

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

MJC

RULE REVIEW CHECKLIST

File No. 1996
DATE RECEIVED 1-20-93
REVIEW DATE 1-29-93
DUE DATE 2-3-93
(DIS)APPROVED 2-3-93
WITHDRAWN _____

Docket No. 05,0009,0739
ADOPTED W/O HEARING _____
EMERGENCY RULE _____
TO REVISOR ON 1-22-93
REVISOR (DIS)APPROVED 1/26/93
FILED W/SEC. OF STATE 2-4-93
RETURNED TO AGENCY 2-4-93

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
June 19, 1989 Date published in State Register
_____ Comments

_____ Petition for Adoption of a Rule

_____ Board's Authorizing Resolution
_____ Date adopted

_____ Proposed Rule
_____ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
270.06 Statutory Authority
N/A Small Business Statement
_____ Expenditure of public money statement
Nov 19, 1992 Signature

_____ Statement of Need and Reasonableness (if applicable)
Statement Small Business Statement
_____ Fees - § 16A.128

✓ Affidavit of Mailing (Notice of Intent to Adopt Rule
December 2, 1992 Dated 30/25 days before adoption
_____ Notice attached indicates it is attached
_____ Copy of rule or summary attached

_____ Publication in State Register
December 7, 1992 Date 30/25 days before adoption

✓ 180-day deadline from:
_____ Effective date of law requiring rule
(14.12) (both rules) amendments don't apply
_____ end of ~~comment period (§ 14.26)~~ (rules without hearing)
_____ effective date of statutory authority (§ 14.29) (emergency rules)

_____ Resolution Adopting
_____ Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
January 8, 1993 Date

_____ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Barry Keller Name of SAAG representing agency

✓ Notice of Submission to Attorney General (if applicable)

✓ Affidavit of Mailing Notice to Attorney General (if applicable) January 20, 1993

Rules adj

Note letter from Fredrikson & Byron
Send the decision to them

STATE OF MINNESOTA

Office of the Attorney General

TO : SUSAN FREMOUW
Attorney
Legal Services and Criminal Investigation Division
10 River Park Plaza
St. Paul

DATE : February 4, 1993

FROM : MARTHA J. CASSERLY
Special Assistant
Attorney General

PHONE : 296-6839

SUBJECT : In the Matter of the Adopted Rule Relating to Sales and Use Tax for Advertising

The above-referenced rule has been approved as to its legality by the Attorney General on February 3, 1993.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard, please contact me.

cc: Barry R. Greller
William Brown, Chief Judge
MaryAnn Hruby
Stephen R. Bergerson, Esq.

MJC:jj.rules.bg4

Department of Revenue

Adopted Permanent Rules Relating to Sales and Use Tax for Advertising

Rules as Adopted

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.25, 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 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.** There is an exemption in Minnesota Statutes, section 297A.25, subdivision 22, for 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 vendor, 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 vendor, 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 five working days after notice of adoption is published in the State Register.

REPEALER. Minnesota Rules, part 8130.9200, is repealed.

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

FEB 04 1993

Joan Anderson Growe
Secretary of State 9:50 AM

RA

APPROVED AS TO FORM AND LEGALITY
February 3 1993
HUBERT H. HUMPHREY, III
ATTORNEY GENERAL
BY MJ Cassedy
SPECIAL ASSISTANT ATTORNEY GENERAL

RECEIVED

JAN 26 1993

Office of the Attorney General
Government Services Section
Capitol Office Bldg., Suite 500
525 Park Street
Paul, MN

FREDRIKSON & BYRON
A PROFESSIONAL ASSOCIATION

1100 International Centre
900 Second Avenue South
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FAX (612) 347-7077

Direct Dial No.
(612) 347-7043

January 25, 1993

Office of the Attorney General
Public Finance Division
525 Park Street
Suite 500
St. Paul, MN 55103

Dear Sir or Madam:

Kindly forward a copy of your decision regarding the legality of the proposed sales tax rule regarding advertising (In The Matter Of The Proposed Adoption Of The Rule Of The State Department Of Revenue Governing Sales And Use Tax For Advertising) to me at the above address.

Thank you for your assistance.

Sincerely,



Stephen R. Bergerson

SRB/aag

120946

STATE OF MINNESOTA

Office of the Attorney General

TO : SUSAN FREMOUW
Attorney
Legal Services and Criminal Investigation Division
10 River Park Plaza
St. Paul

DATE : February 4, 1993

FROM : MARTHA J. CASSERLY
Special Assistant
Attorney General

PHONE : 296-6839

SUBJECT : In the Matter of the Adopted Rule Relating to Sales and Use Tax for Advertising>

The above-referenced rule has been approved as to its legality by the Attorney General on February 3, 1993.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

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If you have any questions in this regard, please contact me.

cc: Barry R. Greller
William Brown, Chief Judge
MaryAnn Hruby
Stephen R. Bergerson, Esq.

MJC:jj.rules.bg4

Stat Authority 270.06 [13] not in notice
administer and enforce the assessment and
collection of state taxes and, from time to
time, make, publish, and distribute rules for
the administration and enforcement of state laws.
The rules have the force of law.

end of comment period is January 6, 1993

no indication if they received any comments
in Findings.
Rules going to hearing withdrew them
negotiated
Call -
1-25-93 -
left a message - asked her if she received
any comments also did they send the
SONAR to LCAR

1-25-93 no comments per Susan Fremouw
sent SONAR to LCAR per Susan Fremouw
said doesn't have to send any proof until
our new rules are in effect. Told her I
will take her word for it.

note letter from law firm

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of a New Rule Relating to Sales and Use Tax for Advertising.

