

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-88(39)S
Sales Tax
August 8, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870812A

On August 12, 1987, a Petition for Advisory Opinion was received from Names in News/Direct Response Inc., 1 Penn Plaza, New York, New York 10119.

The issue raised is whether Petitioner is required to collect tax on its charges for direct response advertising.

Petitioner states that it solicits advertisers (clients) to be included in a mass mailing (Card DEC) to a selected market. Upon acquiring a client, Petitioner executes a written agreement. Petitioner states that it is appointed to act as agent for the client with respect to making purchases by this written agreement. Petitioner's client then provides Petitioner with the mechanical needed to print the advertising material. Upon acquiring a number of clients, Petitioner sends all of the mechanicals to a printer. On the printer's purchase order, each client's full name is disclosed.

Petitioner rents a mailing list which he forwards to the printer. After the printer prints the advertising material, he mails the advertising using the mailing list. The printer bills Petitioner for his services and returns the mechanicals. Petitioner then bills his clients a fee for his service and a pro rata share of the mailing list rental and the printers' fees. Neither of these fees are separately stated on Petitioner's invoice to his client. Petitioner then returns the mechanicals to his clients.

Section 1105(a) of the Tax Law imposes a tax on the sale of tangible personal property. Section 1105(c)(1) of the Tax Law imposes a tax upon the furnishing of information by printed matter but excluding the services of advertising or other agents.

In order for a principal - agent relationship to exist for sales tax purposes, three conditions must be met. Technical Services Bureau Memorandum, TSB-M-83(16)S, June 10, 1983 sets forth these conditions as follows:

1. the advertising agency must clearly disclose to the supplier the name the client for whom the agency is acting as agent.
2. the advertising agent must obtain and retain written evidence of agent status with the client prior to the acquisition of any tangible personal property or service, and
3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own account, such as by charging the item to the account of more than one client.

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Condition 1 above will be met only where the complete name of the client is disclosed on any purchase order given to a supplier and the advertising agency is identified as agent acting for and on behalf of the disclosed client (e.g., x advertising agency as agent for Y, name of client). The mere listing of the client's account number or name or the statement "for the account of" are deemed to be insufficient for meeting condition 1.

Condition 2 above will be met only where there exists a properly executed written agency agreement which clearly sets forth that the advertising agency is appointed to act as agent for and on behalf of the client with respect to making purchases.

Condition 3 above will be met when any expenditures by the firm as agent for a client are billed to the client without being marked up.

Under the circumstances described by Petitioner, it does not appear that Petitioner meets the requirement, as specified in TSB-M-83(16)S, for establishing a principal-agent relationship. However, under such described circumstances, Petitioner is not considered to be selling tangible personal property to its clients, but rather is considered to be selling an exempt advertising service. As such, Petitioner is considered to be the retail purchaser of the tangible personal property and services it acquires in performing its services. Accordingly, when Petitioner purchases taxable tangible personal property or services, e.g. mailing lists, Petitioner must pay sales tax on such purchases. However, Petitioner is not required to collect tax from its advertising clients under such circumstances.

It should be noted that if Petitioner were to qualify as an agent within the meaning of TSB-M-83(16)S, it would nevertheless be required to pay sales and use tax on its taxable purchases. Under such circumstances, such purchases are considered to be taxable purchases by Petitioner's principals and Petitioner, as their agent, would be required to pay any sales or use tax due. Of course, Petitioner would not be required to collect sales tax from its clients when it bills its clients for reimbursement.

DATED: August 8, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.