

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-05(34)S
Sales Tax
September 27, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040707A

On July 7, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Martin R. Timm, P.O. Box 246, Glenwood, NY, 14069.

The issue raised by Petitioner, Martin R. Timm, is whether the sale of photographs from its library collection of stock photographs is subject to sales and use tax.

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

Petitioner owns a library of stock photographs and is starting a stock photo business. Petitioner will sell the photographic images owned by Petitioner to its customers. While retaining all ownership rights in the photograph itself, Petitioner will sell copies of the photograph in tangible format (paper, disk, etc.) and intangible format (i.e., delivered electronically). Petitioner may also receive royalties from use of the photographic image in and on printed products (posters, brochures, etc.) or in the print media (newspapers, periodicals, etc.).

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.

Example 2: A photographer takes photographs and furnishes the same to a magazine publisher for the purpose of reproduction. In the course of reproduction, the photograph is retouched by the publisher. After reproduction, the photograph is returned to the photographer. The receipts from such transaction are subject to the tax as a license to use.

Example 3: A dealer collects photographs and photographic prints. He furnishes the prints to a magazine publisher for the purpose of further reproduction. After reproduction, the prints are returned to the dealer. The prints may or may not be changed or altered. The receipts from such transactions are subject to the tax. Since the dealer merely collects the photographic prints and does not have the right to grant the right to reproduce the original, the transaction is deemed to be a license to use tangible personal property.

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 has a stock photo business in which Petitioner sells photographic images owned by Petitioner.

When a photograph is sold on paper, slide, negative, CD, video, etc., such sale is the sale of tangible personal property and is subject to sales tax under section 1105(a) of the Tax Law.

On the other hand, Petitioner's sale of photographic images delivered solely electronically with no tangible format transferred to the customer is not subject to sales tax. (See *The Stock Market Photo Agency, Inc.* Adv Op Comm T & F, November 12, 1999, TSB-A-99(48)S; *Universal Music Group*, Adv Op Comm T& F, April 18, 2001, TSB-A-01(15)S.)

Charges for the use of a photographic image in a book, newspaper, periodical or some other printed medium are not subject to sales tax where the rights purchased are in the nature of a royalty under the laws relating to artistic and literary property. Similarly, royalty payments for permission to reproduce the photographic depiction itself in or on another product (e.g., poster, brochure, advertising copy, etc.) are not receipts from the sale, lease or license to use the photograph itself. (See section 526.7(f)(1) of the Sales and Use Tax Regulations.)

If the charges to the customer for the use of the photograph are in the nature of a royalty, the transfer of temporary possession or custody of the photograph to the customer for the sole purpose of making the reproduction (i.e., incorporating the photograph into a poster, book cover, brochure, etc.) is not considered to be a transfer of possession which would convert the royalty right into a taxable use. (See *Alan/Anthony, Inc.*, Adv Op Comm T & F, July 30, 1992, TSB-A-92(60)S; and section 526.7(f)(2) of the Sales and Use Tax Regulations.)

However, if some use, other than mere reproduction, is made of the original photograph, such as retouching or exhibiting the photograph, the transaction is a lease or license to use which is taxable. The transaction is also taxable if the customer were to receive permanent possession or use of the photograph or a copy of the photograph. (See *Sherman Grinberg Film Libraries, Inc.*, Adv Op Comm T & F, December 26, 1991, TSB-A-91(79)S; and section 526.7(f)(3) of the Sales and Use Tax Regulations. Petitioner must actually possess the right to grant reproduction rights in the original photograph, or its copies, in order for Petitioner's charges to be considered

in the nature of a nontaxable royalty. See section 526.7(f)(3), *Example 3* of the Sales and Use Tax Regulations.

DATED: September 27, 2005

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