STATEMENT OF NEED AND REASONABLENESS

GENERAL STATEMENT

This document has been prepared as a verbatim affirmative presentation of the facts necessary to establish the statutory authority, need for, and reasonableness of the proposed rule. It is submitted pursuant to Minnesota Statutes, section 14.23 and Minnesota Rules Part 1400.0500, requiring a Statement of Need and Reasonableness.

A Notice of Intent to Solicit Outside Opinion regarding the Sales and Use Tax on Advertising was published in the State Register on June 19, 1989. The notice specifically mentioned this rule and invited interested persons to submit comments or suggestions in writing to the Department by June 30, 1989. No one submitted written comments within that time.

This rulemaking proceeding proposes to adopt a permanent rule relating to the Sales and Use Tax on Advertising. This new rule will replace the existing rule (8130.9200) which is being repealed.

IMPACT ON SMALL BUSINESS

This impact of this rule on small business has been considered. The proposed rule does not impose new filing, or payment requirements on small businesses and therefore is not expected to place any additional financial or administrative burden on small businesses.

All persons (including small businesses) possessing a sales tax permit were given written notification of the Department's rulemaking activities, pursuant to Minnesota Statute, section 14.115, subd. 4. This notification was first published in the Department's January 1990 quarterly Sales Tax Newsletter which was sent to all permit holders (146,918) in late December 1989, and early January 1990.

SPECIAL NOTICE OF RULEMAKING

Pursuant to Minnesota Statutes, section 14.11, the proposed rule will not require the expenditure of public monies by local units of government and will not have any direct adverse effects on agricultural lands in the state.

AUTHORITY TO ADOPT RULES

Minnesota Statutes, section 270.06(13) grants the Commissioner of Revenue authority to promulgate rules concerning administration and enforcement of the sales and use tax laws.

RULE ANALYSIS

General

The existing rule on advertising (Minn. Rule part 8130.9200) was promulgated in 1978. That rule treats all advertising as the sale of tangible personal property and thus subject to sales tax when transferred to the advertiser. Over the years, there has been much concern voiced by the advertising industry that this rule does not reflect the true nature of the advertising business, and that it is difficult to administer within the structure of the industry. In the past, the Department has attempted to promulgate a new advertising rule, but has met with much resistance and controversy. A proposed rule was published in the state register on July 16, 1990, and a hearing scheduled for August 28, 1990. The rule was subsequently withdrawn from the rulemaking process, partly due to the tremendous negative response to the proposed rule. At that time, the Commissioner decided it was appropriate to withdraw the rule and address the many concerns and questions various industry groups were raising through a negotiated-style rulemaking process.

In an attempt to address these concerns, the Commissioner decided to work with industry to develop a rule that describes the proper imposition of sales or use tax on transactions as required under the sales tax statutes (Minn. Stat. Chapter 297A) while at the same time addressing the reality of the way the advertising industry operates. The Commissioner is confident that the proposed rule accomplishes those objectives. The proposed rule describes the application of the sales and use tax to certain transactions that occur in the advertising industry. In developing this rule, the Department of Revenue has worked extensively with various representatives of the advertising industry, and related industries (such

as the printing industry), and through industry associations (American Association of Advertising Agencies - Twin Cities Council, Advertising Federation of Minnesota) and the Communications Industry Coalition (CIC). This rule is the result of much negotiation, drafting, and meeting with those industry groups.

Existing Rule

The Commissioner proposes to repeal the existing advertising rule. This rule divides advertising agencies into two categories for sales and use tax purposes. Advertising agencies may act as "independent service businesses" or as "agents." This division of sales and use tax consequences by the status of the seller, the advertising agency, has no basis in the Minnesota sales and use tax statute. The rule does not define advertising agency, independent service business, or agent. Since these terms are not defined in the present rule, that leads to confusion over the exact meanings and applications.

Under the present rule, it appears that an "independent service business" is a synonym for "retailer" as defined in Minnesota Statutes, section 297A.01, subd. 10. In the rule, an independent service business may either sell tangible personal property or a service. In the sales and use tax statute, the sales of tangible personal property are generally taxable and the sales of services are not, so the use of the term independent service business is imprecise when applied to a seller of tangible personal property, as it is in the existing rule.

The existing rule is silent on the treatment of service or labor cost which is included by statute in the sales price, and does not address the concept of fabrication labor as set forth in the statutory definition of a sale and purchase. The present rule's reliance on the status of a seller to determine tax consequences of a retail sale and its failure to incorporate important statutory concepts regarding "sale" and "sales price" have led to confusion in calculating taxes due from advertising agencies.

Proposed Rule

The proposed rule would tax the sales of advertising and promotional material in a fashion more consistent with the statute and with the way the industry actually works. It would not be necessary to ascertain the status of the person selling advertising and promotional materials because status of the seller would not determine tax consequences. Rather, because the sales and use tax is a transactional tax, the nature of the transaction is the determining factor as to whether or not a tax is imposed. The primary criteria for determining whether a sale at retail is taxable or nontaxable is whether there is a sale of tangible personal property, or a sale of exempt services.

This rule proposes to treat advertising agencies as primarily service providers, not retailers of tangible personal property, which has been a long-standing contention by the industry. It recognizes that under certain circumstances, providing advertising is really a service that may require the use of some tangible personal property in order for the service to be delivered to the customer.

Many of the concepts of the proposed rule were based on similar ones used by the State of Missouri in its sales tax rule regarding advertising agencies (12 Mo. Admin. Code 10-3.590) to the extent they did not conflict with Minnesota sales tax statutes.

Subpart 1.

This subpart defines the terms used in this rule. The definitions are necessary to inform affected persons of what is meant by the terms: advertising, advertising agency, and advertiser, because these terms are all used throughout the proposed rule and because these terms help to clarify the scope of the proposed rule's application.

