New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-12(20)S
Sales Tax
August 28, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S110517A

Petitioner, [redacted], asks whether its receipts from its various forms of advertising services are subject to tax. Petitioner also asks if the charges it pays to a subcontractor to install the advertising displays and other media it uses in its advertising service are subject to tax, and whether it must pay tax on the components it uses to make the advertising displays.

We conclude that the Petitioner's sales of advertising space on its various advertising displays (including wrap and banner ads) are not enumerated as taxable services pursuant to section 1105(c) of the Tax Law. The installation charges Petitioner pays to a contractor for the installation of advertising displays are subject to sales tax under sections 1105(a) and 1105(c)(3) of the Tax Law. If the Petitioner purchases the components for making a display unit out of New York State, and New York State and local sales or use tax is not collected from Petitioner by the vendor, Petitioner must pay the tax itself directly to the Tax Department.

Facts

Petitioner enters into 5 or 10 year contracts with hospitals located within New York State to install advertising fixtures throughout a hospital's facilities and grounds. These advertising fixtures may include a variety of formats (e.g., digital displays, static backlit displays, backlit scroll displays that rotate through various advertisements, and various wraps and banners). Petitioner purchases the advertising fixtures (or their components) and retains title to these fixtures for the length of the contract.

Petitioner sells the advertising space provided by its fixtures to its advertising customers. In return for receiving the exclusive right (via a concession) to use its forms of advertising within the hospital, Petitioner agrees to share part of the revenue it receives from these ads with the hospital. Petitioner's contract allows the hospital to display a certain amount of advertising using its equipment. Petitioner does not produce, create, and/or design materials for advertisers to place in Petitioner's displays.

Petitioner contracts with third parties to install the advertising fixtures at the locations agreed upon, and except for the wraps and banners, the advertising displays are generally bolted to a wall, beam or floor location. A third-party electrician makes the appropriate connection to the hospital's electrical system if needed. Petitioner is responsible for maintaining the advertising displays. To do so, Petitioner hires an independent contractor to repair and maintain the display units, and to replace the printed advertisements both in the display units and those that are wraps or banners. Petitioner purchases materials to assemble the display units, which are often shipped from an out-of-state location for use in hospitals in New York. The shipping charges for these materials

are separately stated on the sellers' invoices. No tangible personal property is ever provided to any advertising customer or the hospital.

If Petitioner's contract with the hospital is not renewed or extended at the end of the contract term, the Petitioner is contractually obligated to remove all of the advertising fixtures and to restore the hospital's premises to its original state. This is accomplished by making nominal repairs such as spackling over any holes and minor paint touch up. All repairs are cosmetic in nature. Any electrical connections would be disconnected in a safe manner.

Analysis

Petitioner sells various forms of advertising to its customers. This includes advertising on digital displays, static backlit displays, backlit scroll displays that rotate through various advertisements, and various wraps and banners placed at designated locations at the hospitals with whom the Petitioner has a contract. Petitioner's sales of advertising placed within the hospital using the various forms used by the Petitioner are not a service enumerated in section 1105(c) of the Tax Law. Therefore, Petitioner's charges to its customers for its advertising services are not subject to sales tax. *See Matter of Ruth Outdoor Advertising Co.*, TSB-H-81(102)S; *See also* TSB-A-08(29)S, TSB-A-08(1)S, TSB-A-88(30)S.

Petitioner hires independent contractors to install and maintain its various forms of advertising displays at the agreed locations within the hospitals it has contracts with. Pursuant to Tax Law section 1105(c)(3), the service of installing tangible personal property is subject to tax except where the installed property constitutes a "capital improvement" to real property. The term "capital improvement" is defined by Tax Law section 1101(b)(9)(i) to mean an addition or alteration to real property that (1) substantially adds to the value of the real property or appreciably prolongs its useful life; (2) becomes part of the real property or is permanently affixed to it so that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation. Section 1101(b)(9)(i) of the Tax Law requires that all three of these conditions be met for an installation to be considered a capital improvement to real property. If the installation of display units fails to meet one or more of these conditions, that installation cannot qualify as a capital improvement to real property.

In Petitioner's situation, the advertising displays are not intended to become a permanent installation because Petitioner retains title to the units at all times, and is required to remove the displays at the end of the contract term if the contract with the hospital is not renewed. Moreover, the removal of the displays (which are generally just bolted to the hospital property)[1] is accomplished by making nominal repairs such as spackling over any holes and minor paint touch up. All repairs are cosmetic in nature. The unbolting of the display units does not damage or destroy the display unit. The other forms of advertising, including wraps and banners, are easily replaced or removed. Therefore, Petitioner's installations do not meet at least two of the

[1] Bolting of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement. *See Matter of Charles R. Wood Enterprises, Inc. v State Tax Commn.*, 67 AD2d 1042 (3d Dep't 1979).

requirements of a capital improvement to real property for the purposes of the Tax Law. Because the installations fail to meet the requirements of a capital improvement, the installation charges Petitioner pays to the contractor for the installation of advertising units (including the wraps and banners) are subject to sales tax under section 1105(c)(3) of the Tax Law.

Petitioner also uses an independent contractor to repair and maintain the display units, and to replace the printed advertisements both in the display units and those that are wraps or banners. Sales tax is imposed on the repair, maintenance, or servicing of tangible personal property. *See* Tax Law §1105(c)(3). Therefore, charges by an independent contractor to Petitioner for the above services to the display units are subject to sales tax. *See* 20 NYCRR §527.5 of the Sales and Use Tax Regulations.

The materials used in setting-up the various advertising displays are often shipped to Petitioner from various sellers from out-of-state locations. The shipping and delivery charges for these materials are separately stated on the vendors' invoices. If the vendor of the components is registered for sales and use tax purposes in New York, the vendor is required to collect New York State and local sales or use tax from Petitioner on the receipts from the sale of the components including any delivery charges. If the vendor fails to collect tax, Petitioner is liable for the New York State and local sales or compensating use tax computed on the full amount of the receipt, including any charges for shipping and delivery, on its purchase of materials delivered to a location in New York State. *See* Tax Law §1101(b)(3); *See* TSB-A-08(29)S. The rate and incidence of the local tax is determined by the point of delivery of the materials from the vendor to Petitioner. *See* 20 NYCRR §525.2(a)(3). Petitioner may also be liable for local compensating use tax based on the purchase price for the materials it purchases if the materials are used and installed by Petitioner in a local jurisdiction other than the jurisdiction where the materials were initially delivered to Petitioner by the vendor. *See* TSB-A-96(66)S; TSB-A-08(29)S.

DATED: August 28, 2012

/S/
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