

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

TSB-A-98(25)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971114B

On November 14, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Puglisi, Midler & Co. LLP, 200 North Central Avenue, Hartsdale, New York 10530.

The issues raised by Petitioner, Puglisi, Midler & Co. LLP, are:

1. Whether under the following circumstances its client is required to register as a sales tax vendor and collect sales and use tax.
2. Whether purchases by Petitioner's client of tangible personal property are subject to sales and use tax.

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

Petitioner's client (Company X), which is located in New York, will develop a sales promotion program, as described below, for one of its clients, a manufacturer. Company X's manufacturer client markets its products through distributors who in turn sell to dealers, value added resellers (VARs) and catalog houses, who sell to businesses, government and consumers. The manufacturer may be located in New York or outside New York.

Since these dealers, VARs and catalog houses (hereinafter called the Channel) carry many products, Company X's programs would help the manufacturer get the attention and concentrated selling efforts of the Channel sales representatives.

The program structure would be based on a point system with a fixed point amount assigned to each of the designated products the manufacturer produces and wants to include in the promotion. By selling these products, Channel sales representatives accumulate points in a database account Company X sets up for them, and Company X sends the representatives statements representing their balance. These points may be redeemed anytime for any of the many different awards featured in an awards catalog. Each award has a stated point value at which it can be ordered. The more a Channel salesperson sells during the year-long, nationwide campaign, the more awards he or she can earn at higher values.

Company X purchases the items that serve as awards from third party suppliers that may be located within or outside New York State. Company X purchases the item in its own name, not as agent for the manufacturer. The manufacturer does not take title to these items. Company X bills the manufacturer for the administration and awards costs based on the award points that are issued to the database accounts of the Channel sales representatives. When awards are ordered by a sales representative, Company X has them shipped from the supplier directly to the representative's home, on behalf of the manufacturer. All unused award points expire at the end of the program.

Applicable Law and Regulations

Section 1101(b)(8)(i)(A) of the Tax Law defines a vendor as: "A person making sales of tangible personal property or services, the receipts from which are taxed by this article."

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

The sales tax is a "destination tax", that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

Section 526.6(c)(4) of the Sales and Use Tax Regulations provides, in part:

(i) Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not a retail sale to the recipient of the property.

(ii) Tangible personal property which is purchased for promotional or advertising purposes and sold for a minimal charge which does not reflect its true cost, or which is not ordinarily sold by that person in the operation of his business, is a retail sale to the purchaser thereof, and not a sale to the recipient of the property.

(iii) A resale certificate may not be used by the person making the purchases described in subparagraphs (i) and (ii) of this paragraph for such purchases.

Opinion

Company X is not selling tangible personal property. Rather, it is providing an exempt advertising or promotional service. If Company X does not sell any tangible personal property or taxable services, it is not required to register as a vendor and collect sales and use tax from its client.

Company X is the retail purchaser of the tangible personal property that it acquires for use as awards in its program. The subsequent redemption of the property by sales representatives for points is not a retail sale. Since the New York State sales and use tax is a destination tax, Company X is required to pay the sales and use tax based upon the place at which it has the tangible personal

property delivered. If the property is shipped by the supplier to an award recipient at an out-of-state address, Company X's purchase of the property is not subject to sales and use tax. If the property is shipped to an address within New York State, whether the supplier is located within or outside New York State, Company X's purchase of the property is subject to tax.

DATED: April 14, 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.