Item A: This item defines the term "advertising" to mean an idea created and produced for reproduction and distribution and which promotes sales of a product or the image of the advertiser. It is reasonable to use this definition because it is consistent with the ordinary meaning attributed to it, and with the industry's own use of the term.

Item B: This item defines the term "advertising agency" as one who is responsible to an advertiser for creating advertising. Since those businesses engaged in providing advertising services are commonly known as advertising agencies, this term was used in the proposed rule to describe them. The term advertising agency is not limited to those persons who hold themselves out as "advertising agencies" but applies to *any* persons engaging in the activities described in item A above. Thus, for example, if a television station created advertising for its clients, it would be treated as an advertising agency for purposes of this rule,

even though the main portion of its business is airing programs and commercials. This definition of advertising agency is reasonable because it is directly related to the activities described as advertising, and because it does not condition the taxability of the sale on the identity of the seller.

Item C: This item defines the term "advertiser" as a person who contracts to purchase advertising. The definition of advertiser is reasonable because it is defined in accordance with the ordinary meaning of the word.

Subpart 2.

This subpart sets out the general approach of the proposed rule, that the sale of advertising is generally a nontaxable service. This approach follows the industry proposition that advertising agencies are for the most part service providers, rather than retailers of tangible personal property. This subpart also provides that in certain circumstances, the advertising agency will be treated as a retailer and will be required to collect sales tax. This occurs when the advertising message is expressed through items that have a use independent of the advertising message. An example would be a pen with a product logo on it. Since the pen can be used for writing as well as to convey an advertising message, the sale of the pen by the advertising agency constitutes the sale of tangible personal property and is subject to sales tax. This approach is reasonable because it reflects the concept that the advertising industry is largely a service industry that also makes taxable retail sales of tangible personal property.

There is a presumption that advertising has an independent value as described above (thus is taxable when sold by the ad agency) and the burden of proof is on the ad agency to prove otherwise. This type of presumption is necessary to ensure consistency in the way these items are taxed, and to lessen the administrative burden on retailers who are selling to advertising agencies. This presumption means that the retailer will not be required to make judgments as to whether something has an "independent value" and thus may be purchased exempt for resale, but rather the burden is on the ad agency to prove that the item does not have the stated "independent value". This presumption is reasonable because it places the burden of proof on the person who has that information available. Furthermore, in other areas of tax law, such as when the commissioner makes returns or assessments for a taxpayer, the returns and assessments are presumed prima facie correct and valid, and the taxpayer has the burden of establishing incorrectness or invalidity (Minn. Stat. § 289A.35 and 289A.37, subd. 3). This presumption is consistent with those provisions.

This subpart also contains the rule that purchases of items used to make one's own advertising are subject to sales tax. This rule would apply primarily to companies or businesses which have their own in-house advertising departments. They would pay the tax on all items purchased for use in advertising, since those items will not be resold (see subpart 9).

Subpart 3.

This subpart sets out the two criteria to be used when determining if something is nontaxable advertising. It also contains a list of example items that would usually be considered nontaxable advertising within the scope of this rule. This

list was prepared with the assistance of industry representatives. It is comparable with the list used by the state of Missouri in its advertising rule, which is similar in format and approach to the proposed rule. It is necessary to set out the two criteria so that when the question of whether an item is considered nontaxable advertising arises, and the item is not contained in the list of examples, the taxpayer can look to the criteria to determine the tax consequences. The examples are also necessary to show the general type of items that will fall within the criteria. This subpart is reasonable because it illustrates items used to provide nontaxable advertising services and follows the industry concept that ad agencies are providing services and not retailing tangible personal property.

Subpart 2 contains the presumption that all advertising has a primary functional use independent of the advertising message. Subpart 3 contains a list of items that will probably not meet this requirement. This list was meant to illustrate the type of item that would *usually* not meet the requirement, it does not mean that the presumption is automatically invalid for these items.

Subpart 4.

This subpart sets out the criteria to be used when determining if the sale of the advertising item is taxable. It also contains a list of example items that would be considered to have a primary functional use independent of the advertising message, and thus are subject to sales tax. This list was also prepared with the assistance of industry representatives. It is comparable with the list used by the state of Missouri in its advertising rule, which is similar in format and approach to the proposed rule. It is necessary to set out the criteria so that when the

question of whether an item is considered taxable advertising arises, and the item is not contained in the list of examples, the taxpayer can look to the criteria to determine the tax consequences. The examples are also necessary to show the general type of items that will fall within the criteria. This subpart is reasonable because it illustrates items commonly sold by advertising agencies and follows the premise in subpart 2 that in some circumstances an ad agency is acting as a retailer.

Item J of this subpart provides for the situation where an advertising campaign may involve mass production of items that would normally be treated as nontaxable advertising under subpart 3. An example would be a poster of a famous athlete that is used in stores to promote sale of tennis shoes. The poster is also reproduced in mass quantities to be given away as prizes. The poster is considered to have a primary functional use independent of its advertising message in the latter instance, and the sale of those posters to the advertiser would be taxable. It is necessary to include this item because it illustrates the fact that there may be times when an otherwise nontaxable transaction becomes a taxable transaction because of it's nature.

Subpart 5.

This subpart describes the imposition of tax on the ad agency's charges for creating and producing taxable and nontaxable advertising. It states that when the agency is selling taxable advertising, all of the agency's charges are subject to tax, including any creative or design charges. This is a reasonable approach because it flows directly out of the statutory definition of sales price (Minn. Stat. §297A.01, subd. 8). This definition provides that the sales price that tax is

computed on means the total consideration for the sale, without deduction for labor or service costs, or cost of the materials used. It is also necessary to state the principle that all of the charges are subject to tax because this is an area that in the past has been confusing for the industry. This subpart makes it clear that these type of charges are in fact included in the tax base when computing the sales tax on the purchase price.

