

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

TSB-A-98(36)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S971118C

On November 18, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from O'Keefe & Company, 115 Broadway, Hicksville, New York 11801.

The issue raised by Petitioner, O'Keefe & Company, is whether any part of the charges for executive education courses, as described in the scenarios below, is subject to sales and use tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Common facts for scenarios 1-8

1. The Smith Company teaches executive education courses.

The Smith Company has a 100-page document, which serves as a textbook for its intensive course. The Smith Company has the copyright to this document.

SCENARIO 1: The Smith Company reproduces one copy of this document for each class participant. It charges its customers a fee for each 100-page document reproduced for the participants of the class and charges its customers a fee for teaching the class. The fee for teaching the class and the fee for the number of textbooks reproduced for the class are billed jointly on the invoice for a particular class.

SCENARIO 2: The Smith Company reproduces one copy of this document for each class participant. It charges its customers a fee for each 100-page document reproduced for the participants of the class and charges its customers a fee for teaching the class. The fee for teaching the class is billed concurrently with the teaching of each class. The fee for the number of textbooks reproduced for all the classes taught for the customer during the year is billed separately once a year.

SCENARIO 3: The Smith Company provides its client with one paper copy of this document and charges an annual licensing fee based on an estimated level of usage by class participants in addition to a fee for teaching the class. The client reproduces the text for its employees who participate in the class.

SCENARIO 4: The Smith Company provides its client with one electronic copy of this document and charges an annual licensing fee based on an estimated level of usage by class participants. The client reproduces the text for its employees who participate in the class.

SCENARIO 5: The Smith Company provides its client with one paper copy of this document and charges an annual licensing fee based on the size of the client in addition to a fee for teaching the class. The client reproduces the text for its

employees who participate in the class but also has the right to reproduce as many copies as the client requires, regardless of the number of class participants.

SCENARIO 6: The Smith Company provides its client with one electronic copy of this document and charges an annual licensing fee based on the size of the client in addition to a fee for teaching the class. The client reproduces the text for its employees who participate in the class but also has the right to reproduce as many copies as the client requires, regardless of the number of class participants.

SCENARIO 7: The Smith Company provides its client with either one hard copy or one electronic copy of the document. It charges a one-time lump-sum fee for the right to use and reproduce the document provided the client continues to use the Smith Company to teach the course. The agreement can limit the reproduction to current participants in courses, or future participants in courses, or client employees. The Smith Company also charges a fee for each class taught.

SCENARIO 8: The Smith Company provides its client with either one hard copy or one electronic copy of the document. It charges a one-time lump-sum fee for the right to use and reproduce the document regardless of whether the client continues to use the Smith Company to teach the course. The agreement can limit the reproduction to current participants in courses, or future participants in courses, or client employees. The Smith Company also charges a fee for each class taught.

Common facts for scenarios 9-11:

1. The Smith Company custom develops unique executive education courses or unique course materials for use by its clients. Course materials could consist of exercises, problems, and questions to be answered by class participants relating, for example, to areas such as business ethics. It is important for these scenarios to emphasize that these materials are custom developed for a particular client. The Smith Company has the copyright to these materials.

2. The Smith Company does not teach these courses.

3. The value of the courses does not relate to a generic arrangement of material but rather to the unique intellectual insight and experience of the course and material developers. The document is tailored to the individual needs of clients.

SCENARIO 9: The Smith Company reproduces these materials for the number of participants required by the client for a per copy fee.

SCENARIO 10: The Smith Company licenses the right to use its materials for a fee and then charges the client an additional fee for each copy of the material provided.

SCENARIO 11: The Smith Company provides the client with either one hard copy or one electronic copy of materials. The client pays either:

- a) A fee for each copy reproduced by client.
- b) An annual licensing fee plus a per copy fee for each copy reproduced by client.
- c) A flat annual licensing fee based on estimated usage.
- d) A one-time lump-sum fee for the right to use and reproduce the materials subject to negotiated restrictions.

Common facts for scenarios 12-17:

1. The Smith Company develops generic executive education courses or generic course materials for use by its clients. Course materials are defined as previously indicated. The Smith Company has the copyright to the course materials.

2. The Smith Company does not teach these courses.

3. The value of the courses does not relate to a general arrangement of material but rather to the unique intellectual insight and experience of the course and material developers. The document is tailored to the individual needs of clients.

SCENARIO 12: The Smith Company reproduces these materials for the number of participants required by the client for a per copy fee.

SCENARIO 13: The Smith Company licenses the right to use its materials for a fee and then charges the client an additional fee for each copy of the material provided.

SCENARIO 14: The Smith Company provides the client with either one hard copy or one electronic copy of materials. The client pays either:

- e) A fee for each copy reproduced by client.
- f) An annual licensing fee plus a per copy fee for each copy reproduced by client.
- g) A flat annual licensing fee based on estimated usage.
- h) A one-time lump-sum fee for the right to use and reproduce the materials subject to negotiated restrictions.

SCENARIO 15: The Smith Company licenses to its client and provides an electronic copy which the client publishes on an internal Website which its employees can access and either read or print out. The client is billed either:

- a) A flat fee for the use of materials.
- b) A fee for each download by the clients employees.

SCENARIO 16: The Smith Company privately publishes and sells its generic materials to retail establishments for resale.

SCENARIO 17: The Smith Company licenses the right to future access to its materials or courses. This means that the client has the right to approach the Smith Company in the future and arrange a mutually agreeable price for copies of materials or courses. The license fee does not contemplate any current exchange of materials or courses.

Applicable Law and Regulations

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 525.2(a)(2) Of the Sales and use Tax Regulations provides:

The sales tax is a "transactions tax," liability for the tax occurring at the time of the transaction. Generally speaking, the taxed transaction is an act resulting in the receipt of consideration for the transfer of title, or possession or both to property or the rendition of services from one person to another. The time or method of payment is immaterial, since the tax becomes due at the time of transfer of property or rendition of service. (Emphasis supplied)

Section 526.6 of the Sales and Use Tax Regulations provides:

(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 526.7 of the Sales and Use Tax Regulations provides:

(f) *Reproduction rights.* (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. (See *Howitt v. Street and Smith Publications, Inc.*, 276 N.Y. 345 and *Matter of Frissell v. McGoldrick*, 300 N.Y. 370.)

(3) Where some use other than reproduction is made of the original work, such as retouching or exhibiting a photograph, the transaction is a license to use, which is taxable.

Section 532.1(a)(2) of the Sales and Use Tax Regulations provides:

(2) Where a vendor makes a sale for which payment is not received at the time of delivery, such sale must be reported on the return covering the period in which the sale is made. Thus, if the sale is a taxable sale, the full amount of tax must be remitted with the return whether or not any money was collected at the time of sale.

Opinion

Petitioner's scenarios contain three basic transactions: the sale of tangible personal property which is subject to sales tax, the sale of a right to reproduce which is not subject to sales tax, and the sale of a teaching service which is not subject to sales tax.

Scenario 1 contains a sale of books subject to tax under section 1105(a) of the Tax Law and a sale of a teaching service which is not subject to tax.

In scenario 2, the Smith Company is required to report and remit the sales tax due on the sale of the books on the return covering the period in which the books are transferred to its client regardless of when the Smith Company bills its client. See Sections 525.2(a)(2) and 532.1(a)(2) of the Sales and Use Tax Regulations.

Scenarios 3, 4, 5, 6, 7 and 8 are sales of a nontaxable teaching service, and may also be nontaxable sales of a right to reproduce tangible personal property if the conditions described below are met. The transfer of the document, whether in the form of a paper copy or diskette, in these cases by the Smith Company to its customer will not be subject to tax if the written agreement with the customer clearly indicates that only reproduction rights are being sold and the document is being transferred for reproduction purposes only. If the original document is permanently transferred to the customer, or the agreement with the customer does not state that only reproduction rights are being sold, the transaction will be subject to tax as a sale of tangible personal property. See Section 526.7(f) of the Sales and Use Tax Regulations.

Scenarios 9, 10, 12 and 13 are sales of tangible personal property, the receipts from which, including the license fee and fee per copy, are subject to tax under section 1105(a) of the Tax Law.

Scenarios 11, 14 and 15 are sales of a right to reproduce which are not subject to sales or use tax, provided the requirements of Section 526.7(f) of the Sales and Use Tax Regulations, as described above, are met.

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Scenario 16 is a sale for resale as provided under Section 1101(b)(4) of the Tax Law and Section 526.6(c) of the Sales and Use Tax Regulations. The Smith Company must receive from its customer a properly completed resale certificate (Form ST-120) within 90 days of the date of sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

In scenario 17, there is no tax due at the time the Smith Company licenses the right to future access to its materials or courses. See Section 525.2(a)(2) of the Sales and Use Tax Regulations.

DATED: May 19, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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