

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(56)S
Sales Tax
December 7, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090602A

Petitioner [REDACTED], requested an advisory opinion as to whether its receipts from the sale of its photographs in either tangible or electronic form and the purchases of property and services used in creating the photographs are subject to sales tax.

We conclude that Petitioner's receipts from the sale of photographs in tangible format are subject to the sales tax if delivered in New York. The purchase of equipment used directly and predominantly in the production of those photographs, in tangible format, as well as certain supply items, may be eligible for exemption from the sales tax. The receipts from the sale of the photographs delivered electronically are not subject to the sales tax. However, purchases of the equipment and supplies used in the production of the electronically delivered photographs are subject to tax.

Facts

Petitioner is hired by clients to assemble all the personnel, property and services required to produce a complete photo shoot requested by the client. Petitioner pays all the bills and collects the money from the customer. Petitioner hires and pays all the talent (models, producer, casting director, photographer, etc.) and assistants (prop stylist, wardrobe stylist, hair stylist, makeup artist, etc.). Petitioner pays for all the costs (props, catering, location rental, equipment rentals, studio, subway, bus, airfare, insurance, etc.). It asks whether its fees and expenses are subject to sales tax.

Petitioner presented a sample invoice for a hypothetical sale. The invoice reflects that a photograph is being produced for a client. The invoice reflects that the client is authorized to use the photograph in direct mail, catalog, and newspaper advertising for a period of 1 year.

The sample invoice reflects costs and expenses of the photo shoot for:

- photographer
- photo assistants – prep/shoot/wrap (billed at \$x a day)
- Polaroid film
- equipment rentals (billed at \$xx per day)
- studio (daily rental)
- talent/models
- casting director
- film and processing (may be purchased by the photographer)
- set materials (some of the materials may be purchased by the photographer)
- location scout
- location rental fees
- permits, parking, traffic cones
- mobile home for crew
- catering – delivery, setup, wrap
- subway, taxi, bus
- airfare

- hotel lodging
- prop stylist -setup/shoot/wrap (daily fees)
- prop assistant - setup/shoot/wrap (daily fees)
- prop rentals (may be initially purchased by the prop assistant)
- prop purchases (client retains after the shoot)
- wig purchase (may be initially purchased by the hair stylist)
- hair stylist (daily fees + a commission charge)
- make-up artist (daily fees + a commission charge)
- wardrobe stylist - setup/shoot/wrap (daily fees + a commission charge)
- wardrobe assistant - setup/shoot/wrap (daily fees)
- wardrobe / accessories rental (may be initially purchased by the wardrobe stylist)
- producer
- insurance
- shipping
- Fed Ex
- messengers
- production fee

Petitioner's sample invoice includes a subtotal for "fees and production costs" and identifies a "taxable portion" of the subtotal to which Petitioner adds "Sales Tax." Petitioner then totals the Estimated Costs (subtotal fees and production costs + taxable portion subtotal+ sales tax) to arrive at its charges to its customer.

Under a heading of "Terms" the invoice provides that: "Ownership and title of all photographs remain with the photographer at all times, any transfer of possession is temporary and granted for purposes of reproduction only...."

The "shipping" and "Fed Ex" costs reflected on the invoice represent charges made to Petitioner for delivery of equipment and props to Petitioner and charges for delivery of items that Petitioner sends to its customers (e.g., photos taken of models at a casting call that are sent to the client for a decision/approval as to whom to hire for use in the photo shoot).

The photo shoot may occur within or outside New York. The completed photographs may be delivered within or outside New York. The photographs may be delivered in tangible form or may be delivered electronically. Petitioner's clients may make a claim of an exempt purchase and may present exemption documents to Petitioner or the client may be an exempt organization.

Petitioner asks whether the tax status of its sales, purchases, and costs is affected by the following factors: (1) the location of the photo shoot, (2) the delivery location for the photographs, (3) whether the photograph is delivered electronically or in tangible format, or (4) whether the customer is an exempt organization or claims an exempt purchase.

Analysis

The Tax Law imposes sales tax on sales, unless for resale or otherwise exempt, of tangible personal property and certain enumerated services (Tax Law section 1105). Generally, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the

purchaser's designee, controls both the tax incidence and the tax rate. See section 525.2(a)(3) of the Sales and Use Tax Regulations.

