



NAVIGATING SALES TAX TREATMENT OF PROMOTIONAL MATERIALS & ONLINE LEAD GENERATORS

GNYADA DEALER WEBINARS
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Greater New York
Automobile Dealers
Association

WITH US TODAY...



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Greater New York Automobile Dealers Association



Identifying Which Leads are Subject to Sales Tax

- ▶ The Tax Law imposes sales and use tax on retail sales of tangible personal property, including prewritten software, and the sale, except for resale, of certain services. See Tax Law §§ 1101(b)(6); 1105(a), (b), (c).
- ▶ Among the services subject to tax is the furnishing of information by printed, mimeographed or multi-graphed 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.
- ▶ Excluded from the tax on information services are advertising services and the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons.

See Tax Law §§1105(c)(1), (9); see also TSB-A-09(44)S.



More on Advertising Services and Lead Generation

- ▶ For purposes of the exclusion from the information service tax, “advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. The furnishing of a personal report containing information derived from information services, by an advertising agency, to its client for a fee is not a taxable information service.” 20 NYCRR §527.3(b)(5).
- ▶ Advertisements have been defined in New York as “the action of making generally known; a calling to the attention of the public.”
 - ▶ Matter of United Parcel Serv. Inc. v Tax Appeals Trib. of State of N.Y., 98 AD3d 796, 798 (2012), lv denied 20 NY3d 860 (2013) (internal quotations omitted).
- ▶ **When several distinct taxable items and non-taxable items are sold together for one nonitemized price, sales tax is due on the total sales price charged.**
 - ▶ See 20 NYCRR § 527.1(b).



Advertising Services Cont.

- ▶ Tax bulletin ST-10 (TB-ST-10)
 - ▶ This bulletin explains how sales and use taxes apply to sales and purchases made by businesses that provide advertising services.
- ▶ Sales of advertising services
- ▶ Sales of advertising services are not subject to sales tax. Advertising services consist of:
 - ▶ Consultation and development of advertising campaigns; and
 - ▶ Placement of advertisements with the media.
 - ▶ Example: an advertising agency is hired to design an advertising program and to furnish a finished advertisement to the media. The fee charged by the agency for this service is not subject to sales tax.



Advertising Materials

- ▶ Any advertising materials created by an advertising agency that are conveyed to its customer by intangible means (e.g., by digital or other electronic media) are not subject to sales tax.
 - ▶ Any tangible materials used by the advertising agency that are turned over to the customer after use by the agency to furnish the advertising content to the media are considered to be incidental to the agency's sale of advertising services and are not subject to sales tax.
 - ▶ However, if the advertising agency sells any tangible personal property, such as layouts or artwork, to the customer prior to furnishing them to the media, the advertising agency is making a sale that is subject to sales tax.
 - ▶ Additionally, any other outright sales of tangible personal property (such as layouts, printing plates, or films contained on tangible media) by an advertising agency are subject to sales tax.



Advertising Cont.

- ▶ Other sales tax exemptions may apply to the purchases of advertising agencies, such as purchases related to:
 - ▶ Producing television and radio commercials and advertisements; or
 - ▶ Developing and producing printed promotional materials.



Media Placement Services

- ▶ Generally speaking, receipts from the sale "marketing", "media placement services" and "web site networks" are not subject to state or local sales and compensating use taxes - provided your organization does not sell or otherwise transfer any tangible personal property to its clients in conjunction with these activities or perform any services otherwise taxable under section 1105(c) of the tax law in conjunction with these activities.

(See, advertising agencies, technical services bureau memorandum, June 10, 1983, TSB-M-83(16)S.



Promotional Flyers/Coupons Mailed to Customers

- ▶ Certain printed promotional materials, including coupons that are mailed to prospective customers free of charge, may be purchased exempt from sales tax by the dealer.
- ▶ The exemption includes the purchase and storage of the exempt promotional materials.
- ▶ To claim the exemption, the dealer must provide the seller with a properly completed Form ST-121.2, Exemption Certificate for Purchases of Promotional Materials.
- ▶ This exemption applies only to promotional materials delivered by the U. S. Postal Service or a similar delivery service.



Software and Digital Products

While New York's sales tax generally applies to most transactions, certain items have special treatment in many states when it comes to sales taxes.

Below describes the taxability of software and digital products in New York.

To learn more, see a full list of taxable and tax-exempt items in New York.

Canned Software - Delivered on Tangible Media

- ▶ **TAXABLE**
- ▶ Sales of canned software - delivered on tangible media are subject to sales tax in New York.





Software and Digital Products - cont.

Canned Software - Downloaded

- ▶ **TAXABLE**
- ▶ Sales of canned software - downloaded are subject to sales tax in New York.

Custom Software - Delivered on Tangible Media

- ▶ **EXEMPT**
- ▶ Sales of custom software - delivered on tangible media are exempt from the sales tax in New York.

