

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-97(43)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961101B

On November 1, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from K2 Design Incorporated, c/o Ratafia & Co., CPA's, PC, 440 Park Avenue South, New York, New York 10016. Petitioner, K2 Design Incorporated, provided additional information pertaining to the Petition on January 7, 1997.

The issues raised by Petitioner concern the applicability of sales and compensating use taxes to its "Web Site Development" and certain peripheral services.

Petitioner submitted the following facts as the basis for this Advisory Opinion. Petitioner also provided Web addresses (URL's) as examples of the Web sites and networks at issue.

Petitioner's business focuses on the creation and design of Web sites for commercial organizations for placement on that part of the Internet known as the World Wide Web. Web sites are increasingly being used as a new medium for advertisement, promotion and technical support of organizations' products and services. Web sites can provide commercial organizations with benefits in addition to those available through conventional media, including the ability to engage and entertain consumers, provide in-depth information, reduce selling and operating costs, expand distribution channels, promote major sporting and entertainment events, monitor popularity of content and make timely changes in response to real-time feedback. Web sites also offer businesses the ability to obtain certain information about visitors to their sites.

Petitioner categorizes itself as an "Interactive Advertising Agency." In addition to the creation and design of Web sites, Petitioner is also engaged in a variety of peripheral services. Petitioner's clients may purchase any of the following services separately.

Web Site Development

Web site development is the creation of a Web site, from start to finish, for a particular client. Each Web site varies in complexity and can contain from one to hundreds of Web pages. The client is billed for this service on an hourly or project basis, plus reimbursables such as photocopying, messengers, etc.

Creation of the Web site takes place in two stages: (1) designing the appearance of the Web site, and (2) computer programming to allow the site to work on-line. Designing the appearance of a Web site encompasses creating the visual appearance/image of the site including text, colors, logos, etc. It also includes audio for the site. Once this is completed, the site must be programmed so it can be accessed and used on the World Wide Web.

After the Web site is designed and programmed, it is ready to "go live." That is, the site is reviewed by the client and made accessible to the world by Petitioner directly placing it on a third party server of the client's choice (e.g., a computer that stores information for access by users of the World Wide Web). Petitioner does not give the client a disk of its completed work, rather the Web site goes directly on-line. Nor does Petitioner maintain servers or host Web sites for fees.

As part of Petitioner's "Web Site Development," Petitioner also performs traditional advertising and promotional services for the client in order to create awareness of the Web site in the marketplace. These services are essentially the same as those described below under "Media Placement Services," but are performed for Web sites that Petitioner creates for particular clients.

Media Placement Services

Petitioner's "Net Media" sales division performs traditional advertising services for commercial organizations. In general, Petitioner analyzes a client's needs and the market upon which the client wishes to focus. Petitioner then creates an advertising campaign that is within the client's budget. Petitioner uses all forms of media, including print, television, radio and the World Wide Web. Petitioner charges the client an hourly fee for the strategic design of the advertising campaign, plus a commission for its media placement services. Petitioner does not sell any tangible personal property to its clients as part of these services.

Web Site Networks

Petitioner's "Cliqnow" division develops Web site networks for specific industries. A Web site network is one site that has individually selected Web sites linked to it. These sites have a common quality that appeals to certain advertisers. Petitioner represents these sites (collectively the network) to advertisers and sells advertising space on each site. That is, Petitioner finds individual businesses that already have Web sites in a particular industry and encourages them to become members of a given network. These businesses do not pay Petitioner to become members nor does Petitioner maintain any of the businesses' sites. Petitioner then locates advertisers who would like to advertise on the Web sites that make up this network. Petitioner collects 100% of the advertising fees and remits 50% of these fees to the individual members who carry the ads on their Web sites. The advertisements take many forms from text links to banners.

For example, a small golfing company with its own Web site may be trying to sell golfing attire. The company decides to join the "Golf Network" developed by Petitioner. Petitioner then attracts a high-end automobile manufacturer to advertise on the Web sites that make up the "Golf Network." The manufacturer wants to advertise to a high income audience and determines that the golfing industry is such an audience. It pays Petitioner all advertising fees. Petitioner then remits 50% of the advertising fees to the Web site members, including the small golfing company, that carried this ad.

Consulting Services

Petitioner offers consulting services for commercial organizations that desire detailed information about visitors to Web sites. This is commonly known as "tracking." This information is generally requested when a client is trying to analyze the marketplace for, among other things, demographics of those who visit its site. Information is given to the client in many forms (e.g., in person, via the telephone, written, on-line, etc.) and varies in complexity depending upon the individual client. Petitioner's consulting services are charged at hourly rates per professional consultant.

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:

* * *

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

* * *

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1105(a) of the Tax Law imposes sales tax upon receipts from the retail sales of tangible personal property in New York, except as otherwise provided in the Tax Law. Subdivision (c) of Section 1105 imposes sales tax upon receipts from the sales, except sales for resale, of certain enumerated services. Section 1110(a) of the Tax Law imposes compensating use tax, in part, on the use within this State of tangible personal property purchased at retail and certain enumerated services, except to the extent that the property or service has already been or will be subject to the sales tax.

Opinion

The "Web Site Development" service that is provided by Petitioner to its clients, which involves designing, computer programming and placing of Web sites on the World Wide Web, is not included among the enumerated services that are subject to New York State and local sales and compensating use taxes. This is so, regardless of whether the Web sites are created for purposes of advertising or promoting the products and services of commercial organizations or are created for other purposes, such as engaging and entertaining consumers or providing in-depth information. (See, Ski Soft, Inc., Adv Op Comm T&F, June 25, 1997, TSB-A-97(35)S.) In addition, each of the Web sites at issue is created "from start to finish" for a particular client of the Petitioner and is therefore distinguishable from "pre-written computer software" and "tangible personal property" as defined in Sections 1101(b)(6) and (14) of the Tax Law. Accordingly, Petitioner's receipts from the sale of its "Web Site Development" service are not subject to sales and compensating use taxes.

The services of advertising are excluded from tax. Petitioner has indicated that it performs traditional advertising services for commercial organizations and that it does not sell any tangible personal property to its clients as part of these services. Because traditional advertising services include a range of transactions between advertisers and their clients, it is necessary to analyze and evaluate the facts and circumstances of each transaction in order to determine its taxable status. (See, Hudson Sheraton Corporation, Tax App Trib, September 29, 1988, TSB-D-88(27)S.) In general, receipts from the sale of Petitioner's "Media Placement Services" and "Web Site Networks" will not be subject to State or local sales and compensating use taxes provided Petitioner does not sell or otherwise transfer any tangible personal property to its clients in conjunction with these activities or perform any services otherwise taxable under Section 1105(c) of the Tax Law in conjunction with these activities. (See, Advertising Agencies, Technical Services Bureau Memorandum, June 10, 1983, TSB-M-83(16)S; Enid Hoffman, Gary Kahn & Co., Adv Op Comm T&F, March 31, 1993, TSB-A-93(23)S; Mike Levy, Adv Op Comm T&F, August 14, 1995, TSB-A-95(33)S.)

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Receipts from the sale of Petitioner's "Consulting Services" that are performed for clients who request detailed information regarding visitors to their own particular Web sites are not subject to State or local sales and compensating use taxes. (See, Paul R. Comeau, Adv Op Comm T&F, March 14, 1990, TSB-A-90(10)S.)

DATED: July 23, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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