This subpart also provides guidance in the area where nontaxable advertising is being provided to a advertiser. In that instance, none of the charges are subject to sales tax. It is necessary to state this principle to illustrate the distinction between the taxability of charges for taxable advertising and nontaxability of charges for nontaxable advertising.

Subpart 6.

This subpart is substantially the same as subpart 2 (B) in the current advertising agency rule part 8130.9200. This new subpart provides that sales tax does not apply to separately stated service charges for preliminary art. This is the same principle that is followed in the current rule and is consistent with the court's ruling in Standard Packaging Corporation v. Commissioner of Revenue, 288 N.W.2d 234 (Minn. 1979). In that case, the Minnesota Supreme Court held that the preliminary art furnished to Brown and Bigelow was not a taxable transfer of tangible personal property, but an exempt service provided by the artist. It is necessary to include this information in the new rule because this is an area that generates many questions and is a common concept in the advertising industry. This is a reasonable provision of the rule since it is consistent with the overall theory that in some situations, an agency is providing exempt services, not

selling tangible personal property. In the case of preliminary art, the agency is treated as providing a nontaxable service because there is no finished product that is being sold at that time.

Subpart 7.

This subpart addresses the situation where an advertising contract covers both nontaxable and taxable advertising being provided to an advertiser. When the contract does not separately state the cost of the taxable advertising, the advertising agency must place a fair market value on the taxable advertising, and sales tax should be collected on that amount. The seller must collect the tax at the time the taxable advertising is transferred to the advertiser.

This subpart is necessary to provide certainty and guidance to advertisers and ad agencies in determining what part of a nonapportioned contract is subject to sales tax. The nonexempt part is taxable according to the statute, so the apportionment of the total sales price is a reasonable method of determining the taxable portion of the total sales price.

This approach also recognizes the fact that there could be a substantial contract with only a small amount attributable to taxable advertising. This approach prevents a possible inequitable result that could occur if the Department took the position that the entire contract was taxable even though only a small portion would have been if separately contracted. This approach puts the taxpayers in the same position as if separate contracts were entered into for the taxable advertising and the nontaxable advertising.

Subpart 8.

This subpart sets forth the tax consequences when an agency purchases items for use in both taxable and nontaxable advertising. This is necessary and important information to include because the sales and use tax rules adopted for general application do not address the unique situation where a purchased item can be used in both the production of tangible personal property and the rendering of a service, but consumed in neither. Since this can and does occur with some frequency in this industry, it is necessary to provide information about it in this rule.

This subpart results in a reasonable application of the sales tax statute because it recognizes that the sales tax is a transactional tax, and classifies sales as taxable or exempt depending on the circumstances at the time of the transaction.

Item A.: This item covers situations when an item is purchased to be used but not consumed in a contract covering both taxable and nontaxable advertising. The purchase may be taxable, depending on the initial contract under which the item was purchased. This allows the issue of whether a transaction is subject to tax to become certain at the time of the contract transaction, even though the item is later put to an exempt or taxable use. This is in accordance with the general principles of the sales and use tax, which is by statutory definition, a transactional tax. Examples of items which can be used but not consumed are graphics, artwork, and photographs.

The taxable or exempt nature of the initial transaction is evidenced by the contract between the parties. There is no relief or refund provisions granted in the sales tax chapter for items that are initially taxable and later put to an exempt use, so this rule cannot administratively create such relief.

When the initial contract is for both taxable and nontaxable advertising, the ad agency has the burden to prove the portion of use attributable to each category. If the agency cannot meet this burden, the contract is considered to be for nontaxable advertising, which means that the purchases made by the ad agency pursuant to the contract are subject to sales tax and may not be purchased exempt for resale. It is reasonable to place the burden of proof on the taxpayer for the same reasons as stated above with respect to subpart 2.

Item B: This item allows the ad agency to purchase materials exempt if it expects to consume the materials in both nontaxable and taxable advertising. This expectation must be reasonable, and must occur at the time of the purchase. If at the time of purchase, the ad agency does not reasonably expect to use the materials in both fashions, it may not purchase the materials exempt for resale.

This item addresses the situation where an ad agency purchases materials that will be consumed in producing taxable and nontaxable advertising. The taxpayer will purchase the items exempt for resale and then pay a use tax on those materials that are used to make nontaxable advertising. Again, the burden of proof rests with the taxpayer (see explanation in subpart 2). It is necessary to include this information since there will be occasions when an agency purchases materials that will be both for resale and for their own use. The general sales tax rules do not address the tax consequences in this particular situation, other than

for construction contractors (see below). This item is reasonable because it gives an simple process to follow when calculating tax due, and is consistent with the tax statutes and rules that require payment of use tax when sales tax has not previously been paid. This item gives the agencies a process to follow similar to that found in Minn. Rule 8130.1200 where contractors can purchase all items exempt and then later self-assess themselves a use tax on the items that are actually used and not resold.

Subpart 9.

This subpart is a restatement of the general rule, set forth in Minn. Rule part 8130.0110, subparts 2 and 3, as it applies to advertising agencies. This subpart is reasonable because it is in accordance with that general rule that all sales are sales at retail unless the purchaser intends to resell the property in the regular course of business or the sale is specifically exempt from taxation. This subpart also helps to clarify some confusion exists in the industry regarding the taxation of purchases that are used in providing a service.

Subpart 10.

