

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

TSB-A-06(32)S
Sales Tax
December 29, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050427A

On April 27, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Doyle Partners, 1123 Broadway, Suite 600, New York, NY 10010. Petitioner, Doyle Partners, provided additional information pertaining to the Petition on May 18, 2005.

The issue raised by Petitioner is whether its charges for graphic designs and design services are subject to sales tax.

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

Petitioner enters into a contract with a client (Company X) for on-going graphic design services. These services include the design and development of ideas regarding Company X's identity, branding and merchandising. Petitioner is not granting reproduction rights or selling a license to reproduce, rather the end products of Petitioner's design services are fully transferred and Company X acquires full ownership. Company X does not qualify as an exempt organization and is located in New York State. The final design is only delivered to Company X electronically.

Some of Petitioner's other clients are given their final designs on disks. In some instances when Petitioner is designing a client's company logo, the client may request that Petitioner also electronically send the logo to an outside vendor or that Petitioner have the logo imprinted on stationery by an outside vendor. In these instances, the completed products from the outside vendor (e.g., the imprinted stationery) are directly shipped and billed by the outside vendor to the client.

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . without any deduction for expenses or early payment discounts and also including any charges by the vendor to the

purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party. . . .

(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, . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), 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.

(6) Tangible personal property. Corporeal personal property of any nature....

Section 1105(a) of the Tax Law imposes a tax on “The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

Section 1105(c)(2) of the Tax Law imposes a tax on the receipts from every sale, except for resale of the following services:

Producing, 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 services are performed.

Section 526.5(e) of the Sales and Use Tax Regulations provides:

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Section 526.7(e)(1) of the Sales and Use Tax Regulations provides:

Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

Section 526.8(a) of the Sales and Use Tax Regulations provides, in part:

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, . . .

Opinion

Petitioner enters into a contract with Company X for graphic design services. Company X receives the final design electronically. Some of Petitioner's other clients receive their final designs on disks. It is presumed, for purposes of this Opinion, that Company X and Petitioner's other clients acquire full ownership of the final design.

When Petitioner's final design is delivered to Company X or a designated outside vendor electronically, Petitioner's charges to Company X are for the sale of intangible property. Therefore, Petitioner's charges pursuant to its contract with Company X are not subject to sales tax. See *Debra Horn Stachura*, Adv Op Comm T&F, November 22, 2004, TSB-A-04(26)S; *Universal Music Group*, Adv Op Comm T&F, April 18, 2001, TSB-A-01(15)S; *Martin R. Timm*, Adv Op Comm T&F, September 27, 2005, TSB-A-05(34)S.

When Petitioner's final design is delivered to a client or a designated outside vendor on a computer disk, Petitioner is selling tangible personal property and Petitioner's charges to the client, including design costs and reimbursable expenses regardless of whether or not such items are separately stated, are subject to sales tax under section 1105(a) of the Tax Law, unless the purchase of the tangible personal property is otherwise exempt. See *Matter of Zagoren Group*, Dec Tax App Trib, May 19, 1994, DTA No. 808189; *Gentile, Wiener, Pena & Co. CPA's PC*, Adv Op Comm T&F, December 27, 1996, TSB-A-96(91)S; section 1101(b)(3) of the Tax Law; and sections 526.5(e) and 526.8(a) of the Sales and Use Tax Regulations. Petitioner is required to collect the applicable sales tax at the rate in effect at the place of delivery of such property to Petitioner's client or designated outside vendor. See section 526.7(e)(1) of the Sales and Use Tax Regulations. Petitioner is not required to collect sales tax if the disk is delivered outside New York for use outside New York.

Petitioner may also be required by the client to provide logos electronically to a printer to imprint the logo on stationery. Petitioner's receipts from the sale of the logo delivered electronically to the client or the client's designee (the outside vendor performing printing services or selling tangible personal property) are not subject to sales tax. If however, Petitioner has been contracted to provide its client with printed material (stationery furnished by Petitioner) or printing services (performed on stationery furnished by the client), Petitioner's receipts from such sales (whether performed by Petitioner or subcontracted to an outside vendor) are subject to

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tax under section 1105(a) or 1105(c)(2) of the Tax Law if the stationery or property upon which the printing and imprinting services are performed is delivered to the client in New York State. To the extent Petitioner was contracted by the client to create the logo separate from the contract to provide the printed material or printing services, the separate charges for the sale of the logo may be excluded from the taxable receipts, provided the logo is delivered electronically and the charge for the logo is reasonable in relation to its value. But if Petitioner was contracted to provide the imprinted stationery to the client without a separate contract for the creation of and sale to the client of the logo used by Petitioner in producing the imprinted stationery or in providing the printing service (notwithstanding that Petitioner may have subcontracted all or some part of such services), the entire charge to the client for the property or services delivered in New York would be taxable.

DATED: December 29, 2006

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