

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

TSB-A-99(48)S  
Sales Tax  
November 12, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990316A

On March 16, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Stock Market Photo Agency, Inc., 360 Park Avenue South, New York, NY 10010.

The issue raised by Petitioner, The Stock Market Photo Agency, Inc., is whether its licensing of unlimited reproduction rights to photographic images, which are transferred to its customers either over the Internet or in CD-ROM form, is subject to sales tax.

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

Petitioner is a "stock photography agency" which licenses photographic reproduction rights on behalf of professional photographers. Petitioner's customers choose images from mass-marketed material, which includes catalogs, CD-ROM's and Petitioner's Web site. The customers are mainly advertising agencies or publishing houses that reproduce the images in advertising, packaging and publishing magazines and books. Once an image is selected and ordered, a photographic transparency corresponding to the image is delivered to the customer. The customer purchases the reproduction rights to this image which are for a specific one-time use of the image in a form of media such as a brochure, poster or print advertisement. After the customer completes its project, the transparencies are returned to Petitioner. The customer pays a royalty fee to Petitioner, which Petitioner shares with the photographer. The photographers are paid their share of the royalty fee once Petitioner receives payment from its customers.

Petitioner is about to start up a new line of business in which it will offer a new collection of images -- called "royalty free" images in the stock photo industry -- to its customers on an unlimited reproduction rights basis. The reproduction rights to these royalty free images will be sold over the Internet for a single image or in the form of a collection on a CD-ROM. A fee is paid for the right to reproduce the images. The payment of the fee allows the customer to use the image more than once. The primary difference between a "royalty free" image and a "royalty" image is that the reproduction rights under a "royalty free" arrangement allow a customer to have unlimited usage privileges, whereas the reproduction rights granted under the "royalty" fee arrangement are for a limited, specified use. In both cases, however, the customer pays a fee for the right to reproduce an image. Regardless of whether an image is classified as a "royalty" or as a "royalty free" image by the industry, ownership of all images remains with the photographer(s) and at no point in time is title transferred to the customer.

For single images, customers will log on to Petitioner's Web site and search for the image they want to use. Once an image is selected, the customer can download the image in a digital file

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format directly onto its computer via the Internet. The customer pays a fee for unlimited reproduction rights to the selected image. There is no need for the customer to return the digital file even after it completes its project since the original image remains with Petitioner. The images are paid for either by credit card or by check. The original photographs and title to all images remain in the ownership of the photographer(s). No ownership rights are transferred to the customer at any time.

A customer may also select a “royalty free” image from a CD-ROM. The customer’s purchase of a CD-ROM grants it unlimited reproduction rights to all of the images on the CD-ROM. The CD-ROMS are purchased by credit card or by check. The original photographs and title to all images on the CD-ROM remain in the ownership of the photographer(s). No ownership rights in the images are transferred to the customer at any time.

As part of its petition, Petitioner submitted samples of its proposed “Royalty Free” License Agreement and proposed customer invoice for review.

### **Applicable Law and Regulations**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for 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. . . .

(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. . . .

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property unless otherwise exempted or excluded from tax.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

Sale, selling or purchase. [Tax Law § 1101(b)(5)]

(a) *Definition.* (1) The words *sale, selling or purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words *sale, selling or purchase* are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

\* \* \*

(c) *Rentals, leases, licenses to use.* (1) The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a “sale” or a “rental, lease or license to use” shall be determined in accordance with the provisions of the agreement. . . .

\* \* \*

(e)(4) *Transfer of possession* with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

(f) *Reproduction rights.* (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. (See *Howitt v. Street and Smith Publications, Inc.*, 276 N.Y.345 and *Matter of Frissell v. McGoldrick*, 300 N.Y. 370.)

(3) Where some use other than reproduction is made of the original work, such as retouching or exhibiting a photograph, the transaction is a license to use, which is taxable.

*Example 1:* A person contracts with an artist for a right to reproduce one of the artist's paintings on a book cover. No other right is given by the artist for the use of his painting. The person who obtains the reproduction right to the painting may have copies made and returns the painting to the artist without alteration, change or correction, and without having destroyed or publicly exhibited the painting. The transfer is not held to be a transaction subject to the sales tax, as a rental, lease or license to use.

Section 526.8(a) of the Sales and Use Tax Regulations provides, in part:

. . . The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

\* \* \*

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings . . .

### **Opinion**

Petitioner provides photographic images to its customers who are mainly advertising agencies and publishing houses that reproduce the images in advertising, packaging, and publishing books and magazines. The "royalty free" images at issue in this opinion will be sold singly in digital file format (over the Internet) or as a collection on a CD-ROM.

The granting of a right to reproduce a photographic image provided in tangible format is not a taxable license to use or a sale if the customer merely takes temporary possession or custody of the photographic image for the sole purpose of making a reproduction and if payment for the right to reproduce the image is made in the nature of a royalty (see Alan/Anthony, Inc., Adv Op Comm T&F, July 30, 1992, TSB-A-92(60)S; Jim Bush Photography, Adv Op Comm T&F, September 20, 1988, TSB-A-88(48)S). If the customer's use of the property is not limited to reproduction purposes, then the transfer of the property to the customer for a consideration will be considered a sale that may be subject to tax under Section 1105(a) of the Tax Law (see New York Society of Renderers, Adv Op Comm T&F, July 1, 1998, TSB-A-98(43)S; Gentile, Wiener, Penta & Co. CPA's PC, Adv Op Comm T&F, December 27, 1996, TSB-A-96(91)S).

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In order for Petitioner's transaction to qualify as a right to reproduce photographs, certain criteria must be met pursuant to Section 526.7(f) of the Sales and Use Tax Regulations. First, the fee paid for the right to reproduce must be in the nature of a royalty. A royalty payment is defined as a "payment which is made to an author or composer by an assignee or licensee in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent" (see Black's Law Dictionary, 4<sup>th</sup> ed, p. 1496). The sample "Royalty Free" License Agreement and customer invoice submitted by Petitioner do not provide for the payment of fees described above but for the payment of a one-time lump-sum license fee. The very name of the Agreement suggests the fee payable under this agreement is not considered to be in the nature of a royalty payment. Additionally, under Section 526.7(f), a license to use property is deemed to exist where possession or custody of the property is more than merely temporary for purposes of making the reproduction. In the case of the "royalty free" images, property is permanently transferred to a customer in connection with the right to unlimited reproduction of images for an unspecified period of time. Since the conditions of Section 526.7(f) of the Sales and Use Tax Regulations are not met, it is concluded that the result of Petitioner's service is considered to be a license to use tangible personal property, where the photographic images are transferred in a tangible format, i.e., on CD-ROMs. The sale of a computer disk containing photographic images may be exempt from tax if the disk is used by a customer directly and predominantly in the production of tangible personal property for sale (New York Society of Renderers, supra; Gentile, Wiener, Penta & Co. CPA's PC, supra). Accordingly, where delivery occurs within New York State, receipts from Petitioner's sale of its "royalty free" photographic images are subject to sales tax under Section 1105(a) of the Tax Law when sold on a disk, unless Petitioner receives a properly completed exemption certificate from its customer. No New York State or local sales tax is due on otherwise taxable products if delivery occurs outside New York State. See Section 525.2(a)(3) of the Sales and Use Tax Regulations.

On the other hand, receipts from the electronic transfer of digital photographic images over the Internet represent receipts from the sale of an intangible and are not subject to sales tax (New York Society of Renderers, supra).

DATED: November 12, 1999

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

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