

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81(70)S
Sales Tax
December 31, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810722A

On July 22, 1981, a Petition for Advisory Opinion was received from Showtime Entertainment, 1633 Broadway, New York, New York 10036.

Petitioner offers various programming services to cable television systems, multipoint distribution service (MDS) and master antenna television systems (SMATV). Petitioner raises the following issues relative to its activities.

- (1) whether it will be required to pay a New York State and New York City Use tax when it takes delivery in New York City of films or video tapes, and if the use tax is applicable, what method of allocation will be used to determine the tax base upon which the tax will be computed if Showtime's pay television programming services are licensed to foreign states, as well as, New York State cable television, multipoint distribution service (MDS) and satellite master antenna systems (SMATV);
- (2) whether the transmission of the Showtime programs from Showtime playback or uplink facilities in New York State (or City) would be considered an effective in-state delivery of property subject to the New York State and New York City sales tax;
- (3) whether Showtime will be required to collect a State or local sales tax if it supplies post production, playback, or uplink services to third parties; and if the sales tax is applicable to promotional, advertising, marketing or entertainment post production services performed for third parties, what is the tax base upon which the tax will be computed: the cost of the film or videotape stock provided or the production cost incurred for the production of the promotional, advertising, marketing or entertainment material recorded on such film or videotape stock.

Currently, Showtime has approximately 1,900,000 subscribers in over 900 cable systems. Approximately 118,000 subscribers are located in New York State, approximately 25,800 of which are located in New York City. Showtime offers motion pictures and entertainment specials to subscribers for a monthly fee. The product exhibited as a part of the Showtime service is generally licensed directly from major or independent theatrical and feature film producers and other distributors, and in some cases is produced by Showtime itself. Those programs licensed from others are obtained either on a flat-fee basis or on the basis of a fee per-subscriber served.

Showtime's own productions are also licensed to other pay television programmers for use on their affiliated systems and to cable systems which do not subscribe to the Showtime service.

Showtime received compensation from its affiliated systems on the basis of a percentage of the monthly subscriber fee charged by that system to its subscribers.

Showtime programming is distributed to the systems it serves primarily by means of a domestic communication satellite. The satellite service is obtained by Showtime from RCA American Communications, Inc. which relays the Showtime service to distribution points throughout the United States, from playback and uplink facilities located in Vernon Valley, New Jersey. Satellite transmission makes Showtime available to any cable system which installs a receiving antenna and enters into a contractual agreement with Showtime. Showtime's post production work is currently performed by independent contractors.

Showtime is currently examining the feasibility of performing its own post production services at a location in New York State and owning and operating its own playback and uplink facilities in New York State. The playback facility may be located with the post production facilities in New York City. It is also anticipated that these facilities will enable Showtime to supply post productions, playback and uplink services to third parties.

A post production facility performs such services as film to video tape transfer, audio recording and mixing, video tape and film editing, and video tape dubbing. Showtime's proposed post production facility will prepare Showtime promotional, marketing and entertainment material and integrate this material with the Showtime programming elements for satellite feed. Showtime may perform similar services for third parties.

An uplink transmits audio, video and data signals to a satellite. Showtime's proposed uplink facility will be located in the New York metropolitan area at a site to be determined after completion of frequency coordination studies.

A playback facility transfers the video and audio electronic signals previously recorded on video tape into the satellite transmission system. If the playback facility is located at the uplink facility, a microwave transmission system will link the two facilities.

Presently, when Showtime licenses a product from a producer, a film or video tape is delivered to a receiving location in Fort Lee, New Jersey. The films or videotapes are sent to the RCA facilities in Vernon Valley where they are integrated with the Showtime promotional material and are transmitted to the satellite. Films must first be transferred to videotapes to permit such transmission. Should Showtime locate its proposed post production and playback facilities in New York State, these films or videotapes would be delivered to Showtime in New York for integration and transmission to the uplink and satellite.

Section 1105(a) of the Tax Law imposes a tax on "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article." The term "sale" is defined in section 1101(b)(5) as "Any transfer of title or possession or both, . . . rental, lease or license to use or consume . . . for a consideration."

Section 1105(c)(2) of the Tax Law imposes a tax on the service of:

"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 such services are performed."

Section 527.4 of the Sales and Use Tax Regulations provides, in part as follows:

"(d) Processing. Processing is the performance of any service on tangible personal property for the owner which effects a change in the nature, shape, or form of the property.

"Example 3: A person, cuts, edits, dubs sound, and adds titles to convert exposed and developed film footage into a completed film. Such procedures constitute taxable processing of the film."

Section 526.7(f) of the Sales and Use Tax Regulations provides, in part, as follows:

"(f) Reproduction rights. (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

"(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. See Howitt v. Street and Smith Productions, Inc., 276 N.Y. 345 and Matter of Frissell v. McGoldrick, 300 N.Y. 370.

"(3) Where some use other than reproduction is made of the original work such as retouching or exhibiting a photograph, the transaction is a license to use, which is taxable.

