

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

TSB-A-93 (23)S
Sales Tax
March 31, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S921005A

On October 5, 1992 a Petition for Advisory Opinion was received from Enid Hoffman, Gary Kahn & Co., 10 Esquire Road, New City, New York 10956.

The issue raised by Petitioner, Enid Hoffman, Gary Kahan & Co., is whether the charge for a video tape produced for advertising purposes is subject to sales tax.

According to the factual situation presented by the Petitioner an advertising agency developed a video for their client's use for advertising purposes. The video was eventually given by the agency's client to buyers and their agents. The video may also have been used on cable television.

The agency provided conceptual and creative development of the video, including copy and illustration. The agency sub-contracted with a production company to provide additional creative services, including the actual videotaping and editing of the final master video.

The agency then arranged for duplicate copies of the video and for labels and cassette boxes to be printed to hold the video.

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 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.

Section 527.3(c)(2) of the Sales and Use Tax Regulations provides that "All purchases of materials by an advertising agency for use in performing its services are purchases at retail subject to the sales tax."

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, Adv Op, St Tx Comm, Sept. 17, 1984, TSB-A-84(22)S.

The creation of a television commercial is considered the production of tangible personal property. Therefore, sales of television 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 the advertising agency's involvement in the production of the commercial is limited to the development of concepts without the transfer of any personal property and the client directly retains the production company to actually produce the commercial, then the agency is merely selling an advertising service which is not subject to sales tax. 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 sales tax.

In a transaction where the client purchases both the development of concepts and the video itself from the advertising agency the charges to the client will be considered as receipts from a single transaction in which the transfer of title to and possession of tangible personal property occurs, if such tangible personal property is transferred to the client pursuant to a contract or agreement whereby the client does not have the option of electing to purchase the video tape from the advertising agency or from an unrelated third party. Crushing Enterprises Inc., Adv Op Comm T&F, October 10, 1990, TSB-A-90(30.1)S.

In a transaction where the client purchases both the development of concepts and the video itself from the advertising agency pursuant to a contract or agreement whereby the client has the option of purchasing the video from the advertising agency or from an unrelated third party and whereby the purchase of the video by the client from the advertising agency is not contingent upon the purchase of the development of concepts from the agency or vice versa, and whereby the charges are separately stated, only the portion of the charges which are applicable to the video itself will be considered receipts from the sale of tangible personal property and subject to the tax imposed under Section 1105(a) of the Tax Law. Crushing Enterprises Inc., Adv Op Comm T&F, October 10, 1990, TSB-A-90(30.1)S.

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

If, in conjunction with the services discussed above, material purchased by the advertising agency 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 Section 1105(c)(1) of the Tax Law. See Matter of Laux Advertising v. State Tax Commission, 67 AD2d 1066.

TSB-A-93 (23)S
Sales Tax
March 31, 1993

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

DATED: March 31, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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