This subpart explains the application of the statutory exemption contained in Minn. Stat. §297A.25, subd. 16, (sales of tangible personal property to a nonprofit group) to the advertising and promotional materials purchased on the nonprofit group's behalf. When an advertising agency purchases taxable items that will be used in nontaxable advertising, it may purchase the items exempt as an agent of the nonprofit group. The purchases must be used in the nonprofit group's performance of it's charitable, religious, or educational functions (see Minn. Rule

part 8130.6200). The last paragraph of this subpart sets forth the general rule that a sale is presumed to be a taxable sale at retail unless the purchaser can show an exemption from taxation.

This subpart also contains a list of the requirements needed for a nonprofit group to establish a principal-agency relationship with the ad agency for purposes of the sales tax. Requirement A is needed to show an actual agency relationship exists, requirements B and C are needed in order to put vendors on clear notice that even though the items would be taxable when sold to the ad agency, the sales are exempt because the nonprofit group is actually purchasing the items, albeit through their agent, the ad agency. Requirement D is needed to prevent an agency from using the tax exempt status of a client for the ad agency's own benefit. These requirements are reasonable because they provide consistent guidelines to be used by all ad agencies in dealing with exempt entities, and at the same time carry out the statutory grant of exempt status to certain nonprofit organizations. The requirements are consistent with current principal/agency case law which requires the presence of: manifestation by the principal that the agent act for him, and a right of control by the principal over the agent, Jurek v. Thompson, 241 N.W.2d 788 (Minn. 1976), to establish a principal/agency relationship. This subpart clarifies any ambiguity that currently exists when an ad agency undertakes a contractual relationship with a nonprofit group.

Subpart 11.

This subpart provides information on the statutory exemption for advertising materials shipped out of state (Minn. Stat. §297A.25, subd. 22). This exemption applies to advertising materials that are shipped out of state for use solely

outside Minnesota. This subpart makes it clear that the exemption applies not only to items purchased in their final form, but also to materials that are incorporated into advertising materials that are subsequently shipped out of state. This subpart also clarifies that the exemption is limited in scope (by statutory language) to materials that promote the sale of merchandise or services, thus not extending this exemption to public service messages or political campaigns, etc.

There are also examples given to illustrate that when purchases of items are used in this state to create advertising that is shipped out of state, but the items themselves do not leave the state, the purchases are taxable. This provision is in accordance with the scope of the exemption statute, which is limited to those materials that are actually shipped out of state. This provision is reasonable because it provides a rational application of the exemption statute (which was intended to exempt items that are not being used in this state; items used and kept here and or used here and subsequently shipped out would still be taxable). Since items that never leave this state are clearly being used here, it would not make sense to broaden the scope of the specific statutory language to include those items.

This information is necessary because there have been questions by taxpayers on the scope of this exemption as it would apply under the terms of this rule. It is necessary to address these questions and clarify the tax consequences to prevent any future misunderstandings and potential unexpected tax liabilities.

Subpart 12.

This subpart contains information dealing with a common situation in the advertising industry. There have been many questions and some confusion in the past as to the correct tax treatment of charges made by and to recording studios. Therefore it is necessary to address those questions in this rule.

This subpart makes it clear that a recording studio must collect sales tax on its charges to ad agencies, because it is considered to be selling tangible personal property to the agencies. This is a reasonable position since sales of tangible personal property are taxable. The recording studio must charge tax when it transfers the finished tape or recording, unless the agency provides an exemption certificate, such as when the agency is acting as an agent for a nonprofit organization (see subpart 10 above).

Subpart 13.

This subpart provides that the rule is prospective only to the extent it differs from past department applications of the sales and use tax to this industry. It is necessary to state an effective date in the rule because of past confusion and concerns raised by this industry. It is reasonable to provide for an effective date in the rule, because it would be inequitable to apply the concepts in this rule to past tax periods, since this rule takes a different approach to tax applications to this industry than did the previous rule that taxpayers were relying on to make business and tax planning decisions.

Repealer.

The existing rule is repealed, see previous discussion of existing rule.

11-25-92

DATE

John Lully, Deputy Commissioner

for DOROTHY A. MCCLUNG

COMMISSIONER OF REVENUE

MINNESOTA Department of Revenue

Appeals, Legal Services, and Criminal Investigation Division

Mail Station 2220 St. Paul, MN 55146-2220
Phone (612) 296-1022 Fax (612) 296-8229

January 20, 1993

RECEIVED
JAN 20 1993
Office of the Attorney General
Government Services Section
Capitol Office Bldg. - Suite 500
525 Park Street
Paul, MN 5510?

The Office of the Attorney General
Public Finance Division
Capitol Office Building
525 Park Street
St. Paul, Minnesota 55103

Re: **In the Matter of the Proposed Adoption of Permanent Rules Relating to Sales and Use Tax For Advertising.**

Dear Sir or Madam:

Enclosed herein are the following:

(1) Affidavit of mailing to all who requested the notice of submission of rule adopted without public hearing to the attorney general.

(2) Notice of submission of rule adopted without public hearing to the attorney general as mailed.

(3) The Declaration of Counsel of Barry R. Greller, Special Assistant Attorney General.

(4) The findings of fact, conclusions, and order adopting the rule.

(5) A copy of the notice of solicitation of outside information or opinion as published in the State Register.

(6) A copy of the proposed rule with a certificate of approval as to form by the revisor of statutes attached.

(7) The statement of need and reasonableness.

(8) The affidavit of mailing the notice of intent to adopt the rule without a public hearing.

(9) The notice of intent to adopt the rule without a public hearing as mailed (attached to affidavit of mailing).

(10) A copy of the notice of intent to adopt the rule without a public hearing as published in the State Register.

(11) Four copies of the rule as adopted.

These documents are submitted for your final approval pursuant to Minnesota Statute chapter 14 and Minnesota Rules chapter 2010. If the rule is approved and filed with the Secretary of State, please notify me.

