

8130.9250 ADVERTISING.**Subpart 1. Definitions.**

A. "Advertising" is the expression of an idea created and produced for reproduction and distribution through means such as television, radio, newspapers, newsletters, periodicals, trade journals, publications, books, magazines, standardized outdoor billboards, direct mail, point-of-sale displays, leaflets, brochures, fliers, and package design, and which is designed to promote sales of a particular product or service or to enhance the general image of the advertiser. Advertising includes public service messages that are designed to affect the behavior of the public, and messages that are political in nature.

B. "Advertising agency" is any person that is directly responsible to an advertiser for, and whose functions as a business include the creation of advertising. Creation of advertising means developing concepts or ideas to express the advertising message.

C. "Advertiser" is a person who contracts to purchase, or have delivered to a third party on its behalf, advertising.

Subp. 2. **In general.** The sale, use, or other consumption (hereinafter referred to as a sale) of advertising ordinarily constitutes a sale of a nontaxable service, and hence is not subject to Minnesota sales or use tax. However, if the means of expressing the advertising is through tangible personal property that has a primary functional use independent of its advertising message, the sale of the advertising will be treated as a taxable sale of tangible personal property. It shall be presumed that the advertising has a primary functional use independent of its advertising message, and the burden is on the taxpayer to prove that the advertising does not have a primary functional use independent of its advertising message.

If a person creates advertising for its own use, all of its purchases of tangible personal property are subject to sales tax. This part, with the exception of subparts 11 and 13, does not apply to such a person. For purposes of subparts 11 and 13, such person shall be treated as an advertiser.

Subp. 3. **Nontaxable items.** The following are examples of items the sale of which are usually considered to be nontaxable within the meaning of this part because: (1) the items meet the definition of advertising, and (2) the means of expressing the advertising message is not through tangible personal property that has a primary functional use independent of its advertising message:

- A. certain printed materials including:
 - (1) fliers, handouts, brochures, and sales promotion materials;
 - (2) direct mail materials; and

- (3) displays, banners, posters, and table tents, including point-of-sale materials;
- B. radio commercials including cassettes and tapes of them;
- C. television commercials including cassettes, tapes, films, and slides of them;
- D. other audio or visual commercials including cassettes, tapes, films, and slides of them;
- E. print media advertising, including:
 - (1) magazine ads;
 - (2) newspaper ads;
 - (3) periodical ads;
 - (4) trade journal ads;
 - (5) book ads;
 - (6) other printed materials ads;
 - (7) newspaper inserts; and
 - (8) yellow pages ads;
- F. billboard ads, transit advertising (bus, rail, taxi, airport), and shopping mall and sports arena advertising and displays; and
- G. direct marketing materials not distributed by mail.

Subp. 4. **Taxable items.** The following are examples of items the sale of which is usually considered to be taxable within the meaning of this part because either: (1) the items fail to meet the definition of advertising, or (2) the means of expressing the advertising message is through tangible personal property that has a primary functional use independent of its advertising message:

- A. specialty advertising, examples of which include key chains, glassware, frisbees, rulers, pens, calendars, buttons, matchbooks, paper napkins, clocks, and notebooks;
- B. business cards and stationery;
- C. books;
- D. annual reports, except as provided in Minnesota Statutes, section 297A.68, subdivision 10;
- E. training and educational materials;
- F. business identification signs;

- G. employee benefit materials and plan descriptions;
- H. business directories, including yellow pages;
- I. warranty books and product instructions; and

J. advertising, including items described in subpart 3, if mass produced or reproduced in quantities in excess of that reasonably anticipated to be necessary for an advertising campaign, but only to the extent of such excess.

Subp. 5. **Charges by an advertising agency to an advertiser for services related to the creation and production of taxable and nontaxable advertising.** In the case of nontaxable advertising no portion of the gross receipts allocable to services related to the creation or the production of the advertising is taxable, since the item constitutes exempt advertising services.

In the case of taxable advertising, all of the gross receipts allocable to all services related to the creation or production of the taxable advertising are taxable. Gross receipts allocable to the creation or production of advertising include all costs incurred in the conception, creation, developing, planning, and design of the advertising, as well as the placing of the advertising.