Custom Software - Downloaded

- ▶ **EXEMPT**
- ▶ Sales of custom software - downloaded are exempt from the sales tax in New York.



Software and Digital Products - cont.

Customization of Canned Software

- ▶ **TAXABLE**
- ▶ In the state of New York, any reasonable, separately stated charges for any modifications which have been applied to canned software which was prepared exclusively for a specific customer is exempt only to extent of their modification. All modified software can be exempt if used directly and predominantly in the production of property for sale or for research and development.

Digital Products

- ▶ **EXEMPT**
- ▶ In the state of New York, some e-books are considered to be exempt if they meet certain standards.



Sales Tax On Computer Software

- ▶ Tax bulletin ST-128 (TB-ST-128)
- ▶ This bulletin explains how sales tax applies to sales of computer software and related services.
 - ▶ Prewritten computer software is taxable as tangible personal property, whether it is sold as part of a package or as a separate component, regardless of how the software is conveyed to the purchaser.
 - ▶ Therefore, prewritten computer software is taxable whether sold:
 - ▶ On a disk or other physical medium;
 - ▶ By electronic transmission; or
 - ▶ By remote access.



Sales Tax On Computer Software – cont.

- ▶ Prewritten computer software includes any computer software that is not designed and developed to the specifications of a particular purchaser.
 - ▶ This includes software created by combining two or more prewritten programs or portions of prewritten programs.
 - ▶ Custom software is not subject to tax provided it is designed and developed to the specifications of a particular purchaser. If the custom software is sold or otherwise transferred to someone other than the person for whom it was originally designed and developed, it becomes subject to tax.
 - ▶ Prewritten software that is modified or enhanced to the specifications of a particular purchaser is subject to tax.
 - ▶ However, if the charge for the custom modification or enhancement is reasonable and separately stated on the invoice, then the charge for the modification or enhancement is not subject to tax.



Sales Tax On Computer Software – cont.

- ▶ Remotely accessed software
- ▶ A sale of computer software includes any transfer of title or possession or both, including a license to use.
 - ▶ When a purchaser remotely accesses software over the Internet, the seller has transferred possession of the software because the purchaser gains constructive possession of the software and the right to use or control the software.
 - ▶ Accordingly, the sale to a purchaser in New York of a license to remotely access software is subject to state and local sales tax. The situs of the sale for purposes of determining the proper local tax rate and jurisdiction is the location from which the purchaser uses or directs the use of the software, not the location of the code embodying the software.
 - ▶ Therefore, if a purchaser has employees who use the software located both in and outside of New York State, the seller of the software should collect tax based on the portion of the receipt attributable to the users located in New York.



Sales Tax On Computer Software – cont.

- ▶ Software maintenance agreements
- ▶ Separately stated and reasonable charges for maintaining, servicing, or repairing software are exempt from sales tax.
 - ▶ However, if a software maintenance agreement provides for the sale of both taxable elements (such as upgrades to prewritten software) and nontaxable elements, the charge for the entire maintenance agreement is subject to tax unless the charges for the nontaxable elements are:
 - ▶ Reasonable and separately stated in the maintenance agreement, and
 - ▶ Billed separately on the invoice or other document of sale given to the purchaser.



Online Sales of Parts and Accessories

- ▶ Sales of parts, accessories, tires, supplies, and other items of tangible personal property are taxable at the combined state and local rate in effect where the property is delivered to the customer.
 - ▶ However, if the purchaser will be reselling the item (for example, if the purchaser is a dealer or independent repair facility), they can use Form ST-120 to make the purchase exempt from tax.
- ▶ Dealers that sell clothing (such as hats or T-shirts) must charge sales tax based on rates for clothing.
 - ▶ See Publication 718-C, Sales and Use Tax Rates on Clothing and Footwear, which lists up-to-date tax rates on clothing sales.



Which Companies Must Be Registered Vendors?

- ▶ If you will be making sales in New York state that are subject to sales tax, you must register with the tax department and obtain a certificate of authority.
- ▶ How often you sell or how much you charge for goods and services does not usually determine whether you need to register for sales tax.



Which Companies Must Be Registered Vendors? - cont.

- ▶ You are a vendor and must register with the tax department if you sell tangible personal property or services that are subject to sales tax, and meet any of the following conditions:
 - ▶ You maintain a place of business in the state, such as a store, office, or warehouse, and sell taxable, tangible personal property or services to persons within the state; or
 - ▶ You solicit business in New York state through employees, independent contractors, agents, or
 - ▶ Other representatives, and through these persons, sell taxable, tangible personal property or services in New York state; or
 - ▶ You solicit business through catalogs or other advertising material, and have some additional connection with the state, and through the catalogs you sell taxable, tangible personal property or services; or
 - ▶ You make sales of taxable products to customers within New York state, and regularly (at least 12 times a year) deliver the products in your own vehicles.



Questions?

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