

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

TSB-A-97(28)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S961010B

On October 10, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Faith L. Levine, c/o Ernst & Young, LLP, Suite 3900, 200 South Biscayne Boulevard, Miami, Florida 33131-5313. Petitioner provided additional information pertaining to the Petition on November 25, 1996.

The issues raised by Petitioner are:

- (1) Whether the sales of loss prevention labels to manufacturers by Petitioner's client qualify for exemption from sales tax as sales for resale.
- (2) Whether the sales of loss prevention labels by Petitioner's client to retailers are exempt from sales tax as sales of packaging material.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's client is incorporated under the laws of the state of Delaware. Petitioner's client is engaged in the business of selling unattached labels to various manufacturing and retail establishments throughout the United States. The labels are sensitized for purposes of tracing the items they are adhered to in order to prevent loss or theft. They are thin, small, and available in a wide variety of types including bar code, white, and clear. They are designed, and are effective for use on products such as books, jewelry, videos, medication bottles, wine bottles, electronic products, food products and household appliances (both indoor and outdoor). The labels cannot be removed without causing damage to the product. In addition, once the label is deactivated, it remains with the product sold to the end user and will not be reused by the manufacturer or retailer.

A manufacturer will purchase the labels from Petitioner's client at the request of its customers. The manufacturer will place the label inside the packaging of the finished product. The finished product, with the label, is then sold to the manufacturers' customers. The label remains with the product until it is sold to the end user and will be deactivated at that time. It is never reused by the manufacturer.

Labels that Petitioner's client sells directly to retailers are affixed by the retailers to the outside of the package of the tangible personal property that is for sale. When the item of tangible personal property is sold, the label is deactivated and remains affixed to the property sold. Thereafter, the label is neither returned nor reused by the retailer.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property "

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five.

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

Section 1115(a)(19) of the Tax Law exempts from tax receipts from the sale of "cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser." (Emphasis added)

Section 528.20(b)(1) of the Sales and Use Tax Regulations defines "packaging material," in part, as follows:

"Packaging material" includes, but is not limited to:
. . . boxes . . . cartons . . . coating . . . gummed labels

Opinion

The loss prevention labels sold by Petitioner's client to the manufacturers do not constitute packaging. However, they do come within the resale exclusion contained in section 1101(b)(4) of the Tax Law inasmuch as they are resold to

their customers. (See Trans World Music Corporation, Adv Op Comm T&F, April 14, 1981, TSB-H-81(52)S). Accordingly, the sales of labels by Petitioner's client to the manufacturing establishments are exempt from tax, provided that the manufacturers supply Petitioner's client with a completed resale certificate (Form ST-120).

With respect to the sales of labels to retailers, the applicable test to find that a purchase is for resale is whether the items purchased at wholesale form a critical element of the product sold at retail to the consumer (see Celestial Food of Massapequa Corporation v. State Tax Commn., 63NY2d 1020; Matter of Burger King v. State Tax Commn., 51 NY2d 614, 623; Matter of Gem Stores, Inc., Tax Appeals Tribunal, October 14, 1988, TSB-D-88(30)S.) Whether an item becomes a critical element of the product sold depends upon whether a critical quality useful to the final customer survives the sale at wholesale. These loss prevention labels are not critical elements of the merchandise sold. Instead they are part of the general overhead which the retailers choose in order to profitably carry on their business, notwithstanding their physical attachment to a portion of the merchandise. Although, as Petitioner states, the use of these labels to reduce the cost of theft is ultimately a savings passed down to the customer, lowering overhead in a competitive marketplace is as necessary for the retailer's survival as it is for the customer's continued patronage (Gem Stores, Inc., supra.)

Having determined that the retailers did not purchase the labels for resale, we next address Petitioner's proposal that the sales of the labels by its client to the retailers be exempt under Section 1115(a)(19) of the Tax Law as packaging material. Packaging materials are included within the statute's exemption only to the extent that vendors use them for "packaging" and "packing." These terms, in turn, deal with enclosing, covering, enveloping, and tightly protecting things, but not with simply adhering something like a label to a portion of them. Although gummed labels are presumably within the intended meaning of packaging materials, examples of these would be adhesive address labels and warning stickers like "FRAGILE - HANDLE WITH CARE," not adhesive sensitized labels that are used to prevent theft. (Gem Stores, Inc., supra.)

Accordingly, the loss prevention labels sold by Petitioner's client to the retailers are subject to sales tax as a retail sale not otherwise exempted from tax.

DATED: April 24, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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