

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

TSB-A-89 (35)S
Sales Tax
September 21, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890511A

On May 11, 1989 a Petition for Advisory Opinion was received from Amerada Hess Corporation, Tax Dept., 1 Hess Plaza, Woodbridge, N.J., 07095, Attention: Joseph M. Aspray.

The issue raised is whether the advertising of and the sales of Hess toy trucks at a uniform "tax included" price by Amerada Hess Corporation ("AHC") and Hess Mart, Inc. ("HM") will violate Section 1132(a) or Section 1133(d) of the Tax Law or any other section of the Tax Law or Sales and Use Tax Regulations.

AHC sells petroleum products through dealer operated and company owned gasoline stations on the East Coast. HM, a wholly owned subsidiary of AHC, operates convenience stores at some of these gasoline stations.

Each November and December AHC and HM sell toy trucks at the gasoline stations and convenience stores. AHC does not issue receipts when it sells the trucks at its gasoline stations. In contrast, HM, as with its other sales, provides the purchaser of toy trucks with a cash register tape which separately states the sales tax collected.

During the months of November and December 1989, AHC and HM intend to sell the toy trucks at a uniform "tax included" price (e.g. \$9.00 including tax) and to advertise the sale of these trucks in newspapers and on television and radio at such tax-included price. AHC and HM will determine the tax due by employing the "unit price method" (as set forth in Technical Services Bureau Memorandum TSB-M-79(15)S) as follows:

- 1) Subtract nontaxable sales, if any, from gross receipts, per records, to arrive at taxable receipts plus applicable sales tax.
- 2) Add the applicable sales tax rate to 100%.
- 3) Divide taxable receipts plus applicable sales tax (#1 above) by the percentage resulting from #2 above to arrive at taxable sales.
- 4) Subtract taxable sales (#3) from taxable receipts plus applicable sales tax (#1) to arrive at the amount of sales tax due.

During the sales campaign, AHC and HM intend to post placards at the gasoline stations and convenience stores which will advertise the sale of the trucks at the tax-included price. The price of the trucks excluding the tax will appear on the cash register tapes which HM provides to customers who purchase the toy trucks at the convenience stores.

Section 1132(a) of the Tax Law states, in part:

Every person required to collect the tax shall collect the tax from the customer when collecting the price ... to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price ... paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

Section 1133(d) of the Tax Law states:

No person required to collect any tax imposed by this article shall advertise or hold out to the public in any manner, directly or indirectly, that the tax is not considered as an element in the price, amusement charge or rent payable by customers.

Section 1144 of the Tax Law states:

Reference to tax. - Whenever reference is made in placards or advertisements or in any other publications to any tax imposed by this article, such reference shall be in substantially the following form: "sales and use tax"; except that in any bill, receipt, statement or other evidence or memorandum of sale, services rendered, amusement charges, dues, rent or occupancy, issued or employed by a person required to collect tax, if the tax is required to be stated separately thereon as provided in subdivision (a) of section eleven hundred thirty-two, the word "tax" will suffice.

Section 532.1(b) of the Sales and Use Tax Regulations states, in part:

Statement of and reference to tax. (1) Whenever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price ... paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.

(2) Whenever the sales and use tax is separately stated on such document, it may be referred to as tax.

(3) The words tax included or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

(4) No written receipt. For sales other than sales of gasoline and diesel fuel a unit price method of accounting for sales may be used where no written receipt is given to the customer. The unit price is the price, including sales tax, at which the sale is recorded. Since the customer must be made aware of the inclusion of sales tax in the total sales price, every business establishment employing the unit price method must

visibly display, to all customers a placard stating that the prices of all taxable items include sales tax. If the sale is recorded on a cash register it may be rung up on a single ring, a quantity of individual items may be rung up in total, or a quantity of items can be rung up individually with a total. In addition, the vendor shall, for the benefit of his customers, distinguish between taxable and nontaxable items offered for sale. This may be done by such methods as:

- (i) attaching labels to merchandise to indicate taxable or nontaxable status;
- (ii) displaying taxable and nontaxable merchandise separately; or
- (iii) having available detailed listings of taxable and/or nontaxable items.

It is responsibility of every vendor who sells both taxable and nontaxable items to maintain accurate records indicating such sales. ...

Section 532.1(c) of the Sales and Use Tax Regulations states, in part:

Absorption of tax and forms of advertising prohibited. No person required to collect any tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law, shall advertise or hold out to any purchaser, to any person, or to the public in general, in any manner, that the tax is not considered as an element in the price, amusement charge, or rent payable by the customer. Among the acts prohibited are statements that the customer is not being charged the tax, or that the tax will be refunded to the customer, or applied as a credit against the customer's bill, account or future purchases. ...

Section 1817(g) of the Tax Law states:

Any person (1) who willfully fails to charge separately the tax imposed under article twenty-eight of this chapter or to state such tax separately on any bill, statement memorandum of receipt issued or employed by him upon which the tax is required to be stated separately as provided in subdivision (a) of section eleven hundred thirty-two of this chapter, or (2) who shall refer or cause reference to be made to such tax in a form or manner other than that required by such article twenty-eight shall be guilty of a misdemeanor.

Whereas Section 1133(d) of the Tax Law and Section 532.1(c) of the Sales and Use Tax Regulations prohibit the absorption of sales tax by a vendor and certain forms of advertising wherein a vendor holds out the sales tax is not considered an element in the price payable by the customer, and whereas Section 532.1(b)(3) of the Sales and Use Tax Regulations prohibits the use of the words "tax included" or words of similar import on sales slips or other documents in instances where

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written receipts are issued to the customers, neither the Tax Law nor the Sales and Use Tax Regulations contain any provisions which either directly or by inference prohibits a vendor from advertising an item for sale at a "tax included" price.

Accordingly, in the instant case, AHC will not be in violation of sections 1132(a), 1133(d) or 1144 of the Tax Law, Section 532.1 of the New York State Sales and Use Tax Regulations, nor of Section 1817(g) of the Tax Law or any other section of the Tax Law or Regulations when advertising the sale of the Hess toy trucks in newspapers or on radio or television at a uniform "tax included" price. It is noted that the words "sales tax included" must appear in any such advertising. Furthermore, AHC will not be in violation of any section of the Tax Law or Regulations when making sales of the Hess toy trucks at such "tax included" price provided that in accordance with section 532.1(b)(4) of the Sales and Use Tax Regulations AHC accounts for sales of the Hess toy trucks by use of the unit price method, whereby: a) each gasoline station under AHC's jurisdiction posts a placard, visible to all customers, stating that the prices of all taxable items include sales tax; and b) such unit price method is only employed at those stations where no written receipt is given to the customer.

Nor will HM be in violation of any sections of the Tax Law or Regulations when advertising the sale of the toy trucks at such uniform "tax included" price provided that in accordance with Section 1144 of the Tax Law and Sections 532.1(b)(1), (2) and (3) of the Sales and Use Tax Regulations HM issues its customers a sales slip, invoice, receipt or other statement or memorandum of the price paid or payable on which the retail price and the sales tax are charged and shown separately and on which the words "tax included" are not used in lieu of such separate statement of tax paid or payable.

DATED: September 21, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.