Petitioner indicates that when it obtains broadcast rights for a motion picture from a distributor or producer, it pays a royalty or licensing fee, as provided in its contract with such distributor or producer. When the licensed motion picture is recorded on film, it must be converted to videotape for broadcast transmission. This may be accomplished in either of two ways. First, the distributor or producer may send the film directly to Petitioner who will make the conversion, using its own equipment. Second, the film may be sent by the distributor or producer to a processing laboratory, mutually acceptable to both the producer or distributor and Petitioner, where the conversion to videotape will be made. In this instance, the producer or distributor receives back from the processing laboratory both the film and the videotape. Pursuant to the contract terms, the producer or distributor then forwards the videotape to Petitioner and bills Petitioner for the cost of the converted videotape.

The payment made by Petitioner, pursuant to its contract with a film producer or distributor, as a royalty or license fee for the right to broadcast a motion picture is not a "sale" as defined in section 1101(b)(5) of the Tax Law, irrespective of whether the motion picture is received by

Petitioner on film or videotape. Therefore, no sales or use tax is payable by Petitioner with respect to such royalty or broadcasting license fee.

When Petitioner takes delivery of a film in connection with its post production operations, for the purpose of conversion to videotape, no further use of the film will be made, and Petitioner will return the film, untouched, to the licensor. Since Petitioner takes possession of the film solely for reproduction purposes, Petitioner does not receive a license to use the film with the meaning of the Tax Law. 20 NYRR 526.7(b). Petitioner is not liable for payments of State or local sales and use taxes upon taking delivery of a film under such circumstances.

Videotapes received by Petitioner from producers will be used directly in Petitioner's post production operations. These videotapes will undergo changes in the course of post production operations. Petitioner, therefore, receives a license to use such videotapes. 20 NYCRR 526.7(f)(3). The delivery of videotapes to Petitioner under these circumstances is, therefore, subject to the State and local sales and use taxes. Tax Law §§1101(b)(5) and 1105(a).

The sales tax with respect to the license to use the videotapes will not be based on the whole of the charge for such video tape, including processing, paid by Petitioner, but only on part of such charge. The portion subject to State sales tax will be the percentage of subscribers to Petitioner's programs located in New York State to Petitioner's total subscribers. The portion of such charge subject to the City tax in addition to the State tax will similarly be the percentage of Petitioner's New York City subscribers to total New York State subscribers. Opinion of Counsel, December 10, 1965.

The electronic signals transmitted by Petitioner's playback and uplink facilities are not tangible personal property. TSB-M-80(18)S. The transmission of such signals by Petitioner to a satellite for broadcast purposes is not, therefore, a taxable sale of tangible personal property under section 1105(a) of the Tax Law. Further, in transmitting such signals, Petitioner provides neither a telegraph service nor an information service within the meaning of the Tax Law. TSB-M-80(18)S. Petitioner's transmission of its program over its own playback and uplink facilities is, therefore, not subject to State or local sales tax.

Providing post production services to third parties will entail audio recording and mixing, videotape and film editing, and videotape dubbing by Petitioner. If the videotape used in post production operations is provided by the purchaser of the service, or its agent, Petitioner will be performing the service of processing tangible personal property, taxable under section 1105(c)(2) of the Tax Law. 20 NYCRR 527.4(d).

Petitioner must, therefore collect State and local sales taxes on the performance of post production services for third parties under these circumstances, unless a properly completed exemption certificate or Direct Payment Permit received from the customer. The tax will be based on the price charged by Petitioner for such services.

If Petitioner provides the videotape used in its post production operations, it will not be rendering a taxable processing service. Rather, Petitioner will be making a sale of tangible personal property. If the transaction is not excluded from the Tax Law as a purchase for resale, and does not come within any of the exemption provisions of the Tax Law, it will be subject to State and local

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taxes by virtue of section 1105(a) of the Tax Law. The charge by Petitioner to its customer for videotape stock provided by Petitioner and post production work performed on the videotape represents the amount subject to tax, unless a properly completed exemption certificate or Direct Payment Permit is received from the customer.

In both transactions involving post production for third party customers the rate of tax to be collected will be the rate in effect where the processed videotape is delivered to the customer. When, pursuant to the contract, Petitioner will provide playback and uplink services, such delivery will occur at Petitioner's playback and uplink facility.

Playback and uplink services provided by Petitioner to third parties in conjunction with post production services are not subject to sales tax. Petitioner prepares the final version of a program for a third party. In transmitting electronic signals for the purpose of broadcasting that program, Petitioner does not act as a mere conduit of material given to it by a third party. Petitioner is transmitting material which it has helped create. Petitioner's playback and uplink services, therefore, are not a telegraph service within the meaning of the Tax Law. TSB-M-80(18)S. Nor are such services information services within the meaning of the Tax Law. TSB-M-80(18)S. Since, under these circumstances, Petitioner's playback and uplink services do not constitute one of the taxable services enumerated in the Tax Law, these services are not subject to sales tax. Charges for such services, however, must be separately stated on Petitioner's bills to its customers.

DATED: December 18, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau