

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

TSB-A-94 (31)S
Sales Tax
July 27, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940425A

On April 25, 1994, a Petition for Advisory Opinion was received from Magnetic Construction Corp., 23-73 48th Street, Astoria, New York 11103.

The issue raised by Petitioner, Magnetic Construction Corp., is whether purchases of special construction photographs and progress photographs required to be submitted by it to the City of New York with progress requisitions for payment are subject to sales tax.

Petitioner is a construction company which has contracts with the City of New York and its subdivisions. The contract with the City requires that requisitions for payment be accompanied with photographs showing the progress of the work. Petitioner is required to engage a qualified commercial architectural photographer to take photographs prior to the commencement of the construction and at substantial completion, and to provide documentation of existing conditions of the decorative painted surfaces of the land mark interiors.

The following are excerpts from Petitioner's contract with the City of New York relating to special construction photographs and progress photographs.

1.02 SUMMARY:

A. General: This section specifies administrative and procedural requirements for photographs of the decorative painted surfaces in the Landmark Interiors.

1. Special Construction Photographs are in addition to Progress Photographs required in the General Conditions and additional photographs specified in other sections.

B. The intent of this Section is to provide documentation of the existing conditions of the decorative painted surfaces of the Landmark Interiors,...

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2.02 PHOTOGRAPHIC PRINTS:

A. Provide 8" by 10" smooth surface glossy color prints on double-weight commercial-grade stock.

1. Color correct prints to match Kodak Color Card.

- B. Identification: Label each photograph on the back in the bottom margin with project name and date the photograph was taken. On the back of each print provide an applied archival quality label with the following information:
1. Name of the Project.
 2. Name and address of the photographer.
 3. Name of the Architect.
 4. Name of the Contractor.
 5. Name of the Construction Manager.
 6. Date the photograph was taken.
 7. Description of vantage point and subject, in terms of location (by notation on, and reference to, elevation and plan drawings).

* * *

ARTICLE 19 - PROGRESS PHOTOGRAPHS

- A) The Contractor for General Construction shall employ and pay for all services of a competent photographer who shall take photographs showing the progress of the work.
- B) There shall be an average of eight (8) photographs taken each month from the commencement of the Contract to the time of completion. These photographs shall show as far as possible, the work completed within and on the exterior, of the structure. The first series of photographs shall be taken prior to the actual commencement of work at the site for each phase. In addition thereto before final payments, there shall be six (6) photographs taken of unobstructed views of the completed buildings or buildings and site, as directed by the Commissioner, after all scaffolding, hoists, shanties, field offices or other temporary work has been removed and final cleaning done. (For demolition work included in the Contract there shall be four (4) photographs taken before commencement of demolition operation, four (4) at mid-point of operations and four (4) at the completion of demolition operations for each phase of the work.) The prints shall be 8" by 10" gloss finish, mounted with a 1" binding flap of muslin on the left side. They shall be marked on the back, with date of exposure, the title of the project and the specific location.

Six copies of each photograph shall be furnished free of charge to the Resident Engineer. Photographs shall be taken as ordered by the Resident Engineer. (Emphasis supplied)

No payment will be made until each months photos are submitted.

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

Section 526.8 of the Sales and Use Tax Regulations defines tangible personal property as follows:

526.8 Tangible personal property. (Tax Law, §1101(b)(6)) (a) Definition. The term tangible personal property means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

* * *

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings;

* * *

Section 526.6(c) of the Sales and Use Tax regulations defines the resale exclusion:

(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer.

Section 1115(a)(15) of the Tax Law provides an exemption from sales tax for:

Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

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Section 1115(a)(16) of the Tax Law provides an exemption from sales tax for:

Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Petitioner's purchases of the photographs are subject to sales tax pursuant to Section 1105(a) of the Tax Law and Section 526.8(3) of the Sales and Use Tax Regulations unless such photographs were purchased for resale or incorporated in a capital improvement for an organization exempt under Section 1116(a) of the Tax Law.

In order to qualify for the resale exclusion, Petitioner must sell the photographs as a component part of other property or services, or in the form in which purchased. Petitioner is in the business of selling capital improvements of which the photographs do not become a part. (See: Fred H. Geller & Co. Adv. Op. Comm. T & F, April 6, 1992 TSB-A-92(33)S).

Petitioner's contract does not create a resale of the photographs. In fact, Petitioner's contract specifically provides that the photographs are to be supplied free. In addition, Petitioner's contract provides that the photographs are used for documentation and that Petitioner will not be paid until the photographs are submitted. Thus, Petitioner itself is using the photographs in order to get paid, and although they may be transferred to the City of New York, the photographs are consumed by Petitioner in the same manner as other supplies, and consequently do not qualify for the resale exclusion. (See Leslie H. Baker, Adv. Op. Comm. T & F, June 23, 1994 TSB-A-94(26)S). Furthermore the photographs do not become an integral component part of the structures involved and thus do not qualify for the exemption from sales tax provided by Sections 1115(a)(15) and 1115(a)(16) of the Tax Law.

DATED: July 27, 1994

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

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