Town B's garbage bag program is authorized by Town Code Chapter [REDACTED]; the Town A's by Town Code Chapter [REDACTED]. Both towns' codes specify that the town-mandated garbage bags are to be made available at locations throughout the towns and provide penalties for the sale or issuance of duplicate or imitation town garbage bags.

Petitioner is a grocery retailer that sells the mandated garbage bags and the recommended leaf collection bags, which are also available from other retailers and directly from the municipalities. The towns promote, in brochures and on their websites, the availability of the garbage and leaf bags from petitioner, other retailers and themselves. Petitioner purchases the embossed bags, which come in several sizes, for resale from the respective towns and sells them at prices set by the towns that include a nominal profit for the retailer. The purchase and resale

prices of the bags vary depending upon the size of the bags, but each size retails for the price set by the respective town regardless of whether sold by the Petitioner, another retailer or the town.

Analysis

All retail sales of tangible personal property are subject to sales tax pursuant to Tax Law §1105(a), unless otherwise exempted. Tax Law §1116(a)(1) provides an exemption to “(t)he State of New York, or any of its agencies, instrumentalities, public corporations ... or political subdivisions ... where it is the vendor of services or property of a kind not ordinarily sold by private persons.”

Section 1116(a)(1) exempts direct sales of the mandated garbage bags by Towns A and B from the sales and use taxes. They are unique products, “not ordinarily sold by private persons,” because the bags are embossed with the respective town’s name and logo; their purchase and use is mandated for disposal of garbage at town disposal facilities and the fee for disposal of household garbage at town disposal facilities is built into the price of the bags.

To the extent that the municipalities have the authority to designate sales agents, the §1116(a)(1) exemption would extend to the Petitioner if considered an agent of the municipalities for the sale of the bags for trash disposal. An agent/principal relationship between the Petitioner and the towns could be established if the circumstances make clear that the towns consented to Petitioner’s acting on their behalf and subject to their control, and that the Petitioner consented to the relationship. *New York Marine & General Insurance Company v. Tradeline (L.L.C.)*, 266 F.3d 112,122 (2nd Cir. 2001); *See also* Publication 765, *Sales and Fuel Excise Tax Information For Properly Appointed Agents of New York Governmental Entities (5/05)*, p.3 Publication 765 assumes that governmental entities have the authority to designate agents, but cautions that such entities must make that legal determination independently – a caution that bears repeating here. The Publication enumerates conditions necessary for establishing agency relationships for purposes of tax exempt purchases: the governmental agency must properly appoint the agent; the agent’s actions must be within the scope of its authority; and the parties’ conduct must evidence an agency relationship.

Although no formal agreement confirming that the Petitioner was properly designated as a town mandated garbage bag vendor by each of the towns has been produced by the Petitioner, the towns’ publications substantiate that the parties are acting in recognition of an agency relationship. The towns have evidenced that they consent to Petitioner’s acting on their behalf to sell their garbage bags and bind the towns to accept those bags from purchasers for garbage disposal at town disposal facilities by publicizing the bags’ availability from the Petitioner online and in print. Petitioner, by relinquishing its right to set the prices for the bags, by selling the bags at the garbage disposal fee-included prices set by the towns, and by otherwise adhering to the program requirements specified in each towns’ code, has evidenced its consent to the agency relationship and to be subject to the towns’ control with regard to this product. Thus, because the requisite conditions for the agency relationship have been satisfied, Petitioner’s receipts from the

sales of the municipally-mandated household garbage bags are exempt from State and local sales and use taxes.

The municipally endorsed leaf collection bags are a different matter. Regardless of whether Petitioner is acting as the Town A's agent, because the town authorizes the use of any similar bag in addition to its own leaf collection bag, it is not a product "of a kind not ordinarily sold by private persons." Tax Law §1116(a)(1). As a result, Petitioner's receipts from those sales are subject to State and local sales and use taxes. Publication 843, *A Guide to Sales Tax in New York State for Exempt Organizations* (12/09), p.8 ("Example: A New York municipality sells leaf/recycling bags to its residents. Sales of the bags are subject to tax because leaf bags are ordinarily sold by private persons.").

DATED: June 24, 2011

_____/S/_____
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.