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

TSB-A-88 (57)S
Sales Tax
November 7, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S880623B

On June 23, 1988, we received a Petition for Advisory Opinion from William J. Young, 7192 West Main Street, Lima, New York 14485.

The issue raised is whether the creative advertising services rendered by Petitioner are subject to sales tax.

Petitioner operates a sole proprietorship under the name of Young Ideas. At any given time, Petitioner has a limited number of clients. Most clients are on a monthly retainer. As part of the retainer agreement, Petitioner provides creative advertising services, primarily in the development and placement of magazine and newspaper advertisements.

In the past, Petitioner would occasionally assist in the development of television or radio commercials for a client. Petitioner would develop the concept and would obtain approval from the client for the concept. He would also obtain approval from the client for the anticipated costs. Petitioner would then arrange with a production company to film or tape the commercial. He would usually attend the filming or taping as an observer. Petitioner would have the right to request changes or modifications if he did not like the finished product. Before the commercials are aired, Petitioner would review them with the client and make any changes that the client requested.

Petitioner would bill the client for his retainer and the television or radio air time charges. All production charges would be billed directly to the client.

Section 1105(a) imposes a tax on receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c)(1) of the Tax Law imposes a tax on the services of furnishing information by printed or mimeographed matter, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. However, that section excludes "... the services of advertising or other agents, or other persons acting in a representative capacity...".

Section 1105(c)(2) of the Tax Law imposes a tax on the services of "[p]roducing, 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.

The Section 527.3(b)(5) of the Sales and Use Tax Regulations states in part, that: Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. ... Sales of tangible personal property such as layouts, printing plates, catalogs, mailing devices or promotional handouts, tapes or films by an advertising agency for its own account are taxable sales of tangible personal property.

> Example 5: An advertising agency is hired to design an advertising program and to furnish artwork and layouts to the media. The fee charged by the agency to its client for this service is not subject to the tax. However, if the layout and artwork is sold by the advertising agency prior to use by it to the customer for his use, the advertising agency is making a sale of tangible personal property which is subject to the sales tax. 20 NYCRR 527.3.

All purchases of materials [or services taxed under section 1105 of the Tax Law] by an advertising agency for use in performing its services are purchases at retail subject to the sales tax. 20 NYCRR 527.3[c][2].

An advertising firm does not necessarily act as an agent for its client when it purchases property for use in creating advertisements. A principal-agent relationship for such purpose will be recognized for sales tax application only if the following conditions are met:

1. The advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent, and

2. the advertising agency must obtain and retain written evidence of agency status with the client prior to the acquisition of any tangible personal property or service, and

3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own account, such as by charging the item to the account of more than one client. See William Esty Company, State Tax Commission Advisory Opinion, Sept. 17, 1984, TSB-A-84(22)S.

A. The production of advertisements and their placement in publications which are not for sale

If no principal-agent relationship exists, Petitioner must pay tax on its purchases of property and taxable services necessary to fulfill its agreement with the client, even if the customer is an exempt organization. (See: Tromson Monroe Advertising, State Tax Commission Advisory Opinion, March 3, 1983, TSB-A-83(12)S). Petitioner's total charge to the client is not taxable whether or not the cost of its purchases is itemized on the bill rendered.

If the same services are performed under a principal-agent agreement, not only must Petitioner pay sales tax on material and services bought on the client's behalf, but it must also charge the client sales tax on the value added to the property by the labor of agency employees. (Tax Law §1105[c][2]). See William Esty Company, State Tax Commission Advisory Opinion, September 17, 1984, TSB-A-84(22)S. Commissions and fees relating to Petitioner's services for the acquisition of property and the placement of advertising are exempt.

Where Petitioner carries out the services described under "A" for a principal who is an organization exempt from tax under section 1116 of the Tax Law, it is not required to collect tax on the total charge to the client, nor to pay tax on property purchased on the client's behalf, provided that conditions 1, 2, and 3, quoted above, are met and Petitioner and its supplier are furnished with the proper exemption certificate (e.g., Form ST-119.1, Exempt Organization Certificate) executed by the client.

B. The production and placement of advertisements in publications which are for sale

Here the agency usually prepares the layout and produces from it the printing plate which it forwards to the publisher who will print the advertisement. In accordance with Technical Services Bureau Memorandum TSB-M-79(7.1)S, May 15, 1980, if no principal-agent contract is in force, Petitioner may claim the manufacturing exemption (Tax Law § 1115[a][12]) on its purchases of equipment such as typography, artwork, film, offset plates, etc., and also on parts, tools and supplies used in the production of the advertisement, by obtaining from its client a properly completed Exempt Use Certificate (Form ST-121) and furnishing to its vendor a properly completed Exempt Use Certificate prepared by the agency.

If a freelance artist is employed to create illustrations or typography upon material supplied and used by Petitioner, this service is subject to sales tax under Section 1105(c)(2) of the Tax Law which imposes the 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 tangible personal property, not purchased by him for resale, upon which such services are performed".

Petitioner's total charge to its client will be exempt from tax as the "services of advertising".

If a principal-agent agreement exists, Petitioner's purchases for the client of equipment, parts, tools and supplies to be used in the production process of the advertisement qualify for the manufacturing exemption, provided vendors are supplied with an Exempt Use Certificate (Form ST-121) executed by the client. The tax liability for services described in Tax Law § 1105(c)(2), supra, whether purchased by the agent or performed by its employees, passes to the client. Material and services obtained by the agent must be re-billed to the principal at cost. Separately stated agency fees for consulting, purchasing, and placement of the advertisement with the media are not taxable.

C. Production of Radio and Television Commercials

The creation of a radio or television commercial is considered the production of tangible personal property. Therefore, sales of television or radio commercials embodied in tangible form in an original negative film, video tape or sound track are subject to sales tax if the property is delivered to the customer or its designee in New York State.

If Petitioner's involvement in the production of a commercial is limited to the development of concepts and the retention of a production company to actually produce the commercial, then Petitioner is merely selling an advertising service which is not subject to tax. Of course, the amount billed by the production company directly to the client for the production of the commercial is a taxable charge on which the production company must collect tax.

However, if after the production of the commercial by the production company Petitioner makes changes to the commercial (e.g. editing, dubbing or mixing) then Petitioner is engaged in a service taxable under section 1105(c)(2) of the Tax Law and must collect tax on his charges for all such services. If Petitioner renders both exempt and taxable services to his client, he must collect sales and use tax on his entire charge to his client unless he separately states the taxable and exempt charges on his billings to his clients.

If, in conjunction with the services discussed under A. and B. above, material purchased by Petitioner for the purpose of creating advertisements is turned over to the client subsequent to such use, this transfer of tangible personal property is considered merely incidental to the "services of advertising" and will not negate the exclusion from tax provided for such services under Tax Law § 1105(c)(1). See Matter of Laux Advertising v. State Tax Commission, 67 AD2d 1066.

However, in the event that artwork retained by Petitioner after completion of a contract is later transferred to the customer for an additional charge, such receipt is subject to tax and Petitioner may not claim a credit for tax paid on its purchase of the property.

Finally, Petitioner is referred to Department of Taxation and Finance Publication 842 (4/84) "Sales Tax Information for Printers" which contains instructions and explanations pertinent to advertising firms.

DATED: November 7, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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