

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(22)S
Sales Tax
May 2, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060322A

On March 22, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Google Inc., 1600 Amphitheatre Parkway, Building #47, Mountain View, California 94043. Petitioner, Google Inc., furnished additional information with respect to the Petition on May 5, 2006, and March 5, 2007.

The issue raised by Petitioner is whether the sale of a video delivered electronically over the Internet is subject to sales and use tax.

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

Petitioner provides various services over the Internet, including providing access to videos from a variety of content providers delivered over the Internet. The content provider for the video will either establish a fee for the video or the video may be provided free. Customers using this service must have access to the Internet but do not need any special or additional software. Customers go to Petitioner's Web site and use one of the following methods to select a video:

- **Download Video to PC, Connected:** A customer may choose a video to be downloaded to a computer (PC) or other device to be viewed while connected to the Internet. In this case, the content provider requires the customer to be connected to the Internet to watch the downloaded video to enable digital rights management (DRM) which is a method the content owner uses to protect the contents of the video from being pirated. When a customer purchases a video, the customer pays the fee at Petitioner's checkout service and may then download the video to a computer or other device. Each time the customer watches the video, he or she must connect to the Internet where Petitioner verifies the customer's identity and enables the customer to watch the video. Although the customer remains connected to the Internet while viewing the downloaded video, the customer still has the ability to choose when and how many times to view the video, and the customer has options available such as fast forwarding, rewinding, and pausing the video. Generally, for a customer to view a free video, the computer does not need to be connected to the Internet, but there are some exceptions.
- **Download Video to PC, Disconnected:** A customer may choose a video to be downloaded to a computer (PC) or other device to be viewed offline. When the customer purchases a video, the customer pays the fee at Petitioner's checkout service

and may then download the video to his or her computer or other device. The customer may then watch the video at any time without being connected to the Internet.

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, . . .

* * *

(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. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. . . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, 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.

* * *

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. . . .

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner. . . .

Section 1110 of the Tax Law provides, in part:

Imposition of compensating use tax. (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, . . .

part: Publication 28 (5/05) *A Guide To Sales Tax for the Film Industry*, , at p. 11, provides, in

Sale of a film

Unless otherwise exempt, sales and use taxes are imposed on the **total selling price** of a film. The vendor selling the film is responsible for collecting sales tax based on the rate of tax in effect in the taxing jurisdiction where the film or tape is delivered. There is no New York sales and use tax imposed on the outright sale of a film when the

film is delivered out of state. A film is deemed to be delivered where the original negative is delivered.

* * *

It should be noted, however, sales tax is not imposed on the outright sale of a film or the granting of a license to exhibit or use the film to a distributor or broadcaster, when the film is delivered electronically or digitally, whether such delivery takes place within or without New York State.

Opinion

Petitioner provides various services through its Web site, including access to videos. After a customer pays the requisite fee, if any, for a video, the customer downloads the video from Petitioner's Web site to a computer (PC) or other device. Customers do not need any special or additional software to watch the video.

Generally, unless there is an exempt use, the sale of a film in tangible form is subject to sales tax. However, sales tax is not imposed on the sale of a film to a distributor or broadcaster when the film is delivered electronically or digitally, whether such delivery takes place within or without New York State. See Publication 28, *supra*.

While receipts from the sale of prewritten software delivered electronically are subject to sales tax pursuant to sections 1101(b)(6) and 1105(a) of the Tax Law, sales of music and photographs delivered electronically are not considered to be sales of software. In the same way that audio content (music) and visual content (photographs) delivered electronically are intangible property not subject to sales tax, receipts from the sale of videos delivered to customers electronically via the Internet and downloaded to the customer's computer or other device are receipts from the sale of intangibles and are not subject to sales or compensating use tax under section 1105(a) or 1110(a)(A) of the Tax Law. (See *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)

Information and entertainment services delivered via telephony and telegraphy are subject to sales tax pursuant to section 1105(c)(1) or 1105(c)(9) of the Tax Law. However, the electronic download of a video file via the Internet to the customer's computer or other device, as described in this Opinion, does not constitute the provision of a taxable information service or entertainment service within the meaning and intent of section 1105(c)(1) or 1105(c)(9) of the Tax Law.

It should be noted that under the facts of this case a customer may be required to connect to the Internet to watch a downloaded video, to enable digital rights management. Although the

customer remains connected to the Internet while viewing the video, the video is downloaded to a computer (PC) or other device and the customer still has the ability to choose when and how often to view the video. The customer also has viewing options available, such as fast forwarding, rewinding, and pausing the video. If the facts concerning the customer connection to the Internet while watching a video were different, the conclusions in the Opinion might not apply.

DATED: May 2, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.