New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(57)S
Sales Tax
December 11, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S010130B

On January 30, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Catanio, Moskowitz & Gutwetter, CPAS PC, 70 Grand Avenue, Suite 104, River Edge, NJ 07661.

The issue raised by Petitioner, Catanio, Moskowitz & Gutwetter, CPAS PC, is whether various advertising services provided by an advertising agency are subject to sales tax, and how any such tax liability would be affected by the formation of a principal-agent relationship between the advertising agent and its out-of-state client.

Petitioner submits the following facts as the basis for this Advisory Opinion.

An advertising agency located in New York enters into a principal-agent contract with a client located outside New York. The contract states that all material or property produced under the contract by the advertising agency is the property of the client upon payment to the advertising agency. All work is performed by either outside professionals or by agency staff.

The advertising agency will produce for the client an advertisement for a "for sale" national publication. The client will be charged a creative fee, the cost of production of the advertisement, and a fee for placement of the advertisement in national media. The work may be performed within and without New York.

Applicable Law and Regulations

Section 1105 of the Tax Law provides, in part:

> On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:
>
> (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.
>
> * * *
>
> (c) The receipts from every sale, except for resale, of the following services:
>
> (1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in

any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity. . . ." (emphasis added)

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . whether or not any tangible personal property is transferred in conjunction therewith . . . .

Section 1110 of the Tax Law provides, in part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . . (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five of this part have been performed....

* * *

(f) For purposes of clauses (C), (D), and (E) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the service, including the consideration for any tangible personal property transferred in conjunction with the performance of the service and also including any charges for shipping and delivery of the property so transferred and of the tangible personal property upon which the service was performed as such charges are described in paragraph three of subdivision (b) of section eleven hundred one.

Section 1115 of the Tax Law provides, in part:

Exemptions from sales and use taxes. (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling . . . but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment. . . .

* * *

(d) Services otherwise taxable under paragraph (1), (2), (3), (7) or (8) of subdivision (c) of section eleven hundred five shall be exempt from tax under this article if the tangible personal property upon which the services were performed is delivered to the purchaser outside this state for use outside this state.

Section 1105-B of the Tax Law provides, in part:

Exemptions for certain parts, tools, supplies and services relating to tangible personal property used or consumed in production.

(a) Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property . . . for sale by manufacturing, processing, generating, assembling, refining, mining or extracting shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article.

(b) Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

(c) Parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section and services described in subdivision (b) of this

section shall be exempt from the compensating use tax imposed by section eleven hundred ten of this article.

Section 1118(7) of the Tax Law provides:

(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction. In such event, the amount payable shall be allocated between the tax imposed by this article and the tax imposed pursuant to article twenty-nine in proportion to the respective rates of such taxes.

Section 1132 (c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (I) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the

provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four . . . the sale shall be deemed a taxable sale at retail . . . Where such a resale or exemption certificate . . . has been furnished to the vendor, the burden of proving that the receipt . . . is not taxable hereunder shall be solely upon the customer. . . .

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 527.3(b)(5) of the Sales and Use Tax Regulations provides, in part:

> Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. . . .
>
> Example 5: An advertising agency is hired to design an advertising program and to furnish art work and layouts to the media. The fee charged by the agency to its client for this service is not subject to the tax. However, if the layout and art work is sold by the advertising agency prior to use by it to the customer for his use, the advertising agency is making a sale of tangible personal property which is subject to sales tax.

Section 528.13 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) Production. (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

> (I) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work

in production such as preparation of work, production and time records.

(ii) Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

* * *

(c) Directly and predominantly. (1) Directly means the machinery or equipment must, during the production phase of a process:

(I) act upon or effect a change in material to form the product to be sold, or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

Section 532.4(b) of the Sales and Use Tax Regulations provides, in part:

Burden of proof. (1) The burden of proving that any receipt, amusement charge, or rent is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

Technical Service Bureau Memorandum entitled Advertising Agencies, June 10, 1983, TSB-83(16)S provides, in part:

* * *

The following is a restatement of the application of the sales and use taxes to purchases and sales of tangible personal property and services by advertising agencies:

A. Principal-agent Relationship

In order for a principal-agent relationship to exist for sales tax purposes, the conditions set forth in TSB-M-78(3)S must be met. Those conditions are:

1. the advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent,

2. the advertising agency must obtain and retain written evidence of agent status with the client prior to the acquisition of any tangible personal property or service, and

3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own

account, such as by charging the item to the account of more than one client.

Condition 1 above will be met only where the complete name of the client is disclosed on any purchase order given to a supplier and the advertising agency is identified as agent acting for and on behalf of the disclosed client (e.g., X advertising agency as agent for Y, name of client). The mere listing of the client's account number or name or the statement "for the account of" are deemed to be insufficient for meeting condition 1.

Condition 2 above will be met only where there exists a properly executed written agency agreement which clearly sets forth that the advertising agency is appointed to act as agent for and on behalf of the client with respect to making purchases.

Condition 3 above will be met when any expenditures by the firm as agent for a client are billed to the client without being marked up.

Since all purchases made by an agent on behalf of client are considered to be purchases by the client, the appropriate sales tax is to be paid when property or services are delivered to the client or the advertising agency within New York State. However, advertising agencies are deemed to be vendors (not agents) of all items of tangible personal property produced or fabricated by their own employees.

Where an advertising agency makes purchases of tangible personal property as agent for its client and subsequently performs taxable services on the client's property (i.e., fabricates, processes, assembles, prints, imprints, etc.) or otherwise uses the property on the client's behalf, such services are subject to tax. If the services are performed upon items which are used in producing or creating the property which is the desired end result of the contract, such preliminary and intermediate services are taxable even though the items, subsequent to such use on the client's behalf, are delivered outside the state by the agency. If the services are performed upon property which as serviced is the desired ultimate end result of the contract, such services are taxable unless such property is delivered outside of New York State without any other use within this State by either the advertising agency or the client.

