

Advertising Agencies

The Department has received numerous inquiries concerning the application of the sales and use taxes to the activities of advertising agencies in the area of (A) principal-agent relationship, (B) production and sale of tangible personal property and (C) rendering of advertising services.

The following is a restatement of the application of the sales and use taxes to purchases and sales of tangible personal property and services by advertising agencies:

A. Principal-agent Relationship

In order for a principal-agent relationship to exist for sales tax purposes, the conditions set forth in TSB-M-78(3)S must be met. Those conditions are:

1. the advertising agency must clearly disclose to the supplier the name of the client for whom the agency is acting as agent,
2. the advertising agency must obtain and retain written evidence of agent status with the client prior to the acquisition of any tangible personal property or service, and
3. the price billed to the client, exclusive of any agency fee, must be the same as the amount paid to the supplier. The advertising agency may not use the property for its own account, such as by charging the item to the account of more than one client.

Condition 1 above will be met only where the complete name of the client is disclosed on any purchase order given to a supplier and the advertising agency is identified as agent acting for and on behalf of the disclosed client (e.g., X advertising agency as agent for Y, name of client). The mere listing of the client's account number or name or the statement "for the account of" are deemed to be insufficient for meeting condition 1.

Condition 2 above will be met only where there exists a properly executed written agency agreement which clearly sets forth that the advertising agency is appointed to act as agent for and on behalf of the client with respect to making purchases.

Condition 3 above will be met when any expenditures by the firm as agent for a client are billed to the client without being marked up.

Since all purchases made by an agent on behalf of client are considered to be purchases by the client, the appropriate sales tax is to be paid when property or services are delivered to the client or the advertising agency within New York State. However, advertising agencies are deemed to be vendors (not agents) of all items of tangible personal property produced or fabricated by their own employees.

Where an advertising agency makes purchases of tangible personal property as agent for its client and subsequently performs taxable services on the client's property (i.e., fabricates, processes, assembles, prints, imprints, etc.) or otherwise uses the property on the client's behalf, such services are subject to tax. If the services are performed upon items which are used in producing or creating the property which is the desired end result of the contract, such preliminary and intermediate services are taxable even though the items, subsequent to such use on the client's behalf, are delivered outside the state by the agency. If the services are performed upon property which as serviced is the desired ultimate end result of the contract, such services are taxable unless such property is delivered outside of New York State without any other use within this State by either the advertising agency or the client.

Any tax due on the preliminary or intermediate services is computed at the applicable rate for the locality where the services are rendered or where the property as serviced is subsequently used by the advertising agency. Any tax due on the final services to property which, as serviced, is the ultimate end result of the contract between the advertising agency and its client is computed at the applicable rate for the locality where the property as serviced is delivered.

Property purchased by the advertising agency, as agent for the client, may qualify for the manufacturer's exemption in accordance with the provisions of TSB-M-79(7.1)S.

Services performed upon the client's property may also qualify for the manufacturer's exemption. Specifically, on September 1, 1980 the New York State tax on the labor used on production machinery and equipment has been reduced to 2% and on March 1, 1981 the New York State tax on such labor was eliminated. There is no exemption from the local taxes imposed by section 1107 (New York City) and pursuant to the authority of Article 29 (local jurisdictions) of the Tax Law for such labor.

Example 1: An advertising agency located in New York State is hired by a client to create advertising posters which the client intends to give away as a promotional item.

The client and the advertising agency enter into a written agreement establishing a principal-agent relationship for the purposes of such contract.

In order to produce the posters, the advertising agency purchases photographs, composition and artwork and fabricates such property to produce layouts and mechanicals. The layouts and mechanicals are used to produce color separations of the poster. The color separations are used to produce offset plates which are used to produce the posters by the agency on its own printing press. The advertising agency then delivers the posters, the offset plates, the layouts, mechanicals, artwork, photographs and composition to the client outside New York State.

The purchases of photographs, compositions and artwork by the advertising agency as agent of the client are subject to tax at the rate in effect where such property is delivered to the advertising agency (i.e. at its offices in New York State).

The charges by the advertising agency for its services in producing, fabricating, processing, assembling, printing, imprinting, and otherwise servicing the photographs, artwork and compositions into layouts and mechanicals are subject to tax at the rate in effect in the locality in which such services are performed. The film purchased by the advertising agency as agent of the client to be used in making the color separations is subject to tax. The services by the advertising agency in creating the color separations are subject to tax.

The unexposed plates, purchased by the advertising agency as agent of the client are subject to tax.

The charges by the agency for its services in producing, fabricating, processing, assembling and otherwise servicing the color separation into the offset plates are subject to tax.