Sincerely,

Susan E. Fremouw

Susan E. Fremouw, Attorney
Legal Services Section
296-1902, Extension 128

Enclosure

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of the Rule of the State Department of Revenue Governing Sales and Use Tax for Advertising.

AFFIDAVIT OF MAILING THE NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Mary A. Lacho, being sworn says:

That on the 20th day of January, 1993, in the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the Notice of Submission to the Attorney General by depositing in the State of Minnesota Central Mail System for United States mailing, a copy thereof, with postage prepaid, to all persons and associations who requested notice that the rule in the above-entitled matter has been submitted to the Attorney General.

Mary A. Lacho

Mary A. Lacho
Clerk Steno 3

Subscribed and sworn to before me this 20th day of January, 1993.

Wayne L. Sather

WAYNE L. SATHER

WAYNE L. SATHER
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
My Commission Expires MAY 30, 1997

Department of Revenue

Proposed Permanent Rules Relating to Sales and Use Tax for Advertising

Rules as Proposed

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

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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

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(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.25, 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

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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

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which may 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.

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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:

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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.** There is an exemption in Minnesota Statutes, section 297A.25, subdivision 22, for 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

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advertising or promoting sales of merchandise or services.

When an advertising agency or an advertiser purchases taxable advertising and the advertising agency, the vendor, 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 vendor, 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

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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

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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 five working days after notice of adoption is published in the State Register.

REPEALER. Minnesota Rules, part 8130.9200, is repealed.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Sales and Use Tax for Advertising

AGENCY: Department of Revenue

MINNESOTA RULES: Chapter 8130

The attached rules are approved for publication in the State Register

Janet M. Rahm
Assistant Deputy Revisor

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of the Rule of the State Department of Revenue Governing Sales and Use Tax for Advertising.	NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 14.26:

PLEASE TAKE NOTICE that the above-captioned rule as adopted will be submitted to the Office of the Attorney General on the date of this notice, January 20, 1993, for review as to legality and form to the extent form relates to legality. The proposed rule, the rule as adopted, all the notices, the Statement of Need and Reasonableness, all written comments and requests for a hearing received, and other required documents also have been submitted to the Attorney General.

The rule must be approved or disapproved by the Attorney General within 14 calendar days of the date of submission to the Attorney General. You may submit written comments to the Attorney General on the legality of the rule. Any written comments must be submitted by 4:30 p.m., January 28, 1993, (which is eight calendar days after the date of submission of the rule to the Attorney General). Your comments must address only the issue of legality of the rule or the legality of the specific parts or subparts of the rule. The Attorney General standards for review are set forth in Minnesota Rules, part 2010.1000. You may receive a copy of the Attorney

General decision upon written request to the Attorney General. Your comments or requests for the decision must be directed to:

The Office of the Attorney General
Public Finance Division
525 Park Street, Suite 500
Saint Paul, Minnesota 55103
Telephone Number: (612) 297-2040
Fax Number: (612) 297-2576

Any written comments submitted to the Attorney General must be submitted simultaneously to:

Susan E. Fremouw, Attorney
Appeals, Legal Services and Criminal
Investigation Division
10 River Park Plaza
Mail Station 2220
St. Paul, MN 55146-2220
Telephone Number: (612) 296-1902 Extension 128
Fax Number: (612) 296-8229

Dated: 1-20-93

Morris J. Anderson
Commissioner of Revenue
State of Minnesota

7505.4000 MAXIMUM PAYMENT FOR CHILD CARE.

When a claim for substitute child care is submitted, the board must not pay more than $250 per week for substitute child care for one child nor more than $350 per week for two or more children.

REPEALER. *Minnesota Rules*, part 7505.3000, is repealed.

Department of Revenue

Proposed Permanent Rules Relating to Sales and Use Tax for Advertising

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Revenue intends to adopt the above entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes*, sections 14.22 to 14.28. The statutory authority to adopt the rule is *Minnesota Statutes*, section 270.06. *Minnesota Rules*, part 8130.9200, is repealed.

All persons have until 4:30 p.m. on January 6, 1993 in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule until 4:30 p.m. on January 6, 1993. Any requests or comments must be received by the Department of Revenue no later than 4:30 p.m. on January 6, 1993. If 25 or more persons submit a written request for a public hearing by 4:30 p.m. on January 6, 1993, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the agency will proceed pursuant to *Minnesota Statutes*, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

Susan Fremouw, Attorney
Appeals, Legal Services and Criminal Investigation Division
10 River Park Plaza
Mail Station 2220
St. Paul, MN 55146-2220
(612) 296-1902 Extension 128

The proposed rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed rule as noticed.

A copy of the proposed rule is attached to this notice.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available from Susan Fremouw upon request.

The proposed rule will not result in the expenditure of public money by local public bodies or have a direct and substantial adverse impact on agricultural land or small businesses.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Susan Fremouw at the address listed above.

Dated: 19 November 1992

Dorothy A. McClung
Commissioner of Revenue
State of Minnesota

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

Rules as Proposed

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.25, 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 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

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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.** There is an exemption in *Minnesota Statutes*, section 297A.25, subdivision 22, for 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 vendor, 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 vendor, 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 five working days after notice of adoption is published in the *State Register*.

REPEALER. *Minnesota Rules*, part 8130.9200, is repealed.

Board of Teaching

Proposed Permanent Rules Relating to Education; Teacher Licensure Examinations

Notice of Intent to Adopt Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the State Board of Teaching intends to adopt the above-entitled rules without a public hearing following the procedures set forth in the Administrative Procedures Act for adopting rules without a public hearing in *Minnesota Statutes*, section 14.22 to 14.28. The statutory authority to adopt the rules is *Minnesota Statutes*, sections 125.05, subd. 1.a. and 125.185, subd. 4.(b).

