

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(42)S
Sales Tax
December 5, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050527A

On May 27, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from LaBella Associates, P.C., 300 State Street, Rochester, New York, 14614. Petitioner, LaBella Associates, P.C., provided additional information pertaining to the Petition on September 19, 2005.

The issue raised by Petitioner is whether purchases and sales of certain printing services are subject to sales tax.

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

Petitioner is an engineering and architectural firm engaged in project design for various clients. Most of Petitioner's clients are, for sales tax purposes, exempt organizations or exempt governmental entities. Typically, at the conclusion of the planning process, Petitioner's clients are provided with an original set of blueprints (final working drawings) as a part of Petitioner's engineering or architectural service. The final working drawings are produced by Petitioner in-house and are delivered to the client. Petitioner then engages a third party printer to reproduce copies of the final working drawings. These copies of the final working drawings are used by Petitioner's clients to solicit competitive bids from contractors for projects outlined in the drawings. Multiple copies of the final working drawings are necessary because these copies (referred to collectively as the bid set) are distributed by Petitioner's clients to all qualified contractors interested in bidding on the project described in the final working drawings.

Petitioner's contracts with exempt organizations or governmental entities generally contain a provision that requires Petitioner to provide a maximum number of copies in the bid set. Petitioner charges its clients separately for the bid set and for the architectural/engineering fee which includes the final working drawings. Petitioner charges its client at Petitioner's cost for the bid set. The client determines the number of copies to be reprinted in the bid set and the location to which they are to be delivered. Petitioner's charges for the bid set vary depending on the number of pages per copy and the number of copies in the bid set requested by the client. These clients are free to purchase a bid set directly from a printer of their choice without purchasing the bid set from Petitioner.

Contracts with Petitioner's nonexempt clients generally do not contain language calling for a bid set, but these clients often ask Petitioner to order a bid set on their behalf once the project is designed. Clients may, if they wish, enter into their own contracts with a printer for bid sets.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) a person making sales of tangible personal property or services, the receipts from which are taxed by this article; . . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax - - . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes tax on receipts from the sale, except for resale, of certain enumerated services.

Section 1116(a) of the Tax Law provides for exemption from the sales and compensating use taxes with respect to purchases by New York State governmental entities, United States governmental entities, certain nonprofit organizations and other entities who have received New York State sales tax exempt organization status.

Section 1131 of the Tax Law provides, in part:

Definitions When used in this part IV, (1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services. . . .

Section 1132 of the Tax Law provides, in part:

(a) (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price . . . paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

* * *

(c) (1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (ii) the

purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven . . . Such application shall be in such form as the tax commission shall prescribe. . . .

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale. (a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(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.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

* * *

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Example 10: A shoe repairman purchases leather to be used for resoling shoes. His purchase of the leather is not a purchase for resale, even though the leather will be transferred to the customer in connection with the performance of the service because the service he is performing is not taxable.

Section 529.2(b)(2) of the Sales and Use Tax Regulations provides:

New York State governmental entities as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document.

Section 529.3(b)(2) of the Sales and Use Tax Regulations provides:

United States governmental entities as purchasers, users, consumers, occupants or patrons must exercise their right to exemption through the issuance of governmental purchase orders or the appropriate exemption document.

Section 532.1(b) of the Sales and Use Tax Regulations provides, in part:

Statement of and reference to tax. (1) Whenever the customer is given any sales slip, invoice, receipt, or other statement or memorandum of the price, amusement charge, or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him.

(2) Whenever the sales and use tax is separately stated on such document, it may be referred to as *tax*.

(3) The words *tax included* or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered.

Section 541.3(d)(2)(v) of the Sales and Use Tax Regulations provides, in part:

Documents. (a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location, and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Opinion

Petitioner's architectural and engineering services are not services enumerated in section 1105 of the Tax Law and receipts from the sale of these services are not subject to sales tax. However, all purchases of tangible personal property and taxable services used or consumed by

Petitioner in providing its architectural and engineering services are subject to sales tax. See section 526.6(c)(7) of the Sales and Use Tax Regulations.

Petitioner provides a "bid set" (printed copies of the final working drawings) to its clients who have requested it either as part of their contract with Petitioner or after the contract for design services is completed. Clients are free to obtain their bid set directly from a printer of their choice and are not required to purchase the bid set from Petitioner. Petitioner charges its client separately for the bid set. Petitioner's charges to its clients for bid sets are its cost of having the bid sets printed.

Based on the facts in this Opinion, Petitioner is considered to be making sales to its clients of tangible personal property in the form of printed matter that are separate from its sales of architectural and engineering services. Accordingly, Petitioner is a vendor of tangible personal property for sales tax purposes. See section 1101(b)(8) of the Tax Law. Petitioner's sales of such tangible personal property are subject to the sales tax imposed by section 1105(a) of the Tax Law, unless otherwise exempt.

Petitioner is required to collect sales tax from its client on sales of the bid set unless the client qualifies as an exempt organization or governmental entity under section 1116(a) of the Tax Law. Where Petitioner's client is an exempt governmental entity, a copy of the signed contract with such entity received by Petitioner within 90 days of delivery of the bid set will be sufficient to relieve Petitioner of the burden of proving the exempt status of the sale of the bid set. See sections 529.2(b)(2), 529.3(b)(2) and 541.3(d)(2)(v) of the Sales and Use Tax Regulations. If Petitioner's client is an exempt organization other than a governmental entity, a properly completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1) received by Petitioner within 90 days of delivery of the bid set will be sufficient to relieve Petitioner of the burden of proving the exempt status of the sale of the bid set. See section 1132(c)(1) of the Tax Law. If Petitioner's client is not otherwise exempt from sales tax, Petitioner is required to collect the sales tax on the charges shown on its bill, invoice or contract for the bid set. The sales tax must be stated, charged and shown separately on the first of such documents given to the client. See section 1132(a)(1) of the Tax Law and section 532.1(b) of the Sales and Use Tax Regulations.

Since Petitioner is making sales of bid sets to its clients, Petitioner may purchase the bid sets without the payment of sales tax as purchases for resale. Petitioner should provide the printer of the bid sets with a properly completed *Resale Certificate* (Form ST-120) within 90 days of the delivery of the bid sets in order to relieve the printer of the burden of proving the exempt status of the sale of the bid sets. See section 1101(b)(4)(i) of the Tax Law and section 526.6(c) of the Sales and Use Tax Regulations. If Petitioner has paid tax on its purchase of bid sets purchased for resale, it may claim a credit or refund on its periodic sales tax return for such sales tax paid. Such credit or refund must be claimed within three years of the due date of the

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sales tax return on which the tax was paid or payable by the printer of the bid sets. See section 1139(a) of the Tax Law.

DATED: December 5, 2005

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