The purchases of paper and ink by the advertising agency as agent for the client are subject to tax.

The charges by the advertising agency for its services in printing and imprinting the client's paper and ink into the finished posters are taxable, however, in this example the agency is not required to collect sales tax on such services since the completed posters are delivered to the client outside New York State.

The advertising agency, as agent for the client, is not entitled to the manufacturer's exemption for any of the previously discussed purchases or services since no tangible personal property for sale has been produced.

Example 2: An advertising agency located in New York State is hired by a client to create color separations for an advertisement which the client will place in a publication which is sold to the public by its publisher.

The client and the advertising agency enter into a written agreement establishing a principal-agent relationship for the purposes of such contract.

In order to produce the color separations, the advertising agency purchases photographs, composition and artwork and services such property to produce layouts and mechanicals. The layouts and mechanicals are used to produce color separations of the advertisement. The advertising agency then delivers the color separations, the layouts, mechanicals, artwork, photographs and composition to the client outside New York State.

The purchases of photographs, compositions and artwork by the advertising agency as agent of the client are subject to tax at the rate in effect where such property is delivered to the advertising agency (i.e. at its offices in New York State), and the charges by the advertising agency for its services in producing, fabricating, processing, assembling, printing, imprinting, and otherwise servicing the photographs, artwork and compositions into layouts and mechanicals are subject to tax at the rate in effect in the locality in which such services are performed. These purchases and services may qualify for the manufacturer's exemption in accordance with the provisions of TSB-M-79(7.1)S since such items are to be used in the production of property for sale (i.e., the publication).

The film purchased by the advertising agency as agent of the client to be used in making the color separations is subject to tax, however, such purchase may, as above noted, qualify for the manufacturer's exemption. The charges by the advertising agency for its services in creating the color separations are taxable services, however, in this example the agency is not required to collect sales tax on such services since the property as serviced is delivered to the client outside the state.

Separately stated agency fees or commissions are taxable as part of the "receipts subject to tax" unless such fees or commissions are related solely to the acquisition of property or services by an agency on behalf of his principal.

B. Production and Sale of Tangible Personal Property

Where an advertising firm is engaged by a client to produce or acquire property which it will sell to the client (such as posters, brochures, annual reports, etc.) and no principal-agency agreement is in force, the advertising firm will be considered for sales tax purposes to be a vendor and/or producer of the property sold. Purchases by the advertising firm of the property (the posters, brochures, annual reports, etc.) or physical component parts thereof (e.g., paper, ink, etc.) which are to be sold to the client may be purchased for resale without payment of the tax.

Purchases by the advertising firm of property such as artwork, color separations, mechanicals, composition, type, etc. which will be used by the advertising firm to produce the property it will sell to the client are retail purchases by the advertising firms and may not be purchased for resale. Such purchases may, however, qualify as production equipment eligible for the manufacturer's exemption in accordance with the provisions of TSB-M-79(7.1)S. Property used by the advertising firm to produce the finished product it will sell to the client may not be purchased for resale whether or not such property is actually transferred to the customer upon completion of the contract regardless of whether the contract between the advertising firm and the client requires such transfer.

Sales tax is to be collected from the client by the advertising firm on the total selling price of the finished product without any deduction for fees or commissions or other expenses of the agency when such finished product is delivered to the client or his designee in New York State.

C. Rendering of Advertising Services

Advertising services consist of consultation and development of advertising campaigns without the transfer of tangible personal property and the development and placement of an advertisement in the media. (See Sales Tax Regulation 527.3(b)(5)).

All transactions between an advertising firm and its client will be judged on the essence of the transaction or the end result desired by the client. The fact that an advertising firm bills its client separately for various components and services will not alter the fact that a single transaction has taken place.

The total charge by the advertising firm to its client for advertising services with respect to media placement is not subject to the sales tax, even though the advertising firm has itemized its costs of artwork, type, etc. on the bill rendered to its client.

All purchases by an advertising firm of property or services for use in rendering an advertising service are deemed to be purchased at retail and subject to the appropriate sales tax.

Where an advertising firm is engaged to develop and place an advertisement in a publication which is for sale, the firm may be entitled to the manufacturer's exemption from the New York State and local sales tax except the 4% sales tax in New York City on all purchases of equipment used in the advertisement's production as set forth in TSB-M-79(7.1)S.

In determining whether the advertisement will be placed in a publication for sale, the advertising firm must obtain from its client a properly completed Exempt Use Certificate, Form ST-121, substantiating that fact. Failure to obtain the Exempt Use Certificate will negate eligibility for the manufacturer's exemption. If the advertisement is placed in a publication or media which is not for sale, no exemption from the sales or use tax is granted on purchases used in the advertisement's production.