All persons have 30 days, until 4:30 p.m., January 6, 1993, to submit comment in support of or in opposition to the proposed rules or any part or subpart of the rule. Each comment must be in writing and received by the agency contact person by the due date. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rules within the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the agency will proceed pursuant to *Minnesota Statutes*, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

Judith A. Wain, Acting Executive Secretary
Minnesota Board of Teaching
608 Capitol Square Building

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In the Matter of the Proposed Adoption
of the Rules of the Minnesota
Department of Revenue Governing
Sales and Use Tax for Advertising

DECLARATION OF COUNSEL

I, Barry R. Greller, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rule and the supporting rulemaking record and that based on my examination, the Administrative Procedure Act and Minnesota Rules, chapter 2010 have been followed without exception. For Attorney General billing purposes, the four-digit docket client code is 0739.

Dated: January 14, 1993.

Barry R. Greller

BARRY R. GRELLER
Special Assistant
Attorney General

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STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of the Rules of the Minnesota Department of Revenue Governing Sales and Use Tax For Advertising.	FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING RULE WITHOUT PUBLIC HEARING

FINDINGS

1. Notice of the Commissioner of Revenue's intent to adopt the above-entitled rules was published in the State Register December 7, 1992, and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, sections 14.14, subdivision 1a, and 14.22 on December 2, 1992.

2. The statement of need and reasonableness was prepared before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the rulemaking mailing list and published in the State Register and was available to the public.

3. All of the notice and procedural requirements in Minnesota Statutes, chapter 14, and other applicable law have been complied with.

4. All persons were given the opportunity to submit comment on the rule for 30 days after notice of proposed rulemaking. The 30-day comment period expired on January 6, 1993.

5. The agency received one request for notice of submission to the attorney general. The agency received no requests for a public hearing. Therefore, there are not 25 or more outstanding requests for a public hearing.

6. The statement of need and reasonableness together with these findings, establish and justify the rational basis for the need for and reasonableness of the rule.

CONCLUSIONS

1. The Commissioner of Revenue duly acquired and has jurisdiction over this proceeding.

2. The Commissioner of Revenue published and served timely and adequate notice of intent to adopt the rule without a public hearing.

3. All relevant legal and procedural requirements of statute and rule have been complied with.

4. The rule is needed and reasonable.

NOW, THEREFORE, IT IS ORDERED that the rules identified as "Adopted Permanent Rules Relating to Sales and Use Tax for Advertising" is adopted this 8th day of January, 1993, pursuant to authority vested in me by Minnesota Statutes, section 297A.29.

MORRIS J. ANDERSON
COMMISSIONER OF REVENUE
STATE OF MINNESOTA

SEF/sef

Subp. 3. **Certificate of need process.** Except upon a showing of an emergency, a utility shall not submit a certificate of need application for a large energy facility, unless the general type of facility is included in its most recently approved resource plan. An emergency must be deemed to exist if failure to consider the certificate of need application could reasonably result in an electricity supply which is inadequate, unreliable, unnecessarily expensive, or environmentally unacceptable.

Subp. 4. **Construction of major utility facilities.** A utility submitting a proposed resource plan shall be exempt from the filing requirements of *Minnesota Rules*, parts 7841.0100 to 7841.0500. However, if a utility proceeds with construction of, or planning for the construction of, a major utility facility not in the utility's most recently approved resource plan, the commission may review the prudence of such construction or planning in the utility's next resource plan and general rate case proceedings.

Subp. 5. **Ratemaking.** During general rate case proceedings, the commission may consider a utility's performance in planning to meet the needs of its customers. Specifically, the commission may consider the utlity's efforts in complying with approved resource plans and in makign appropriate adjustments to those plans as circumstances change.

Subp. 6. **Conservation improvement program filings.** In preparing its conservation improvement program filings under *Minnesota Statutes*, Section 216B.241, the utility shall, to the extent practicable, consider and comply with the conservation targets established under part 7843.0500, subpart 4.

Department of Revenue

Appeals and Legal Services Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Administration of the Sales Tax; Administration of the Use Tax; and Payments, Returns, Assessments, and Collections

NOTICE IS HEREBY GIVEN that the State Department of Revenue is seeking information or opinions from sources outside the agency in preparing to propose the amendment of the rules governing administration of the sales tax; administration of the use tax; and payments, returns, assessments, and collections. The adoption of these rules are authorized by *Minnesota Statutes*, section 297A.29, which required the agency to promulgate all needful rules for the administration and enforcement of *Minnesota Statutes*, sections 297A.01 to 297A.44 not inconsistent with its provisions.

The State Department of Revenue requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Stephen E. Krenkel
Department of Revenue
Appeals and Legal Services Division
10 River Park Plaza
Mail Station 2220
St. Paul, MN 55146-2220

Oral statements will be received during regular business hours over the telephone at (612) 296-1022 and in person at the above address.

All statements of information and opinions shall be accepted until June 30, 1989. Any written material received by the state Department of Revenue shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law judge in the event the rule is adopted.

Dated: 8 June 1989

Stephen E. Krenkel
Attorney

→ Department of Revenue

Appeals and Legal Services Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Sales and Use Taxation: Advertising Agencies

NOTICE IS HEREBY GIVEN that the State Department of Revenue is seeking information or opinions from sources outside the

agency in preparing to propose the amendment of the rules governing sales and use taxation imposed on advertising agencies. The adoption of these rules are authorized by *Minnesota Statutes*, section 297A.29, which required the agency to promulgate all needful rules for the administration and enforcement of *Minnesota Statutes*, sections 297A.01 to 297A.44 not inconsistent with its provisions.

