

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

TSB-A-98(18)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970421B

On April 21, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Century Marketing, P.O. Box 1087, Bowling Green, OH 43402.

The issues raised by Petitioner, Century Marketing, are whether the receipts from its sales of each of the following types of labels and tags that are affixed or attached by Petitioner's customers to their products or to the containers, bags or boxes that are transferred by them to their customers along with the products at the time the products are purchased are subject to New York State and local sales and compensating use taxes.

1. Labels or tags that are affixed or attached to the product by the producer or manufacturer of the product and that identify, describe or provide information about the product.
2. Labels or tags that are affixed or attached to the product by the retailer of the product and that identify, describe or provide information about the product.
3. Labels or tags that are affixed or attached to the product by its producer or manufacturer and that have the name and/or address and/or telephone number of the producer or manufacturer of the product.
4. Labels or tags with the retailer's name, address and/or telephone number that are affixed or attached to the product.
5. Labels that are affixed to car windshields to remind customers of the time of their next oil change.
6. Any label or tag, regardless of function, affixed or attached to a container, bag or box that holds the product being sold to the customer, at retail, and that is transferred, along with the product, to the customer at the time of sale.
7. Labels or tags affixed or attached to a container, bag or box that is transferred, along with the product, to the customer at the time of sale, where the label or tag has the retailer's name and/or address and/or telephone number.

8. Labels or tags affixed or attached by the retailer to a container, bag or box, that is transferred along with the product at the time of sale to the retailer's customer, where the label or tag identifies, describes or has information regarding the product contained within the container.
9. Price tags or labels that are affixed or attached to products or containers and that may also display product related and/or seller related information.

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

Petitioner is a manufacturer of custom labels and tags. Petitioner is located in Bowling Green, Ohio and sells labels and tags in over thirty states. While Petitioner has over seventy thousand customers, Petitioner's average sale to its customers is only around \$300.00.

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
(emphasis added)

Opinion

Purchases of labels or tags may, in some cases, be excluded from tax as purchases for resale. The applicable test to determine whether a label or tag is purchased for resale is whether the label or tag purchased at wholesale forms a critical element of the product sold at retail to the consumer (see Celestial Food of Massapequa Corporation v. State Tax Comm., 63 NY2d 1020; Matter of Burger King v. State Tax Comm., 51 NY2d 614, 623; Matter of Gem Stores, Inc., Tx App Trib, October 14, 1988, TSB-D-88(30)S.) Whether an item becomes a critical element of the product sold at retail depends upon whether a critical quality useful to the final customer survives the sale at wholesale and is not just an expense or part of the general overhead which the retailer chooses in order to carry on its business profitably. (See Faith L. Levine, Adv Op Comm T & F, April 24, 1997, TSB-A-97(28)S.) In addition, labels or tags may, under certain circumstances, constitute packaging material and, therefore, be exempt under Section 1115(a)(19) of the Tax Law, but only to the extent that a vendor uses the materials to enclose, cover, envelop or tightly protect the product, and the packaging material is actually transferred by the vendor to the purchaser with the product being sold. Gummed labels within the meaning of packaging materials would include adhesive address labels and warning stickers indicating "FRAGILE - HANDLE WITH CARE" and the like. (See Faith L. Levine, supra.) Petitioner can sell any of the labels and tags described in examples 1 through 9 above, for resale, to a person who or which will resell them to the person who will affix or attach them in the manner described in such examples, provided that Petitioner receives a properly completed Resale Certificate, Form ST-120, from its customer.

The following analysis assumes that Petitioner itself sells labels and tags to the person who or which will affix or attach the labels or tags in the manner described in examples 1 through 9. The analysis also assumes that the producer or manufacturer is not also the retailer.

Accordingly, the labels and tags described in examples 1 and 3 that are affixed or attached to the product by the producer or manufacturer of the product that identify, describe or provide information about the product, or provide the name and/or address and/or telephone number of the producer or manufacturer of the product, are considered to be a critical element of the product sold to the

consumer. Therefore, the manufacturer or producer may purchase such labels or tags for resale, provided that the purchaser furnishes a resale certificate to Petitioner. However, labels or tags which specify size, style, lot or inspection numbers are not considered to be a critical element of the product sold to the customer, and may not be purchased for resale if they are not permanently attached to the product. (See Publication 852, Sales Tax Information For: Manufacturers, Processors, Generators, Assemblers, Refiners, Miners and Extractors, Other Producers of Good and Merchandise, (12/97)).

Labels and tags described in example 2 that are affixed or attached to the product by the retailer that identify, describe or provide information about the product, are also considered to be a critical element of the product sold to the consumer. Therefore, the retailer may purchase such labels or tags for resale, provided that the purchaser furnishes a resale certificate to Petitioner. However, labels or tags which contain the retailer's name, address and/or telephone number as described in example 4, are not considered to be a critical element of the product sold to the customer, and may not be purchased for resale if they are not permanently attached to the product.

As for example 5, labels affixed to car windshields (presumably by an automotive service provider) to remind customers of the time and date of their next oil change may not be purchased for resale since their use by the service provider as a reminder to customers does not suffice to make them a critical element of the product or service sold. Such labels do not constitute packing or packaging materials. Thus, the exemption under Section 1115(a)(19) of the Tax Law cannot apply.

With respect to examples 6, 7 and 8, not all labels and tags, regardless of their function, affixed or attached to a container, bag or box that holds a product for sale to a customer are packaging or may be purchased for resale. For example, loss prevention labels or tags may not be purchased by a retailer exempt from tax either as packaging material or as a purchase for resale. See Matter of Gem Stores, supra. Manufacturers, however, may purchase loss prevention labels for resale to wholesalers or retailers. (See Faith L. Levine, supra.) Address labels attached to containers, bags or boxes (including the retailer's address labels described in example 7), or labels that provide handling instructions like "FRAGILE - HANDLE WITH CARE," are considered packaging material and may be purchased exempt from tax. In addition, labels and tags that form a critical element of the product being sold may be purchased for resale. This would include labels and tags that provide information such as expiration dates, ingredients, contents or instructions, and not simply pricing stickers such as UPC symbols or labels and tags that say "paid".

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Concerning example 9, price tags and price labels affixed to the product are not a critical element of the products sold and do not add to their value. They are affixed to the product by the vendor solely for use in selling the products and recording the sales for inventory purposes. Therefore, price tags and price labels are not packaging material and may not be purchased for resale, regardless of any additional information included in the tags. (See Morton L. Coren, Adv Op Comm T & F, March 31, 1992, TSB-A-92(29)S.)

DATED: March 24, 1998

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

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