Petitioner's sales of photographs

Petitioner's sample invoice reflects that a photograph is being produced for a customer. Likewise, Petitioner's charge to the customer for the production fee appears to be a charge to the customer for the production and sale of the photograph.

The sale of a photograph provided and delivered electronically is not considered to be a sale of tangible personal property, and the receipts from that sale are not subject to the sales tax. (*See Martin R. Timm*, Adv Op Comm T&F, September 27, 2005, TSB-A-05(34)S; *Google Inc*, Adv Op Comm T&F, May 2, 2008, TSB-A-08(22)S.) The sale of a photograph provided and delivered in tangible format (including by disc, photocard, tape, flash drive, etc) is considered a sale of tangible personal property the receipts of which are subject to sales tax when the photograph is delivered within New York State. The sale of a photograph in tangible format will not be taxable if the photograph is delivered outside New York. The location of the photo shoot does not affect the tax status of Petitioner's sales of photographs.

Transfers of original photographs or other artwork may be deemed to be nontaxable licenses to reproduce when there is a temporary transfer of a piece of art or photograph for use as background in the advertisements, catalogues, etc. to be created or for purposes of taking measurements to make a copy, etc., and the payment made for the license to reproduce is in the nature of a royalty under the laws relating to artistic and literary property. (*See* section 526.7(f) of the Sales and Use Tax Regulations.) However, in the present case, Petitioner's customers have hired Petitioner to create photographs the customer expects to incorporate in the customer's catalogues, newspaper advertisements, etc. The customers are not limited in the amount of use they may make of the photograph (other than the 1 year limitation) and Petitioner receives no royalty or other payment based on the amount of usage of the photograph. The fees paid appear to remain the same whether the photographs are used in 1,000 or 1,000,000 catalogues or are published in media with a circulation of 1,000 or 1,000,000. The fact that Petitioner and/ or the photographer has retained certain rights in the photograph or limited the use of the photograph by the customer for reproduction purposes only is of no account. *See Stock Market Photo Agency Inc.*, Adv Op Comm Tx & Fin, November 12,1999, TSB-A-99(48)S. Based on the facts in this Opinion, we do not see Petitioner's transactions as being other than a contract for the production and sale of the photograph (whether delivered in tangible or electronic format).

The customers' purchases of photographs delivered in New York in tangible format for use in making catalogues or other printed promotional materials may qualify for exemption pursuant to section 1115(n)(7) of the Tax Law. *See Summary of Recently Enacted Sales and Use Tax Legislation*, February 8, 2001, TSB-M-01(4)S. Photographs used for production of the customer's ads in newspapers and periodicals may be eligible for the production exemption under section 1115(a)(12). (*See Printing Industry*, May 15,1980, TSB-M-79(7.1)S.)

Petitioner's sales of photographs to an organization or governmental entity exempt from sales tax pursuant to section 1116(a) of the Tax Law are not taxable. Petitioner need not collect sales tax on these sales. In lieu of collecting the sales tax from such customers, Petitioner should obtain a properly completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1), or, in the case of a governmental entity, a copy of a governmental purchase order or a contract signed by an authorized governmental representative to substantiate the exempt nature of the transaction. *See* Parts 529 and 533 of the Sales and Use Tax Regulations.

Petitioner's purchases/costs

When the photograph is sold in tangible format, the exemptions provided in Tax Law sections 1105-B and 1115(a)(12) for machinery, equipment, parts, tools and supplies purchased for use directly and predominantly in the production of tangible personal property (the photograph) for sale and for services to that machinery, equipment, etc. may be applicable to certain of Petitioner's purchases. The production exemptions do not apply with respect to purchases used directly and predominantly in the production and sale of a photograph which is delivered electronically because there is no sale of tangible personal property in such circumstance (i.e., the machinery, equipment, etc. in that circumstance has not been used in the production of tangible personal property for sale).

