

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

TSB-A-04(26)S
Sales Tax
November 22, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030904A

On September 4, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Debra Horn Stachura, 374 Delaware Avenue, Suite 314, Buffalo, New York, 14202. Petitioner, Debra Horn Stachura, provided additional information pertaining to the Petition on December 10, 2003 and February 24, 2004.

The issue raised by Petitioner is whether certain purchases and sales by its company as described below are subject to sales tax.

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

Petitioner's company (Company) specializes in the production of video and audio advertising for its clients. Company delivers the finished product to its client in the form of a disc, CD-ROM or other tangible electronic media. However, in addition, Company may occasionally transmit the finished product to its client or a media outlet contracted by the client via the Internet by mp3, wav, or other file format compatible with Internet transmission. Company's product in tangible form becomes the property of its client upon completion of the contract. Media placement is the responsibility of Company's clients. However Company will, in a separate agreement, contract to merely deliver the advertisements to media of the client's choice. Company does not contract with its clients to conduct advertising campaigns. Company is not an "advertising agency" to the extent that it does not place ads or buy media time and space for its clients.

Company may provide its clients with an itemized bill for the following items, which include items from third parties and in-house costs:

Purchases

- Script writing - process of conceptualizing and writing creative copy for TV, radio and print
- Shooting - filming footage based on story board in studio or on location
- Producer - coordinates and oversees entire production
- Film processing and transfer- transferring footage from one format to another for editing
- Make-up/Stylist
- Graphic Artwork - digital elements used in conjunction with footage
- Music
- Video duplication - copying tapes in volume
- Studio rental - rental of space used for production shoots
- Talent and voice-over - money paid to free-lance and in-house actors
- Dubs - copies of television and radio commercials and corporate videos

- Film, tape and digital media stock - raw material used to record audio and video
- Props - wardrobe and other objects used in creating sets necessary to the production

In-house costs

- Pre-production - meetings to discuss creative process
- Production - overall process of creating television and radio commercials, and corporate videos
- Editing - selecting and arranging footage to create video
- Electronic filing - electronic transmission of creative material over Internet

Company is registered for New York State sales tax purposes and possesses a valid *Certificate of Authority* for sales tax.

Applicable law and regulations

Section 1101 of the Tax Law provides, in part:

Definitions.

* * *

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. . . .

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred

five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. . . . Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. . . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . 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:

* * *

(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 the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, . . .

Section 1105-B of the Tax Law provides:

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, gas, electricity, refrigeration or steam 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 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, refining, mining or extracting, 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. . . .

* * *

(39) Tangible personal property for use or consumption directly and predominantly in the production, including editing, dubbing and mixing, of a film for sale regardless of the medium by means of which the film is conveyed to a purchaser. For purposes of this paragraph, the term "film" means feature films, documentary films, shorts, television films, television commercials and similar productions.

* * *

(bb) 1. Receipts from the sale of services described in paragraph two or three of subdivision (c) of section eleven hundred five of this article, and consideration given or contracted to be given for, or for the use of, such services, shall be exempt from tax under this article when rendered with respect to property exempt under paragraph thirty-nine of subdivision (a) of this section.

2. Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of a film for sale, as described in paragraph thirty-nine of subdivision (a) of this section, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

Receipt. (a) Definition. The word *receipt* means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. . . .

Section 526.6(c)(1) of the Sales and Use Tax Regulations provides, in part:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

Sale, selling or purchase. (a) Definition. (1) The words *sale*, *selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

* * *

(4) The term *sale* also includes the rendering of a service enumerated in subdivisions (b) and (c) of this section, and the transactions enumerated in subdivision (d), (e) or (f) of section 1105 of the Tax Law, except services taxed under section 1105(c) of the Tax Law when performed by an employee.

* * *

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(6) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates.

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

Machinery and equipment used in production; telephone and telegraph equipment; parts, tools and supplies.

(a) *Exemption.* (1) Exemption from statewide tax. An exemption is allowed from the tax imposed under subdivisions (a) and (c) of section 1105 of the Tax Law, and from the compensating use tax imposed under section 1110 of the Tax Law, for receipts from sales of the following:

(i) Machinery or equipment (including parts with a useful life of more than one year) used or consumed directly and predominantly in the production for sale of tangible personal property, gas, electricity, refrigeration or steam, by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

* * *

(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.

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

* * *

(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.

