

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

TSB-A-97(60)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970425A

On April 25, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Morton L. Coren, P.C., 638 Meadow Court, Westbury, NY 11590-5925.

The issue raised by Petitioner, Morton L. Coren, P.C., is whether the services provided by its client in meeting the visual impact requirements of the New York State Environmental Quality Review Act (hereinafter "NYSEQRA") are subject to State and local sales and use taxes where:

1. Sites are located in New York State and reports are delivered within New York State.
2. Sites are located in New York State and reports are delivered outside of New York State.
3. Sites are located outside of New York State and reports are delivered within New York State.
4. Sites are located outside of New York State and reports are delivered outside of New York State.

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

Petitioner's client (hereinafter "Company A") assists planning board applicants in meeting the visual impact requirements of NYSEQRA and similar laws in other states. Specifically, NYSEQRA requires that the lead environmental review agency determine the "impairment" of any proposed project upon the area's "aesthetic resources." New York State has developed criteria for the initial environmental review, requiring an applicant to supply information as to the project's visibility during various seasons from a wide variety of viewing points, such as State and Federal parks, designated open areas, public roads, and so forth.

Company A's principals have developed the expertise needed to meet the NYSEQRA visual impact requirements. One principal is an attorney who has been admitted to practice law in New York State, and has undergone NYSEQRA review for his own subdivision project. The other principal has been constructing homes and roads (including NYSEQRA review), and has been working with computers for more than 10 years. Both principals have engineering experience developed in the field on their own projects and in consulting on other projects, but are not licensed land surveyors or engineers under the Education Law.

Company A's clients have been primarily, but not exclusively, cellular communications companies. They will usually contact Company A after the particulars of a site have been determined (i.e., feasibility for intended use; feasibility of other sites; contingent lease for the site, etc.). Company A is provided with engineering drawings of the structure and a locator map.

Prior to the commencement of field work, Company A obtains road and topographical maps of the site and surrounding area that are prepared by the U. S. Geological Survey, for a radius of 3 miles. All obvious NYSEQRA points are noted. A pre-fieldwork site visit is made to gain familiarity with the area. Company A's client, its attorneys and engineers, are also consulted for information concerning possible points of visual interest.

Company A arrives at the site and deploys three 3-foot diameter helium weather balloons at a height generally 20% higher than the proposed tower, or structure. One person remains on-site and uses surveying instruments to measure any shift in height and position of the balloons.

The field work consists of traveling down every public road within a 2 ½ (and sometimes as much as 5) mile radius of the site, stopping to photograph the site from a number of predetermined points of potential visual impact. Additional points are added in the field, as the suspended helium balloons are viewed from various locations. Vegetation, site, and map irregularities are considered. Print and slide photographs are taken. The balloons' position is confirmed using radio phones to contact the individual located at the proposed site of the structure.

The film is developed and scanned into a computer. The site and each point is located on a contour map, using position information provided by the consulting engineer. Engineering software is used to create a model of the actual proposed structure, using the dimensions and drawings furnished by the construction engineer.

A computer program is used to photo-realistically render the tower as seen from each of the selected points, maintaining the perspective, the points and the structure as a computer file. The software utilizes this information to reference the tower and point locations, thus maintaining their relative position. Each point, including the structure site, is adjusted for its correct elevation. The software is set at each point's coordinates and photographs of the model tower are prepared on the computer. The coordinates allow the computer to prepare renderings of the tower to its correct scale, and which show its position for each point.

The computer renderings are made to exactly reproduce the appearance of the tower as it will appear. Finally, the photo-realistically rendered tower is inserted into the digitized site photos Company A has taken and converted into digitized photographs.

The output, generally 8"x 10" digitized photos, are then delivered to Company A's client, either mounted on foam board or in dossier format, as a visual aid presentation to the NYSEQRA review agency, along with their report of methodology. Company A's services include attendance at a meeting before the review agency, to make the presentation and answer questions from the agency and the public.

Company A offers a second service that is based, in part, upon the services previously described. It will review topographical and aerial photography maps to note those areas whose views of the balloons may be blocked by either vegetation or by topography, for a 2 ½ mile radius from the site. This information is confirmed in the field by viewing the suspended balloons from all public roads, and wherever other access can be obtained.

This information is then evaluated by the computer. An imaginary line is drawn from the site to a designated point. That line will show any intervening topography. Field notes, used in conjunction with the aerial photos, will indicate whether this line-of-sight is blocked by any intervening trees or similar vegetation. This data is then transposed upon a road map with the site at dead center, and concentric circles radiating from the site indicating 1 mile, 2 mile and 2 ½ mile distances. Contrasting colors are then assigned to indicate those areas on the map whose view of the completed construction would be blocked by vegetation and/or topography.

Company A's client is presented with a poster-sized mounted road map and a more detailed report. Company A's services include attendance at a meeting before the NYSEQRA review agency, to make the presentation and answer questions from the agency and the public.

Applicable Tax Law and Regulations

Section 1105(a) of the Tax Law imposes a sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in the article."

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides that "[t]he sales tax is a 'destination tax', that is, the point of delivery or the point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

Opinion

In Lockwood Support Services, Inc., Adv Op Comm T&F, July 29, 1988, TSB-A-87(26.1)S, pertaining to a petitioner engaged in the business of aerial photogrammetry which obtained information about physical objects and the environment through the process of recording, measuring and interpreting aerial photographic images and patterns of electromagnetic radiant energy and other phenomena and provided its client with its findings, it was concluded that when the petitioner acted in the capacity of a licensed land surveyor pursuant to

Section 7203 of the Education Law or in the capacity of a licensed professional engineer pursuant to Section 7201 of the Education Law, such services were outside the scope of the sales tax. The opinion did conclude that to the extent the petitioner was making sales of tangible personal property, such sales of tangible personal property would be subject to sales and use tax. Examples of this would be aerial photographs or maps.

In the instant case, Company A, to assist its clients in meeting NYSEQRA visual impact requirements, photographs and maps the visual impact its client's proposed structure will have upon a certain area's aesthetic resources. After obtaining topographical maps of the site and surrounding area of the proposed structure, Company A deploys a helium weather balloon and photographs such balloon from various points within a 2 ½ mile radius of the site to determine the visual impact of the structure. The film is then developed and scanned into a computer. Company A then constructs a model of the actual proposed structure, using the dimensions and drawings furnished by the construction engineer. A computer program is then used to photo-realistically render the structure as seen from various selected points. The photo-realistically rendered structure is inserted into digitized photos Company A has taken and converted into digitized photographs, which are delivered to Company A's client as part of Company A's report and for use as visual aids in presentations to the NYSEQRA review agency. In addition, as a separate service, Company A using the information it obtained to prepare the digitized photographs, may prepare maps and a more detailed report. As part of its services, Company A attends meetings of the NYSEQRA review agency to make the presentation before the review agency and the public. The principals of Company A are not licensed surveyors or engineers under the Education Law.

Company A in providing reports and digitized photos to be used as visual aids for presentation to the NYSEQRA review agency is providing a nontaxable service which is not among the enumerated services subject to tax under Section 1105(c) of the Tax Law. This is so, regardless of the site location and the delivery point of the reports.

However, to the extent that Company A makes sales of tangible personal property, such sales may be subject to sales and use tax. Examples of this would be photographs and maps sold to clients without reports of findings and presentations before NYSEQRA, or separate orders by clients for extra copies of photographs and maps. Pursuant to Section 525.2(a)(3) of the Sales and Use Tax Regulations, if Company A is making such sales of photographs and maps which will be delivered within New York State, then such sales will be subject to sales tax regardless of the site location.

DATED: September 29, 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.