Subp. 6. **Preliminary art.** The Minnesota sales or use tax does not apply to gross receipts allocable to services which relate to preliminary art, film, or tape. Preliminary art, film, or tape, means art, film, or tape prepared for the purpose of conveying or demonstrating an idea or concept for acceptance by a buyer before the final approval is given by a buyer for finished art or finished film or tape. Examples of preliminary art, film, or tape include roughs, visualizations, comprehensives, layouts, sketches, drawings, paintings, designs, story boards, rough cuts of film and tape, initial audio and visual tracks, and work prints. In the case of print advertising, finished art is the final art used for actual reproduction by photochemical or other process. In the case of broadcast advertising, finished film and tape means the master tape or film and duplicate prints. Gross receipts are treated as allocable to preliminary art only to the extent that they are separately billed or stated.

Subp. 7. **Nonapportioned contracts.** Where a contract or commission or fee agreement or other agreement requires both the creation of nontaxable advertising and taxable advertising by an advertising agency, and when no separate cost is attributed to the taxable advertising, sales tax on the fair market value of the taxable advertising must be collected and remitted to the commissioner at the time of transfer of title or possession of the taxable advertising to the advertiser or its designee. Fair market value of the taxable advertising will include a fair and appropriate allocation of the agency's fee or commission.

Subp. 8. **Purchases for use in producing both nontaxable advertising and taxable advertising.** This subpart applies to purchases by an advertising agency of tangible personal

property which may be used repeatedly, and to tangible personal property which is consumed in part for producing nontaxable advertising and in part for producing taxable advertising.

A. If an advertising agency purchases tangible personal property which is used, but not consumed, with respect to both nontaxable advertising and taxable advertising, the determination of whether the purchase is exempt from sales or use tax is based on the initial contract for which the property is purchased. An example of such tangible personal property is a photograph that may be used in connection with both nontaxable advertising services such as a newspaper ad, and taxable advertising such as a mug.

If the initial contract with the advertiser is for nontaxable advertising, the purchase by the advertising agency is subject to sales or use tax, notwithstanding that the purchased property may later be used with respect to taxable advertising. The subsequent sale of taxable advertising using such tangible personal property is not exempt from sales and use tax because of the previous tax payment.

If the initial contract with the advertiser is for taxable advertising, the item purchased by the advertising agency may be purchased exempt for resale, notwithstanding that the purchased tangible personal property may later be used with respect to nontaxable advertising.

If a contract (or contemporaneously negotiated contracts) with an advertiser is for both taxable advertising and nontaxable advertising, the burden is on the advertising agency to demonstrate the portion of the use that is attributable to each of such categories. If this burden is not met, the contract with the advertiser is deemed to be for nontaxable advertising. An example of this rule may be artwork purchased and used initially in making both a magazine ad and in making a calendar. Where the burden of proof is not met by the advertising agency, the purchase is taxable and the subsequent sale of taxable advertising is not exempt because of the previous tax payment.

B. If an advertising agency expects to consume materials in producing both nontaxable advertising and taxable advertising, all such materials can be purchased exempt for resale. An example of such material is a ream of paper that may be used in connection with the production of nontaxable advertising such as a brochure, and taxable advertising such as a calendar. To the extent that the materials are subsequently consumed in producing nontaxable advertising, the materials are taxable and must be reported as purchases subject to use tax on the agency's sales and use tax return. The percentage of materials consumed in producing nontaxable advertising is multiplied by the total purchase price of the materials to determine the amount of materials subject to tax. The burden is on the taxpayer to demonstrate the portion of usage that is attributable to taxable advertising. If the burden is not met, all the materials consumed are deemed to be for nontaxable advertising.

Subp. 9. **Purchases for agency use.** Office supplies, capital equipment, and other materials including those used to prepare preliminary art, which are consumed or used

by an advertising agency and do not become an ingredient or component part of taxable advertising to be sold at retail, constitute a retail sale from the vendor to the advertising agency. An advertising agency is the consumer of such tangible personal property. Either the vendor must collect sales tax or the advertising agency must remit use tax on those purchases.

Tangible personal property that becomes an ingredient or component part of taxable advertising to be sold at retail may be purchased exempt for resale.

Subp. 10. **Advertisers that are tax-exempt entities.** Advertisers that are tax-exempt entities may appoint advertising agencies as purchasing agents. If a valid purchasing agency appointment is made, the advertiser shall pay no sales or use tax other than what it would have paid had it made the purchase directly. To make a valid appointment of an advertising agency as a purchasing agent, an advertiser must:

A. grant to the agent the ability to bind the principal to pay for purchases made by the agent;

B. require that the agent not purchase materials in its own name;

C. require that all contracts, purchase orders, and other similar writings of the agent shall specifically state that the principal is obligated to pay for materials purchased and that a clear disclosure of the agency relationship is made to the vendor of the materials; and

D. require that the advertising agency make no use of the property for itself or for any client other than the principal.

