

**New York State Department of Taxation and Finance  
Office of Tax Policy Analysis  
Taxpayer Guidance Division**

TSB-A-08(54)S  
Sales Tax  
December 16, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050127A

On January 27, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Val Pak Direct Marketing Systems, Inc., 8605 Largo Lakes Drive, Largo, Florida, 33773.

The issue raised by Petitioner, Val Pak Direct Marketing Systems, Inc., is whether there is any sales or compensating use tax liability arising from the production and mailing of advertising materials from outside New York State to postal addresses within New York State as described below.

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

Petitioner, a corporation organized in Delaware, operates a national direct mail advertising program and is based outside New York State. Petitioner has a business relationship with local affiliates ("Franchisees"), who or which deal directly with local merchants ("Advertisers") in a given territory (including territories in New York State).

Pursuant to contracts between the Franchisee and an Advertiser, and contracts between the Franchisee and Petitioner, Petitioner includes advertising materials in a direct mailing to potential customers of the Advertiser, typically within a specified geographical area (which may be within or without New York State). Petitioner does the direct mailings in accordance with its predetermined mailing schedule, and Petitioner uses its proprietary mailing lists for the mailings. The mailing is done via the U.S. Postal Service.

In some cases, layout or camera-ready copy for the materials is provided by an Advertiser; in other cases Petitioner provides design and layout assistance. In all cases, Petitioner does the printing and stuffing and mailing of envelopes outside New York State. A mailing includes materials from a number of Advertisers in the same envelope.

The fee to be paid by each Advertiser to the Franchisee is typically based on the complexity of the print job (e.g., 1-color or 4-color, 1-sided or 2-sided) and the number of copies to be printed and mailed; where layout or design assistance is provided, it is charged for separately. The Franchisee, in turn, pays Petitioner in accordance with a payment schedule.

Petitioner provided sample copies of the Mailing Participation Agreement between the Franchisee and the Advertisers, customer invoice, and Franchisee invoice. The Mailing Participation Agreement is signed by advertisers and indicates what is to be printed (e.g.,

coupon, flyer, 2/3 flyer), whether print is to be single sided or double sided, color of paper to be used, number of colors to be used, quantity to be printed, quantity to be mailed, frequency, and cost. Invoices sent to customers also contain similar information. Franchisee invoices represent an aggregate of charges for orders placed by customers. Such aggregate charges are categorized for printing, envelopes, addressing/processing, inserting, postage, and layouts.

**Applicable law and regulations**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

(4) Retail sale. (i) 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 where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

\* \* \*

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof . . . Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

\* \* \*

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. . . Promotional materials shall also include paper or ink furnished to a printer

for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

Section 1105 of the Tax Law imposes sales tax, in part, on:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, . . .

Section 1115(n) of the Tax Law provides, in part:

(1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

\* \* \*

(4) Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or

prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

Technical Services Bureau Memorandum entitled *Expanded Sales and Compensating Use Tax Exemption for Promotional Materials*, dated August 20, 1997, TSB-M-97(6)S, provides, in part:

### **Printed Promotional Materials**

Effective March 1, 1997, printed promotional materials mailed or shipped to destinations in the state are exempt from tax when all of the conditions listed below are met.

- The printed promotional materials are ultimately mailed or shipped to customers or prospective customers of the purchaser of the printed promotional materials.
- The printed promotional materials are mailed or shipped by the purchaser of the materials using a common carrier, the U.S. Postal Service or a like delivery service. (This requirement is also met if the mailing or shipping is arranged by a third party [such as a printer/mailer] on behalf of the purchaser of the promotional materials.)
- There is no charge to the purchaser's customer or prospective customer (ultimate recipient) for the promotional materials, or for mailing or shipping them.
- The purchaser of the promotional materials gives a properly completed Form ST- 121.2, *Certificate of Exemption for Purchases of Promotional Materials*, to the seller of the promotional materials.

\* \* \*

Example 5. XYZ Department Store/Mail Order Seller asks Printco to print 1,000,000 catalogs which subsequently will be furnished, free, to XYZ's customers and prospective customers. XYZ arranges for the shipment of 500,000 of the catalogs to Mailerco for mailing via the U.S. Postal Service. The remaining 500,000 are shipped to XYZ's headquarters for storage until a subsequent mailing that will occur in three months. XYZ intends to place 1,000 of those catalogs in its New York retail store to give away to customers. XYZ will ship the remaining 499,000 catalogs to Mailerco for mailing in the same manner as the initial 500,000. XYZ may purchase 999,000 of the catalogs from Printco tax exempt. However, Printco must collect sales tax from XYZ on the charges attributable to the 1000 catalogs XYZ does not intend to mail or ship to customers or prospective customers. On Form ST- 121.2, *Certificate of Exemption for Purchases of Promotional Materials*, given to Printco, XYZ should indicate that 99.9% of the catalogs

are exempt from tax, since they will be shipped or mailed to XYZ's customers or prospective customers in accordance with Section 1115(n) of the Tax Law. Form ST-121.2 given to Mailerco should show that Mailerco's services are exempt from tax, since 100% of the 999,000 catalogs furnished to Mailerco will be shipped or mailed to XYZ's customers or prospective customers in accordance with Section 1115(n) of the Tax Law.

### **Opinion**

Petitioner operates a national direct mail advertising program and has a business relationship with local Franchisees in a given territory to solicit orders for advertising materials to be included in mailings to prospective customers of their Advertisers. Petitioner does the printing and stuffing and mailing of envelopes outside New York State for delivery within or without New York State. A mailing includes advertising materials for a number of Advertisers in the same envelope and such mailings are done on a periodic basis via U.S. Postal Service.

As defined by section 1101(b)(12) of the Tax Law, promotional materials includes any advertising literature, and envelopes used to deliver them, as well as the paper or ink used by the printer in producing or printing promotional materials. Section 1115(n)(4) of the Tax Law provides an exemption for printed promotional materials where the purchaser mails or ships promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge, by means of a common carrier, United States postal service or like delivery service.

Petitioner and its Franchisees do not appear to be a traditional advertising agent acting in a representative capacity for its customers and providing services excluded from sales tax pursuant to section 1105(c)(1) of the Tax Law. Rather, Petitioner's direct mail advertising program consists of the sale of printed advertising literature that is delivered to Advertisers' potential customers. Petitioner's Franchisees contract with the Advertisers to provide the advertising literature, and then pay Petitioner to print and mail the advertising literature.

Therefore, Petitioner's Franchisees are selling printed promotional materials exempt from sales tax pursuant to section 1115(n)(4) of the Tax Law, provided that Franchisees receive a timely and properly completed *Certificate of Exemption for Purchases of Promotional Materials*, Form ST-121.2, from the Advertiser. Franchisees may make exempt purchases of the printed materials for resale by submitting a timely and properly completed Resale Certificate, Form ST-120, to Petitioner.

It should be noted that any portion of the printed promotional materials delivered directly to Advertisers located in New York State does not meet the requirements of section 1115(n)(4)

of the Tax Law. The charges for such portion of the printed promotional materials, therefore, are subject to sales tax.

DATED: December 16, 2008

/s/  
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Taxpayer Guidance Division

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.