

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

TSB-A-88 (48)S  
Sales Tax  
September 20, 1988

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880614A

On June 14, 1988, a Petition for Advisory Opinion was received from Jim Bush Photography, 1685 Elmwood Avenue, Loft 304, Buffalo, New York 14207.

The issue raised is whether the temporary transfer of possession of a photographic print or transparency for the purpose of reproducing such photographic print or transparency constitutes a taxable sale.

Petitioner, a commercial photographer, is in the business of rendering photographic services wherein a client will contact Petitioner for consultation regarding a display or photographic reproduction desired for inclusion in a promotional publication. Petitioner will meet with the client to determine the nature of the client's promotional objective and to provide the client with recommendations as to the nature of photographic content which would best suit the project.

If engaged by the client, Petitioner proceeds to take the desired shots either at Petitioner's studio or another site. Petitioner then processes the original film to produce either negatives or transparencies. The client is provided with either a print produced from a negative or a transparency, depending on whether Petitioner produced a negative or a transparency from the original film. Because a print produced from a negative can be used for reproduction, the negative can be retained by Petitioner. However, because a transparency serves as both negative and print, the transparency must be delivered to the client.

When a client is granted the right to reproduce a print or a transparency the reproduction is to be used solely for the purpose for which the photograph was originally intended. The print or transparency is loaned out to the client for a specific period of time and must be returned to Petitioner in its original form without alterations or retouching. Because Petitioner retains ownership of the print or the transparency, Petitioner can make the transparency or print of the original negative available to any other client to whom he may wish to grant reproduction rights, even to a competitor of the original client. Petitioner has the right to sell the original negative or transparency, although it is seldom done.

The invoice which Petitioner presents to his client contains certain conditions. "Period of Use" is stamped on the front with the period of time the client can use the print or transparency inserted after the phrase. (The normal period allowed is one year.)

The invoice also states that use is subject to terms and conditions on the reverse side. The legend on the back states, in part, "Grant of reproduction rights is conditioned on receipt of payment in full. All rights expressly granted remain the exclusive property of Photographer. ..." The legend also contains wording providing for copyright and trademark protection being the sole right of the applicant.

The taxability of temporary transfers of tangible personal property has been addressed in Matter of Vignelli Associates, Ltd., et. al. State Tax Commission, February 11, 1981, TSB-H-81(26)S. Therein the State Tax Commission determined "That since the transfers of possession... were temporary for the purpose of reproduction only, without the right to alter or retouch the same, title thereto at all times remaining in Vignelli Associates, Ltd., they did not constitute taxable sales."

Pursuant to 20 NYCRR 526.7(f)(1) and (2), the granting of a right to reproduce is not a license to use or a sale and is not taxable. Mere temporary possession or custody for the purpose of making a reproduction is not deemed to be a transfer of possession which would convert the reproduction right to a license to use. (Matter of Frissell v. Mc Goldrick, 300 N.Y. 370; 88 N.Y.S. 2d 896; 91 N.E. 2d 305 (1950).)

The transfer of prints from original negatives and transparencies by Petitioner to his customers under the circumstances described herein does not constitute a license to use or the sale of tangible personal property under section 1105(a) of the Tax Law. The fact that the prints and transparencies were produced by Petitioner specifically for his customers does not change the nature of the transaction. The facts remain that Petitioner's customers did not alter or change the prints or transparencies and returned them to Petitioner after the necessary steps were taken for reproduction.

Accordingly, Petitioner's charges to his customers are not subject to state or local sales tax. However, when Petitioner produces negatives or transparencies for the purpose of granting a right to reproduce, Petitioner is not producing tangible personal property for sale. If more than 50% of the negatives and transparencies produced by Petitioner are used for transactions wherein the client is granted the right to reproduce the photo or transparency, Petitioner will not be considered to be producing tangible personal property for sale by manufacturing, processing, etc. All purchases of equipment, tools, supplies and services by Petitioner will be subject to state and local tax.

DATED: September 20, 1988

FRANK J. PUCCIA  
Director  
Technical Services Bureau

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