There is an exemption from sales tax for Petitioner's purchases of machinery, equipment, and parts, tools and supplies used and consumed directly and predominantly (more than 50% use) in the production of photographs for sale in tangible format. In this context, the purchases or rentals of set materials, props, wigs, and wardrobe and accessories are eligible for the exemptions provided in sections 1105-B and 1115(a)(12) of the Tax Law. Likewise, to the extent equipment such as cameras, lights, booms, etc. is used or consumed directly and predominantly in the production of the photograph for sale in tangible format, the rentals of the equipment would also be exempt from sales tax. Equipment not directly used in production (e.g., leased vehicles used to transport people to and from the shoot location) would be taxable.

The tax status of certain of Petitioner's expenses is not affected by whether the photograph produced is delivered in tangible or electronic format:

- Permits, parking, and traffic cones – Fees for required municipal permits are generally not subject to sales tax. Purchases of taxable parking services will be subject to tax regardless of the delivery method for the photographs. Traffic cones (assuming they are not being used as a prop) are subject to tax as purchases of tangible personal property or, as applicable, protective services. *See* Tax Law §1105(c)(8).
- Catering – Catering services, including charges for delivery, setup, cleanup, wrap, etc., are subject to sales tax under Tax Law §1105(d).
- Hotel lodging – Charges for occupancy provided at hotels within the State are subject to the State and local sales tax on occupancy and may also be subject to additional local taxes, where applicable. *See* Tax Law §1105(e).
- Airfare, subway, taxi, and bus fares– Subway and bus fares and airfare are generally considered purchases of transportation services, which are not subject to tax. However, livery services provided by limousine, black car, and certain other motor vehicles, with a driver, are subject to sales tax. *See* Tax Law § 1105(c)(10) and *Sales Tax Imposed on Certain Transportation Services*, May 6, 2009, TSB-M-09(2)S; *Additional Guidance Relating to the Sales Tax Imposed on Certain Transportation Services*, May 22, 2009, TSB-M-09(7)S. In addition, there is a tax of 50 cents for each medallion taxi cab ride that originates and terminates within the Metropolitan Commuter Transportation District. This tax is imposed on the cab owner, but the economic incidence of the tax is required to be passed through to the passenger as part of the fare. *See* Tax Law Article 29-A; *Tax on Medallion Taxicab Rides in the Metropolitan Commuter Transportation District*, October 1, 2009, TSB-M-09(9)M.
- Insurance – Fees paid for the purchase of insurance contracts are not subject to tax. However, the reimbursement of a lessor's or service provider's insurance expenses as an added cost of the rental of equipment (and other tangible personal property) or as an added cost of the purchase of the services is a part of the receipt for such rental/services and will be considered included in the receipt subject to tax if the rental/service is otherwise taxable.

- Shipping, FedEx, messengers – Charges for the purchase of shipping and transportation services (shipping, FedEx, messenger service) are generally not subject to sales tax. Thus, Petitioner's purchase of, for example, FedEx or a messenger service to deliver photos of models to a customer is not a purchase of a service subject to tax. However, the charge for shipping and delivering taxable tangible personal property or services is considered part of the receipt for the purchase of such goods and services and taxed as part of that receipt. Thus, delivery charges for Petitioner's purchase of taxable property or services are part of the receipt upon which tax is to be charged and collected. Petitioner's total charge to its customers for sales of taxable tangible personal property, including Petitioner's cost for the transportation/delivery of the property to the customer (whether these costs are separately stated and charged or merely included within the amount of the receipt), is the taxable receipt upon which tax is computed.
- Trailers, motorhomes, etc. – Rentals of trailers, portable dressing rooms, motorhomes, etc. for use by the crew are subject to sales tax.
- Location rental fees, studio fees – Fees for the rental, lease, license to use, etc. of real property and land are not subject to sales tax. Studio rentals may, depending on the equipment provided in conjunction with the rental (and depending on whether Petitioner as lessee has dominion and control of the equipment), constitute a rental of equipment (separately stated operator's fees might be excludable from the taxable receipt) or a purchase of a service. (See *A Guide to Sales Tax for the Film Industry*, Publication 28 (10/98), and *Sigma Sound Studios*, Adv Op Comm Tx & Fin, October 1, 1987, TSB-A-87(39)S.)

