

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-10(3)S  
Sales Tax  
February 8, 2010

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090923A

On September 23, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether college textbooks and other nonfiction books that it distributes free of charge in New York by means of common carrier to authors, book critics, college professors, awards committees and exhibitors are exempt from use tax under Tax Law section 1115(n)(4) as printed promotional material distributed to customers or prospective customers. Petitioner also asks what the proper use tax basis for the books would be if the materials do not qualify for exemption under section 1115(n)(4). The books are not exempt from sales and use tax. The amount subject to use tax is the amount Petitioner paid for the books.

**Facts**

Petitioner is a limited liability company located [REDACTED] [outside New York State]. It is a joint venture whose members are three university presses, which formed Petitioner to provide fulfillment services (though not necessarily “fulfillment services” as defined in Tax Law section 1101[b][18]) to its members on a cost sharing basis.

Petitioner’s fulfillment services entail storage, promotion, and distribution of college textbooks and other nonfiction books that Petitioner’s members purchase from third party printers. A member bears the risk of loss for the books it stores with Petitioner.

When a customer places an order for a book, Petitioner purchases from a member university press (i.e., the publisher) the book and ships it to the customer. Petitioner sells the books at cost (i.e., what it paid the university press for the books) and records the receipts from the retail customers as revenue on its financial records.

Petitioner will withdraw books from storage, pay the publisher for the books, and distribute them to influential persons within and without New York for promotional purposes. The books are sent to book critics as publicity review copies, to professors as sales samples/desk copies, to awards committees as submissions, and to exhibitors for display purposes. These copies are sent at no charge to the recipient.

Petitioner also distributes copies of the books to the authors who are entitled under contract with the publisher to a certain number of free books. Petitioner purchases these books from the publisher.

Petitioner’s representatives travel to New York to participate in shows and exhibits two to three times each year for about four days each visit. Book sales occur at each of these events.

**Analysis**

Section 1105(a) of the Tax Law imposes sales tax on the sale of tangible personal property in New York. Tax Law section 1110 imposes use tax on the use in the State of tangible personal property

purchased outside the State. Use includes the distribution of tangible personal property as promotional material in the State. Tax Law section 1101(b)(7). Tax Law section 1115(n)(4) provides an exemption from sales and use tax on printed promotional materials mailed or shipped by a common carrier or a like delivery service to customers or prospective customers of the purchaser of the promotional materials.

The Tax Law section 1115(n)(4) exemption is inapplicable to the books distributed by Petitioner in New York because the recipients are not Petitioner's customers or prospective customers. The professors, book critics, and other recipients are not prospective customers of a book after they receive a free copy of the book. Petitioner's prospective customers as to the books it distributes free to professors, book critics, and other recipients are students and readers of book reviews, respectively. That is, neither a professor's assignment of a book as course material nor a critic's public recommendation that a book be purchased makes the professor or critic a prospective customer of the book. See *Promex Medical, Inc.*, Adv Op Comm T&F, April 8, 1999, TSB-A-99(23)S. Use tax is due on the books distributed in New York because the books are used in New York. Tax Law section 1101(b)(7). (The exemption from use tax provided by Tax Law section 1118(2) is inapplicable to Petitioner's use of books in New York because Petitioner is conducting business in the State.) The basis of the tax is the amount Petitioner paid for the books. Tax Law section 1110(b).

DATED: February 8, 2010

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Jonathan Pessen  
Director of Advisory Opinions  
Office of Counsel

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.