

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner inquires whether receipts from its sales of certain graphic design services are subject to New York State and local sales taxes based on three factual scenarios.

We conclude that Petitioner's receipts from the sales of comps, designs and/or prototypes delivered in tangible form to customers within New York State, including its design costs and other expenses, are subject to New York State and local sales taxes, regardless of whether those charges are separately stated, unless the sales of the tangible personal property are otherwise exempt. Petitioner's sales receipts are not subject to New York State and local sales taxes if the designs, comps or prototypes are delivered to customers outside of New York State or if they are delivered in electronic form to customers within New York State.

Facts

Petitioner offers graphic arts packaging, including packaging solutions, press runs, and sample packaging designs for retailers. These services include taking the customer through various stages of design for its products, from developing design concepts and artwork mechanicals to providing prototypes or comprehensive layouts, referred to as "comps." The end product is delivered in tangible or electronic format. As part of its petition, Petitioner submitted copies of several invoices that do not show separately stated charges for the tangible personal property and/or services provided to its customers.

Scenario 1: Sale of Packaging Design Services and Electronic Delivery of the Final Product

In this scenario, Petitioner works with its customers to design and produce product packaging designs or comps. During this process, Petitioner works with its customers to review and change various versions of illustrations, artwork or mechanicals. Petitioner provides the customers with these comps for review. After the comps are inspected by the customers, they are typically discarded. The customer is not charged for the preliminary comps as they are not finalized and the customer cannot use them for any purpose. When the comp is accepted by the customer, Petitioner transfers the final comp and specifications electronically to the customer or to a customer-specified printer.

Scenario 2: Sale of Comps or Prototypes

In this scenario, the Petitioner may sell the comps once the designs are complete. The finalized comps are typically used by the customer for promotional or advertising events, e.g., sale shows, vendor meetings or conferences. Petitioner offers customers a wide range of deliverables for this purpose, ranging from multi-colored silkscreened production ready comps to simple printed prototypes for demonstration purposes only. Petitioner maintains that charges for these comps or prototypes are separately stated.

Scenario 3: Sale of Packaging Design Services when the Final Product is not Determinable

In this scenario, Petitioner is hired by its customers to create and develop design concepts, including prototypes and comps where the final product is not yet determined. Comps may be developed and a final design could be transmitted electronically, but under this scenario the customer decides to abandon the project. Petitioner maintains that charges for the production of comps or prototypes prepared and provided to the customer are separately stated on the invoice apart from the charges for artwork and/or illustration design.

Analysis

Tax Law § 1105 imposes tax on all sales of tangible personal property, unless otherwise exempt, and on certain enumerated services. *See* Tax Law § 1105. The receipts from the sale of comps delivered in tangible form by Petitioner to its customers in New York State are subject to tax because they are sales of tangible personal property. The design services used to create tangible personal property are an integral component of the sale of such tangible personal property. *See Penfold v. State Tax Comm'n*, 114 AD2d 696 (3d Dep't 1985); *see also* Tax Law § 1132(c); 20 NYCRR 527.1. Thus, Petitioner's entire charge to its customers for the comps delivered in tangible form within the State, including its design costs and other expenses, constitutes the receipt subject to sales tax, regardless of whether those charges are separately stated, unless the purchase of the tangible personal property is otherwise exempt. *See* Tax Law § 1101(b)(3); 20 NYCRR 526.5(e); *See also Matter of Zagoren Group Inc.*, DTA Nos. 808189, 808190 (May 19, 1994); 20 NYCRR 526.8(a); *Marschallin + Sachs, Inc.*, TSB-A-09(20)S; *Doyle Partners*, TSB-A-06(32)S. Thus, under scenarios 2 and 3 Petitioner is required to collect the applicable sales tax at the State and local rates in effect at the place where Petitioner delivers the tangible personal property to its customer or its designee. *See* 20 NYCRR 526.7(e)(1).

Petitioner is not required to collect New York State and local sales taxes if the tangible personal property is delivered outside of New York. Similarly, Petitioner is not required to collect New York State and local sales taxes on comps delivered in electronic format to its customer or their designees, as described in scenario 1, regardless of whether the delivery is in New York State or outside of the State. In that case, Petitioner's charges for comps provided in non-tangible form are not subject to New York State and local sales taxes. *See Apple Computer Inc.*, TSB-A-07(11)S; *Marschallin + Sachs, Inc.*, TSB-A-09(20)S; *Doyle Partners*, TSB-A-06(32)S; *Universal Music Group*, TSB-A-01(15)S.

If Petitioner delivers the comps to a customer or designated vendor electronically, but later delivers a tangible copy of the comp for a separately stated charge, the separately stated charge for the tangible copy is subject to tax, unless another exemption applies. The separate offering of a tangible copy will not cause the entire charge to be subject to tax, provided that the charge for the tangible copy is separately stated and reasonable in relation to the overall charge. *See Tax Law § 1132(c); 20 NYCRR 527.1.*

DATED: May 26, 2020

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.