The State Department of Revenue requests information and opinions concerning the subject matter of the rule. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Stephen E. Krenkel
Department of Revenue
Appeals and Legal Services Division
10 River Park Plaza
Mail Station 2220
St. Paul, MN 55146-2220

Oral statements will be received during regular business hours over the telephone at (612) 296-1022 and in person at the above address.

All statements of information and opinions shall be accepted until June 30, 1989. Any written material received by the state Department of Revenue shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law judge in the event the rule is adopted.

Dated: 8 June 1989

Stephen E. Krenkel
Attorney

Minnesota Sentencing Guidelines Commission

Notice of Public Hearing to Consider Modifications to the Sentencing Guidelines

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, July 20, 1989, at 5:30 PM in Hearing Room 10, Ground Floor, State Office Building, 100 Constitution Ave., St. Paul, Minnesota. The public hearing is to consider proposed modifications to the sentencing guidelines regarding the ranking for new and amended crimes passed during the 1989 legislative session, increased durations for murder, and several housekeeping changes.

Additional copies of the proposed modifications that include proposed modifications to the Commentary are available, free of charge, by contacting the Minnesota Sentencing Guidelines Commission at 51 State Office Building, St. Paul, MN 55155, or by calling (612) 296-0144.

All interested persons are encouraged to attend the hearing and offer comments. Persons wishing to speak may register in advance by contacting the Commission staff at the above address/telephone number.

The Commission will hold the record open for five days after the public hearing to accept additional written comment on the proposed modifications. On July 25, 1989, the Commission will meet at 5:30 pm in Room 10, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota to formally adopt or reject the proposed modifications. If adopted, the modifications as indicated will become effective August 1, 1989. Those requiring Legislative review will become effective August 1, 1990 absent legislative action to the contrary.

I. PROPOSED MODIFICATIONS EFFECTIVE AUGUST 1, 1989, IF ADOPTED

Proposed Modifications to Section II. B. 3. c.

A prior misdemeanor or gross misdemeanor sentence shall not be used in computing the criminal history score if a period of ten years has elapsed since the offender was adjudicated guilty for that offense, to the sentencing date for the current offense.

Proposed Modifications to Section II. C. Presumptive Sentence: ...Similarly, when the current conviction offense is ~~sale of~~ a severity level VI drug crime or sale of cocaine and there was a previous adjudication of guilt for a ~~sale of a~~ severity level VI or above drug crime or sale of cocaine before the current offense occurred, the presumptive disposition is Commitment to the Commissioner of Corrections. The presumptive duration of sentence is the fixed duration indicated in the appropriate cell of the Sentencing Guidelines Grid.

Proposed Modifications to Section II. D. 2. b. Factors that may be used as reasons for departure (Aggravating Factors):

(8) The offender was convicted of a controlled substance offense in violation of chapter 152 and the offense was committed in a park zone or in a school zone as defined in chapter 152.01.

State of Minnesota

Department of Revenue

In the Matter of the Proposed Adoption of the Rule Relating to Sales and Use Tax For Advertising

NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING

(1) **Notice is hereby given that** the Minnesota Department of Revenue intends to adopt the above entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in Minnesota Statutes, sections 14.22 to 14.28. The statutory authority to adopt the rule is Minnesota Statutes section 270.06. Minnesota Rules, part 8130.9200, is repealed.

(2) All persons have until 4:30 p.m. on January 6, 1993 in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. (3) Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule until 4:30 p.m. on January 6, 1993. Any requests or comments must be received by the Department of Revenue no later than 4:30 p.m. on January 6, 1993. (4) If 25 or more persons submit a written request for a public hearing by 4:30 p.m. on January 6, 1993, a

public hearing will be held unless a sufficient number withdraw their request in writing. (4) Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. (7) If a public hearing is required, the agency will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

(5) Susan Fremouw, Attorney
Appeals, Legal Services and Criminal Investigation Division
10 River Park Plaza
Mail Station 2220
St. Paul, MN 55146-2220
(612) 296-1902 Extension 128

(8) The proposed rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed rule as noticed.

(11) A copy of the proposed rule is attached to this notice.

(12) A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the

proposed rule has been prepared and is available from Susan Fremouw upon request.

The proposed rule will not result in the expenditure of public money by local public bodies or have a direct and substantial adverse impact on agricultural land or small businesses.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adopted rule, must submit the written request to Susan Fremouw at the address listed above.

Dated: November 19, 1992

John O. Lucky, Deputy Commissioner

for Dorothy A. McClung
Commissioner of Revenue
State of Minnesota

STATE OF MINNESOTA
DEPARTMENT OF REVENUE
APPEALS AND LEGAL SERVICES DIVISION

IN THE MATTER OF THE PROPOSED ADOPTION OF THE RULE RELATING TO SALES AND USE TAX FOR ADVERTISING

AFFIDAVIT OF MAILING THE NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING AND CERTIFICATE OF MAILING LIST

STATE OF MINNESOTA }
}ss.
COUNTY OF RAMSEY }

Margaret A. Connolly, being sworn says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 or 14.30, that their names be placed on the state Department of Revenue rulemaking mailing list is accurate, complete, and current as of this 2nd day of December, 1992.

That on the 2nd day of December, 1992, at the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached Notice of Intent to Adopt A Rule Without a Public Hearing by depositing in the State of Minnesota Central Mail System for United States mailing, a copy thereof, with postage prepaid, to all persons and associations on the aforementioned mailing list.

Margaret A. Connolly
MARGARET A. CONNOLLY
SECRETARY, SENIOR TYPIST 4

Subscribed and sworn to
before me this
2ND day of December, 1992

Wayne L. Sather
WAYNE L. SATHER

