

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

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Sales Tax
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THE SALES AND USE TAX AND
PROMOTIONAL MATERIALS

Effective September 1, 1989, three amendments to the New York State Sales and Use Tax Law impacted on the tax status of promotional materials. Since that time, the Department has received numerous requests for clarification concerning the overall effect these changes have on tax policy in this area.

- I. A new paragraph (12) was added to section 1101(b) of the Tax Law to define promotional materials as any advertising literature, applications, order forms and return envelopes related to such advertising literature, free gifts, complimentary maps or other items given to travel club members, annual reports, promotional displays, Cheshire labels and similar items of tangible personal property used for promotional purposes. Promotional materials also include property related to advertising literature that has been personalized through the use of the recipient's name or other information uniquely related to such person. However, promotional materials do not include invoices, statements and the like.

Prior to this amendment, the Tax Law did not specifically define the term promotional materials, although the Tax Department had defined it in 1979 in a policy memorandum titled "The Taxability of Promotional Materials Sent into New York State" (TSB-M-79(9)S). The new definition effectively incorporates much of the Department's prior definition, but also expands the prior definition to include outside mailing envelopes, Cheshire labels and materials which were personalized (contents of envelopes that are addressed or identified for a particular individual). Billing invoices, account statements, personal responses to customer correspondence and the like, which were not considered promotional material before September 1, 1989 continue to be excluded from its definition under the new law.

- II. A new subdivision (n) was added to section 1115 of the Tax Law to provide that promotional materials mailed, shipped or otherwise distributed from a point within this 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, are exempt from sales and compensating use taxes. This new subdivision also provides that certain services relating to mailing lists or to activities directly in conjunction with mailing lists are exempt from such taxes when the services are performed on or directly in conjunction with exempt promotional materials.

Before the addition of this exemption, the purchaser of promotional materials had to pay tax and show that such materials were shipped outside the state for use outside the state in order to claim a refund of the tax from the Tax Department pursuant to section 1119 of the Tax Law. Services performed on mailing lists in this state were taxable without any right to refund. Accordingly, this new exemption with respect to mailing list services represents a major change in the taxability of such services in that, among other things, the exemption can be claimed in the first instance, rather than through a refund claim.

III. The definition of the term "use" in Section 1101(b)(7) of the Tax Law was amended to provide that "use" also includes the distribution of tangible personal property, such as promotional materials.

This expanded definition of "use" effectively expands the imposition of the compensating use tax to cover the use of promotional materials coming into this state. Prior to this change, the former statutory definition of "use" permitted the owner of promotional materials to avoid New York State sales and use taxes by purchasing from out-of-state printers and mailers.

When these changes are viewed together, they establish a tax plan that exempts sales of promotional material that are delivered to the buyer, the buyer's agent or designee, inside New York State, if the buyer, agent or designee will then have such property delivered to points located outside this state; and taxes, where applicable, any promotional materials, regardless of point of sale or origin, that are ultimately delivered to locations inside this state.

Example (1) A New York vendor purchases catalogs from a printer. The vendor will mail or in some other manner have the catalogs delivered to customers and prospective customers located outside New York State. The New York vendor is allowed to purchase such catalogs from the printer without the payment of sales or use tax pursuant to the exemption provided in Section 1115(n) of the Tax Law.

Example (2) A multi-state vendor with sales offices in New York purchases catalogs from a printer outside this State. The multi-state vendor will mail or in some other manner have the catalogs delivered to customers or prospective customers located in New York State. The multi-state vendor owes a compensating use tax based on its cost of the catalogs which are delivered to locations inside New York State. (The authority for the imposition of this compensating use tax is Sections 1110 and 1101(b)(7) of the Tax Law).

The following chart helps illustrate the difference between the tax status of certain purchases related to promotional material both before and after September 1, 1989.

<u>Promotional Materials</u>	<u>Before 9/1/89</u>	<u>As of 9/1/89</u>
• Contents of Envelope (non-personalized)		
- Mailed from N.Y. to N.Y. destinations	Taxable	Taxable
- Mailed from N.Y. to destinations outside N.Y.	Exempt*	Exempt
- Mailed from outside N.Y. to N.Y. destinations	Exempt	Taxable