The fees paid by Petitioner for talent/models are not subject to sales tax. Similarly, assuming the fees paid by Petitioner are for labor and not otherwise in conjunction with the sale of taxable tangible personal property or services by the individuals, the fees paid by Petitioner to the photographer's assistant, casting director, location scout, and producer are not subject to sales tax. If the services of the make-up artist, wardrobe stylist and assistant, and prop stylist and assistant are separately available apart from the tangible personal property sold by them and the charges for such services and property are reasonable in relation to their respective value and separately stated on their invoice to Petitioner, generally the receipts for the tangible personal property are taxable (unless the production exemption applies as discussed above) and the charges to Petitioner for the services are not taxable. However, make-up artists' and hair stylists' services are subject to the tax on beauty and barbering services when performed in the city of New York. See *J.P. Molyneux Studio Ltd.*, Adv Op Comm T & F, May 22, 1996, TSB-A-96(31)S; *Lewis Van Arnam*, Adv Op Comm T & F, December 29, 2006, TSB-A-06(33)S.

With respect to the fees paid by Petitioner to the photographer, to the extent the fee relates solely to the photographer's labor and is not otherwise in conjunction with the sale of tangible personal property by the photographer to Petitioner, the fee is not subject to sales tax. However, Petitioner indicates that the photographer may purchase some of the set materials and the film and film processing. Thus, though being paid an hourly/daily rate, it appears that the photographer may be producing and selling the actual photograph to Petitioner and/or Petitioner's customer. Petitioner's sample invoice to customers provides further support for this conclusion, since the invoice reserves rights in the photograph to the photographer rather than to Petitioner as seller. To the extent that Petitioner is purchasing tangible personal property (i.e., the photograph with any *use* restrictions that might be imposed) from the photographer, the purchase would be exempt from tax as a purchase for resale, since Petitioner is selling that same tangible personal property to its customer. If the photographer is selling an *electronically* delivered photograph to Petitioner, the fee paid by Petitioner for that photograph is likewise not subject to tax.

Whether the photograph sold by Petitioner to its customer is delivered inside or outside New York and whether the location of the photo shoot is within or outside New York will not affect the tax status of the

property and services purchased by Petitioner. The tax status of Petitioner's purchases will be determined by whether the property or services purchased are delivered to or used by Petitioner in New York. Thus, purchases of beauty and barbering services in New York City and of parking services or hotel occupancy within the State will be taxable to Petitioner regardless of whether the photograph is delivered inside or outside the State and whether delivered electronically or in tangible form. Conversely, purchases of these services or hotel occupancy outside of New York are not subject to tax.

Petitioner's purchases may be eligible for the exemptions for machinery, equipment, parts, etc. used and consumed directly and predominantly in production when the photograph is sold in tangible form (or may be eligible for the resale exclusion with respect to the purchase of the tangible photograph itself) notwithstanding that the charge for the sale of the photograph to the customer is not subject to New York State sales and use tax because the photograph is delivered to the customer outside the State.

All expenses incurred by Petitioner in producing the photograph that are passed through to the customer (whether or not separately itemized on the receipt) are included in the taxable receipts from the sale. *See* Tax Law §1101(b)(3) and 20 NYCRR 526.5(e). The cost of items (equipment rentals, props, set materials, wardrobe, motor home, etc.), services (catering, stylists, hotel lodging, etc.) and other expenses (models, subway, taxi, airfare, shipping, messenger, etc.) used and consumed by a Petitioner in producing the photographs, as well as the applicable sales tax paid by the Petitioner on its purchases of these items, are expenses incurred by it in its production of the photograph for sale. Since all these expenses are passed through to the customer, the expenses are included in the *receipt* for the sale. If the sale of the photograph is subject to tax, it is upon this total receipt (i.e., the sum total of all the expenses including tax paid and accrued in respect of those expenses) that tax is computed. If the receipt for the purchase of the photograph is ultimately not subject to tax (e.g., if the photograph is delivered electronically in or outside the State, or delivered to the customer outside the State in tangible form), Petitioner would still be required to pay sales tax on its purchase of taxable property and services used and consumed by it in the production of the photograph, and Petitioner's costs for the property and services, including the tax, would be passed along to the customer. *See* TSB-A-09(42)S, Adv Op Comm Tx & Fin, September 22, 2009.

DATED: December 7, 2009

/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.