

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

TSB-A-87(23)S
Sales Tax
May 22, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S821004C

On October 4, 1982, a Petition for Advisory Opinion was received from Showtime Entertainment, 1533 Broadway, New York, New York 10036.

The issue raised is whether the sales and use taxes imposed under Article 28 and 29 of the Tax Law on Petitioner's purchases of tangible personal property and processing services, used to integrate videotapes containing entertainment features with promotional elements for television broadcasting, are subject to allocation because the viewers of the programs are located both within and without New York State.

Petitioner offers motion picture and entertainment specials packaged as 24 hour program feed for satellite transmission. The products exhibited are usually obtained from theatrical and feature film producers or distributors in the form of videotapes - or film prints which must be converted to videotape before broadcasting.

Petitioner inquires whether an allocation based upon location of Petitioner's viewing audience may be applied to the following costs incurred in preparing, for its own use, programs for satellite transmission:

- (A) Purchases of the services of videotape editing and dubbing; audio recording, mixing and dubbing; and preparing the promotional and on-air-advertising elements of a program.
- (B) Purchases of material upon which the above mentioned services will be performed, and of duplicate prints and tapes.
- (C) Rental of editing room equipment and screening rooms.

Section 1105(a) of the Tax Law imposes tax on "[t]he receipts of every retail sale of tangible personal property, except as otherwise provided in this article".

Section 1105(c)(2) of the Tax Law imposes tax on the receipts from every sale, except for resale, of the services of "[p]roducing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the...property, not purchased by him for resale, upon which such services are performed".

The Sales and Use Tax Regulations of the State Tax Commission explain in Section 525.2(a)(3) that the sales tax is a "destination tax" where the point of delivery or point at which possession of tangible personal property is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate. Similarly, tax on the receipts from rendering a service is determined by the location where the serviced property is delivered to the customer. 20 NYCRR 526.7(e)(1).

Section 1110 of the Tax Law imposes a tax for the use within this State of any tangible personal property purchased at retail, and of any tangible personal (except merchandise inventory) on which a service described in Tax Law 1105(c)(2) has been performed, on which tax has not been paid.

Thus, purchases of the services listed under (A) whether or not performed in New York State, are taxable if the serviced property is delivered to Petitioner within the State. If delivery is taken out-of-state for subsequent use in-state, such property will be taxed on the basis of the purchase price and at the rate in effect at the location of use.

Similar considerations apply to purchases of the tangible personal property listed under (B).

Section 1101(b)(5) of the Tax Law defines the terms "sale, selling or purchase" to include rentals of tangible personal property.

Accordingly, rentals of editing room equipment are taxable at the rate in effect at the location where Petitioner has the right to custody, possession or use of the equipment. 20 NYCRR 526.7(e)(4).

Regulation Section 526.8(c) states that, for the purposes of administering the Tax Law, real property is not considered tangible personal property.

Therefore, screening room rental charges which do not include the use of equipment are not taxable.

However, screening room costs usually include the use of the projecting equipment and may include the services of an equipment operator. When Petitioner has the right to direct the technician provided or supplies his own operator, possession of the equipment is deemed to have been transferred, making the entire rental charge a sale subject to tax.

Nevertheless, any portion of the rental amount representing the operator's wages and rent for the room (if reasonable in relation to prevailing wage and rent rates) is not taxable, if shown separately from the taxable charge on the invoice rendered. 20 NYCRR 526.7(e) 4, 5 and 6.

If the sales record lacks sufficient detail for determining taxable and exempt charges, the total amount billed will be subject to tax. 20 NYCRR 532.2(b)(2).

The receipts from the sales of cable television services Petitioner provides are not subject to the sales tax. (New York State Cable Television v. Tax Commission of New York, 88 Misc2d 601). Furthermore, no transfer of title to or possession of tangible personal property occurs between Petitioner and its customers. Thus, the aforementioned transactions are retail sales to the Petitioner as the ultimate user and taxpayer. (Cf. Shanty Hollow Corp. v. New York State Tax Commission, 111 AD2d 968).

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Consequently, whenever the costs here at issue are subject to tax, they are fully taxable in accordance with the above quoted sections of the Tax Law and regulations, which allow no deductions from such taxable receipts based on the subsequent use of the acquired property or services; nor has the destination of the television broadcast signals initiated by such use any bearing on the tax status of the purchases.

DATED: May 22, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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