Opinion

Company specializes in the production of video and audio advertising. Generally, Company sells the advertisements in a tangible electronic format, such as video tapes, audio tapes, CD-ROMs and the like which are transferred to its clients. Media placement is the responsibility of Company's clients. However Company will, pursuant to a separate agreement, merely deliver the advertisements to a media outlet of the client's choice.

Company's sales of video tapes, audio tapes, CD-ROMs and the like are retail sales of tangible personal property pursuant to section 1101(b)(4) of the Tax Law, and charges for such tangible personal property are subject to sales tax pursuant to section 1105(a) of the Tax Law when delivered to a location in New York State. Charges for music, audio recordings or artwork delivered electronically pursuant to the contractual agreement are not sales of tangible personal property and are thus not subject to sales tax. Although Company may separately state, on its bill to its customer, charges for pre-production, script writing, shooting of film, production, etc., these charges are in conjunction with the sale of video tapes, audio tapes and/or CD-ROMs and all such charges represent expenses incurred by Company in making a sale of tangible personal property. Such charges are not deductible from the receipt subject to sales tax. See section 1101(b)(3) of the Tax Law and section 526.5(e) of the Sales and Use Tax Regulations.

Company's purchases of tangible personal property and services which are used to produce video (television) and audio (radio) advertisements may fall into the following categories: 1) purchases of services not enumerated in Article 28 of the Tax Law; or 2) purchases

of tangible personal property or services intended for resale; or 3) purchases of tangible personal property or services used directly and predominantly in the production of tangible personal property for sale; or 4) taxable purchases of tangible personal property or services. Any service otherwise subject to sales tax is not taxable when performed for Company by its employees. See section 526.7(a)(4) of the Sales and Use Tax Regulations.

Script writing and talent and voice over services (services provided by actors or narrators) are not services enumerated as taxable under section 1105(c) of the Tax Law. See *Charles Mintz*, Adv Op St Tx Comm, April 1, 1981, TSB-H-81(76)S; *Crushing Enterprises, Inc.*, Adv Op Comm T&F, October 10, 1990, TSB-A-90(30.1)S. Accordingly, Company's purchases of these services are not subject to sales tax. Make up and stylist services are not subject to sales tax when performed outside of New York City. Such services are subject to sales tax at the current local rate of 4 $\frac{1}{8}$ % when performed in New York City.

Company's purchases of tangible personal property, and services to such tangible personal property, that will become a component part of the product sold (tape, CD, film, etc.) and are actually transferred to its customer as part of the sale are considered to be purchases for resale and may be made without payment of sales tax. See section 1101(b)(4) of the Tax Law and section 526.6(c)(1) of the Sales and Use Tax Regulations. Company should issue a properly completed Resale Certificate (Form ST-120) to substantiate the exempt nature of the transaction. See section 1132(c) of the Tax Law.

Company's purchases of the services of shooting film or taping audio, film and audio processing and transfer, editing, video and audio duplication services performed on blank tape provided by Company, and purchases of tangible personal property such as film, dubs, video and audio tape and digital media stock, will qualify as purchases for resale only when the film, tape or other tangible personal property which is purchased, or on which the services are performed, is actually transferred to Company's customer as part of the finished product without prior use by Company. For example, Company's contract with its customer may provide for Company to transfer a radio commercial to its customer on a CD. Company may use audio tape to record the radio commercial. After editing and adding music and/or sound effects, Company transfers the commercial to a CD for sale to the customer per its contract. Company may also give the customer the audio tape of the commercial. The purchase of the blank CD by Company is a purchase for resale. However, the purchase of the blank audio tape was for Company's use in creating the CD and, even though the tape was ultimately transferred to the customer, it was purchased for Company's use and not for resale. Though not eligible for the resale exemption, since the tape is used in the production of the CD for sale, it may be eligible for the production exemptions provided in section 1115 of the Tax Law as discussed below.

The creation of video tapes, audio tapes, and CD-ROMs is considered a manufacturing activity that results in the production of tangible personal property. Purchases of tangible personal property which is used directly and predominantly in the production of video tapes, audio tapes and CD-ROMs for sale, and services to such property, may be exempt from all State and local sales taxes pursuant to section 1115(a)(12), section 1105-B, section 1115(a)(39) or section 1115(bb) of the Tax Law. The exemptions granted pursuant to these sections only apply

to the purchase of property or services that are used or consumed directly and predominantly in the production process. They do not apply to the purchase of property or services for use in either administrative or distribution activities. See section 528.13(b) of the Sales and Use Tax Regulations. When producing video tapes, audio tapes, CD-ROMs and the like for sale, Company is, therefore, entitled to all of the exemptions available to manufacturers. Since Company is registered as a New York State sales tax vendor, it may issue all appropriate exemption certificates to its suppliers. Machinery or equipment, as well as parts, tools and supplies, used or consumed directly and predominantly in the production of video tapes, audio tapes, CD-ROMs and the like for sale may be purchased or leased exempt from State and local sales and use taxes. Machinery or equipment is used predominantly in production if more than 50 percent of its use is directly in the production phase of a process. See section 528.13(c)(4) of the Sales and Use Tax Regulations. Likewise, services of installing, repairing, maintaining or servicing equipment used by Company directly and predominantly in the production of tangible personal property for sale may be purchased exempt under section 1105-B(b) of the Tax Law.

Section 1115(a)(39) of the Tax Law provides that tangible personal property for use or consumption directly and predominantly in the production, including editing, dubbing and mixing, of a film for sale, *regardless of the medium by means of which the film is conveyed to a purchaser*, is exempt from sales and use tax. Therefore, even if the video production is transferred to the customer electronically (i.e., via the Internet), the producer still qualifies for the exemptions granted pursuant to section 1115(a)(39) of the Tax Law. Section 1115(a)(39) of the Tax Law defines the term *film* as feature films, documentary films, shorts, television films, television commercials and similar productions.

Tangible personal property such as graphic artwork (digital elements used in conjunction with footage), or music, furnished in a tangible format such as a tape or CD, props (wardrobe and other objects used in creating sets), film, video tape and digital media stock which are not actually transferred to Company's customer but are used by Company directly and predominantly in the production of film for sale will be exempt from sales and use tax pursuant to sections 1115(a)(12) and 1115(a)(39) of the Tax Law. Services such as shooting film, film processing and transfer, and film editing as well as repair or maintenance of cameras, video and audio recorders and other equipment, are exempt from tax under section 1115(bb) of the Tax Law when performed on qualifying property used in film production. The tax treatment of any tangible personal property or services used in the production of video tapes, CD-ROMs and the like for sale will be determined by its function in the production process. For example, story boards which are created and used in the production of a film for sale qualify as exempt equipment. Story boards for proposed commercials created by an advertising firm as part of the bid process to win a client do not qualify as production equipment and are subject to tax.

Charges for studio time are charges for the rental of a recording studio and for the equipment contained in the studio. Studio equipment is considered to be transferred to Company (if included in the studio rental) since Company or its agents direct and control the use of the equipment. See section 526.7(e)(6) of the Sales and Use Tax Regulations. The rental of real property such as a sound studio is not subject to New York State and local sales and use taxes. Therefore, the fees paid for studio time are not subject to New York State and local sales and use

taxes if such fees are solely for the rental of real property. However, the rental of recording equipment may be considered the sale of tangible personal property and, therefore, subject to sales tax, unless it otherwise qualifies for exemption. The production exemption under section 1115(a)(12) or 1115(a)(39) of the Tax Law may apply if the equipment is used to produce tangible personal property or a film (even if intangible) for sale. See section 528.13 of the Sales and Use Tax Regulations. If the rental fee includes both the rental of a sound studio and the rental of taxable equipment, the entire fee is taxable unless the nontaxable charges for the sound studio rental are separately stated on the bill or invoice and are reasonably related to its true value. Company may issue an *Exempt Use Certificate* (Form ST-121) to rent equipment without the payment of sales tax provided such equipment is used directly and predominantly to produce tangible personal property or a film for sale. See *CAV Corp dba Soundtrack NY*, Adv Op Comm T&F, May 20, 1998, TSB-A-98(33)S.

It must be noted that sections 1115(a)(39) and 1115(bb) of the Tax Law do not apply to the production of audio tapes or CDs for radio play. Section 1115(a)(12) of the Tax Law may apply to purchases of tangible personal property and services in connection with the production of such audio tapes or CDs. If an audio commercial is produced for delivery electronically (and not as tangible personal property), not only are the provisions of section 1115(a)(39) inapplicable to purchases used and consumed in the production of the audio commercial, but the provisions of sections 1115(a)(12) and 1105-B of the Tax Law would likewise be inapplicable since no tangible personal property has been produced for sale.

In order to make exempt purchases of tangible personal property used directly and predominantly in the production of video tapes, audio tapes and CD-ROMs for sale, and services to such property, Company should provide a properly completed *Exempt Use Certificate* (Form ST-121) to its supplier.

DATED: November 22, 2004

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