When dealing with advertising agencies acting as purchasing agents for tax-exempt entities, vendors must presume that the agency is the purchaser in the absence of an express statement on a purchase order from an advertising agency that the advertising agency is acting as an agent and that the purchase is within the scope of authority expressed in the agreement. The agency may issue exemption certificates as authorized in part 8130.3000 in the name of the principal and signed by the advertising agency as purchasing agent.

Subp. 11. **Advertising materials shipped out of state.** Minnesota Statutes, section 297A.68, subdivision 11, exempts materials designed to advertise and promote the sale of merchandise or services, which material is shipped out of Minnesota for use solely outside the state. This exemption may apply to the purchase of items in final form or to the purchase of an item that is incorporated into a product that ultimately leaves the state. Similarly, the exemption may apply to the purchase of taxable advertising or to the purchase of tangible personal property that is used in creating or producing nontaxable advertising.

This exemption is limited to materials used to advertise and promote the sale of merchandise or services. This exemption does not include any advertising which is done

for other purposes such as public service messages not related to advertising or promoting sales of merchandise or services.

When an advertising agency or an advertiser purchases taxable advertising and the advertising agency, the retailer, or the advertiser ships the taxable advertising out of state for use solely outside the state, the advertising agency or advertiser is not subject to sales or use tax with respect to such purchases because it is the purchaser of materials that are designed to advertise and promote the sale of merchandise or services, and the materials are being shipped outside the state for use solely out of state.

When an advertising agency or an advertiser purchases tangible personal property that is used in creating or producing nontaxable advertising, and the advertising agency, the retailer, or the advertiser ships the advertising out of state for use solely outside the state, the advertising agency or advertiser is not subject to sales or use tax with respect to such purchases because it is the purchaser of materials that are designed to advertise and promote the sale of merchandise or services, and the materials are being shipped outside the state for use solely outside the state. An example of this is when an advertising agency or advertiser purchases advertising brochures that will be shipped out of state. The agency or advertiser can purchase the brochures from the printer exempt from tax. The printer can purchase the paper and ink used to print the brochures exempt because they are being purchased for resale, whether or not the advertising agency or advertiser has an exemption for shipments out of state. The advertising agency or the advertiser is eligible for the exemption described in this subpart whether the item it purchases is in final form, such as a finished brochure or whether the item is incorporated into the product that ultimately leaves the state, such as cardboard that is purchased and becomes part of an advertising sign that is shipped out of state.

The rules described in this subpart also apply with respect to an advertising agency if the advertising agency, instead of itself shipping the advertising directly out of state, delivers the advertising to an advertiser within Minnesota for the purpose of subsequently shipping the materials out of state for use solely outside the state. Similarly, the purchase by the advertiser is not subject to sales or use tax with respect to its purchase of the advertising.

This exemption does not apply to purchases that are used to create or produce nontaxable advertising to the extent that these purchases do not get sent outside the state. An example of this is when an advertising agency purchases a photograph that it uses in preparing advertising brochures. The sale of the photograph to the advertising agency is taxable. The sale of the brochures to the advertising agency is exempt to the extent that those brochures will be sent out of state as described in this subpart. Another example is when an advertising agency purchases a master tape that it uses to make copies that will be shipped out of state. The copies or the materials used to make them may be purchased

exempt but the purchase price of the master tape is taxable unless that tape is also shipped out of state as described in this subpart.

Subp. 12. **Miscellaneous provisions.** When an advertising agency contracts with a recording studio to produce a tape to be used for nontaxable advertising, the recording studio must charge sales tax on all charges to the agency. If the agency hires actors, or directly purchases other exempt services to be used in making the tape, the agency does not pay tax on those purchases. The recording studio only collects tax on the charges it makes to the agency.

If a recording studio or printer has contracted directly with the advertiser to produce a tape or printed material, the studio or printer must charge tax on the amount charged to the advertiser, unless the studio or printer is also doing creative work and is acting as an advertising agency. If the studio or printer is acting as an advertising agency, it must pay tax on all its inputs for nontaxable advertising, and does not collect tax on its charges to the advertiser.

Subp. 13. **Effective date.** To the extent that this part is different from previous department applications of the sales and use tax as it applies to the advertising industry, this part is prospective only and is effective March 8, 1993.

Statutory Authority: *MS s 14.388; 270.06; 270C.06*

History: *17 SR 2106; L 2005 c 151 art 1 s 114; 31 SR 449*

Published Electronically: *February 18, 2008*