Any tax due on the preliminary or intermediate services is computed at the applicable rate for the locality where the services are rendered or where the property as serviced is subsequently used by the advertising agency. Any tax due on the final services to property which, as serviced, is the ultimate end result of the contract

between the advertising agency and its client is computed at the applicable rate for the locality where the property as serviced is delivered.

Property purchased by the advertising agency, as agent for the client, may qualify for the manufacturer's exemption in accordance with the provisions of TSB-M-79(7.1)S.

Services performed upon the client's property may also qualify for the manufacturer's exemption. . . .

* * *

Example 2: An advertising agency located in New York State is hired by a client to create color separations for an advertisement which the client will place in a publication which is sold to the public by its publisher.

The client and the advertising agency enter into a written agreement establishing a principal-agent relationship for the purposes of such contract.

In order to produce the color separations, the advertising agency purchases photographs, composition and artwork and services such property to produce layouts and mechanicals. The layouts and mechanicals are used to produce color separations of the advertisement. The advertising agency then delivers the color separations, the layouts, mechanicals, artwork, photographs and composition to the client outside New York State.

The purchases of photographs, compositions and artwork by the advertising agency as agent of the client are subject to tax at the rate in effect where such property is delivered to the advertising agency (i.e. at its offices in New York State), and the charges by the advertising agency for its services in producing, fabricating, processing, assembling, printing, imprinting, and otherwise servicing the photographs, artwork and compositions into layouts and mechanicals are subject to tax at the rate in effect in the locality in which such services are performed. These purchases and services may qualify for the manufacturer's exemption in accordance with the provisions of TSB-M-79(7.1)S since such items are to be used in the production of property for sale (i.e., the publication).

The film purchased by the advertising agency as agent of the client to be used in making the color separations is subject to tax, however, such purchase may, as above noted, qualify for the manufacturer's exemption. The charges by the advertising agency for its services in creating the color separations are taxable

services, however, in this example the agency is not required to collect sales tax on such services since the property as serviced is delivered to the client outside the state.

Separately stated agency fees or commissions are taxable as part of the "receipts subject to tax" unless such fees or commissions are related solely to the acquisition of property or services by an agency on behalf of his principal.

TSB-M-83(16)S, supra, refers to TSB-M-79(7.1)S with respect to the manufacturer's exemption. For a more recent explanation of the manufacturer's exemption, see Sales Tax Information For: Manufacturers, Processors, Generators, Assemblers, Refiners, Miners, Extractors, and Other Producers of Goods and Merchandise, Publication 852, (12/97).

Opinion

In accordance with TSB-M-83(16)S, supra, presuming the advertising agency has met the three conditions set forth therein to establish a principal-agent relationship for sales and use tax purposes, all purchases made by the agency on behalf of its client are considered to be purchases by the client. The sales tax is a destination tax. See Section 525.2(a)(3) of the Sales and Use Tax Regulations. Therefore, the appropriate sales tax is to be paid on purchases of property or services delivered to the client or the advertising agency within New York State. Advertising agencies are deemed to be vendors, not agents, with respect to all items of tangible personal property produced or fabricated by their own employees. Property delivered to the client or agency outside New York State, or services performed on such property, will be subject to use tax under Section 1110 of the Tax Law if the property is used in the State. A credit against the use tax may be available for sales or use tax paid to another state or jurisdiction with respect to such property or services. See Section 1118(7) of the Tax Law.

Where the advertising agency makes purchases of tangible personal property as agent for its client and subsequently performs taxable services on the client's property (i.e., fabricates, processes, assembles, prints, imprints, etc.), such services may be subject to tax under Section 1105(c) of the Tax Law. If the services are performed in New York State upon property which, as serviced, is an item such as a layout or mechanical which is used in the State to produce the property which is the desired end result of the contract, i.e., the advertisement itself, such services are taxable even though the production items are subsequently delivered outside the State by the agency. If the services are performed in New York State upon property which, as serviced, is the desired end result of the contract, i.e., the advertisement itself, such services are taxable unless such property is delivered outside the State without any other use within this State by either the advertising agency or the client. See Section 1115(d) of the Tax Law. Any tax due on the services is computed at the applicable rate for the locality where the services are rendered or where the property as serviced is subsequently used by the advertising agency. If services are performed upon property outside New York State, use tax may be due if the property is used in the State, based on the consideration paid for the service. See Section 1110(a)(D), (f) of the Tax Law.

Tangible personal property used by the agency in the creation of the advertisement for the client, and services performed on such property, may not be purchased for resale since such property is not resold by the principal or agent. However, since the agency will produce an advertisement that will be included in a national publication offered for sale, such tangible personal property and services may qualify for the manufacturer's exemption from State and local sales and use taxes. See Sections 1115(a)(12) and 1105-B of the Tax Law. The tangible personal property, and services to such property, may be exempt if the property is used directly and predominantly in the production of the advertisement that will be included in the national publication. See TSB-M-83(16)S, supra. In order to benefit from this exemption, the agency should furnish the vendor with a properly completed Exempt Use Certificate (Form ST-121) executed by the client within 90 days of purchasing tangible personal property or services for use in the production of property for sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

Advertising services are not taxable. Nontaxable advertising services "consist of consultation and development of advertising campaigns and placement of advertisements with the media without the transfer of tangible personal property" (Section 527.3(b)(5) of the Sales and Use Tax Regulations). Under the facts as presented herein, separate charges by the agency to its client for consulting or preproduction discussions, and for placement of the advertisement with the media are not taxable.

DATED: December 11, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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