* Exempt Through Refund

<u>Promotional Materials</u>	<u>Before 9/1/89</u>	<u>As of 9/1/89</u>
• Contents of Envelope (personalized)		
- Mailed from N.Y. to N.Y. destinations	Taxable	Taxable
- Mailed from N.Y. to destinations outside N.Y.	Taxable	Exempt
- Mailed from outside N.Y. to N.Y. destinations	Exempt	Taxable
• Outer envelopes & outer labels		
- Mailed from N.Y. to N.Y. destinations	Taxable	Taxable
- Mailed from N.Y. to destinations outside N.Y.	Taxable	Exempt
- Mailed from outside N.Y. to N.Y. destinations	Exempt	Taxable
• Mailing Lists (Purchase or Rental)		
- List Received In N.Y.	Taxable	Taxable based on percentage of N.Y. mailings
- List Received Outside N.Y.	Exempt	Taxable based on percentage of N.Y. mailings
• Related Services (merge/purge, label affixing, glue affixing, imprinting, keying enhancement, etc.)		
- Service Performed in N.Y.	Taxable	Taxable based on percentage of N.Y. mailings
- Service Performed Outside N.Y.	Exempt	Taxable base on percentage of N.Y. mailings

<u>Promotional Materials</u>	<u>Before 9/1/89</u>	<u>As of 9/1/89</u>
• Mailing Services (stuffing, sorting, metering, folding, bursting, sealing, zip coding, stamp affixing, etc.)		
- Service Performed in N.Y.	Exempt	Exempt
- Service Performed outside N.Y.	Exempt	Exempt

When purchasing promotional materials that are eligible for the exemption provided by section 1115(n), the purchaser of such material must present the seller with a properly completed Exempt Use Certificate, Form ST-121, in order to receive the tax benefit at the time of purchase. Since the exemption is limited to promotional materials that are for distribution outside the state and since it is likely that not all the promotional materials being purchased will qualify for the exemption, it will be necessary for the purchaser to indicate directly on the exempt use certificate what percentage of the purchase is exempt from tax.

Accordingly, in those instances where the purchaser of promotional material buys such material in bulk and knows the exact percentage of the total purchase that is eligible for exemption, the purchaser can indicate to the vendor the amount of the exempt percentage on the Exempt Use Certificate (Form ST-121). The vendor is then permitted to charge sales tax only on the portion of the charge which is not eligible for exemption. The exempt use certificate will be revised so as to include a space for the purchaser to indicate the exempt percentage. Since these percentages cannot be expected to remain constant from purchase to purchase, exempt use certificates used to purchase promotional materials will be recognized as single purchase certificates only.

Prior to September 1, 1989, promotional materials purchased in bulk and delivered into New York State were subject to sales or use tax at the moment such materials were delivered to the purchaser or his designee inside this state. If the promotional materials were subsequently shipped out-of-state in bulk, the purchaser was eligible for a refund of the tax paid for that portion of the materials shipped outside the state pursuant to section 1119 of the Tax Law. Section 1119 was not affected by changes reported in this memorandum concerning promotional materials. Therefore, promotional materials which are purchased tax paid are still eligible for refund, when applicable.

The exemption provided in section 1115(n) is available to any person registered with the Tax Department as a vendor, whether such vendor is located inside or outside New York State. The vendor must provide to the seller of the promotional materials a properly completed "Exempt Use Certificate", Form ST-121. A purchaser of promotional materials that is eligible for exemption pursuant to section 1115(n) but who is not registered as a vendor for sales tax (e.g., a person who sells a nontaxable service) is not allowed to issue an exemption document and must therefore pay

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the sales tax on such materials at the time of purchase. That purchaser may then claim a refund for that portion of the sales tax paid attributable to the material sent outside the state. To claim a refund, the purchaser must file an Application for Refund or Credit, Form AU-11, with the Tax Department within three years of the date the tax was payable.

Purchases of promotional materials from an out-of-state supplier who is not authorized to collect New York State sales taxes will be subject to a use tax if any portion of the promotional material is delivered into New York. The reporting and payment of the use tax is due with the filing of the purchaser's sales and use tax return if the purchaser is a registered vendor. If the purchaser is not a registered vendor, the purchaser should file a Use Tax Return, Form ST-130, within 20 days after the taxable use occurs.

When promotional materials are purchased from a vendor who will also ship such material to the customer's intended recipients, the vendor of the promotional material is permitted to charge tax only on the portion of the materials that are mailed or otherwise delivered to points located within New York State. A vendor who charges sales tax on only a portion of the total charge to the customer must maintain adequate records to substantiate that the materials which were not taxed were delivered outside New York State. This documentation must be retained to substantiate exempt out-of-state deliveries for audit purposes.

Services performed on mailing lists used to distribute promotional materials are subject to the sales or use tax in the same proportion that New York State addresses contained in the mailing list bear to the total number of addresses contained in such list.

Note: The Collection and Reporting Instructions for Printers and Mailers (ST 152) and the related Supplementary Instructions, Publication 831, may continue to be used for the computation of the sales tax due on promotional materials delivered in New York State. However, where the information relating to promotional materials contained in the Collection and Reporting Instructions (ST-152) is inconsistent with that contained in this memorandum, the information in this memoranda controls.