

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

TSB-A-07(11)S
Sales Tax
April 12, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060411A

On April 11, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Apple Computer, Inc., c/o Terry Ryan, Director of Tax, 1 Infinite Loop, Cupertino, California 95014. Petitioner, Apple Computer, Inc., furnished additional information with respect to the Petition on May 15, 2006.

The issue raised by Petitioner is whether the sale of a video delivered electronically over the Internet is subject to sales and use tax.

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

Petitioner, a California company, will store a digitized catalog of videos and video content on a server located in California. The videos will be for sale to its customers. Customers, using their computers, will purchase the videos, which will be delivered to them electronically over the Internet. Customers will pay for the digitized content in one of a number of ways, including with a credit card issued by a third-party financial institution. The video content will be delivered electronically in digital form and will be stored on the customer's computer or other device. Customers cannot watch the video while it is being downloaded. Further, the content will not be broadcast "live" or in "real-time." The videos are unlike the "streaming" of radio or television broadcasts or "Webcasts." In order to be able to download a video to a computer or other device, customers will be required to download and install proprietary software (the proprietary software required is available for download on Petitioner's Web site free of charge) on their computer or other device.

A downloaded video will remain on the customer's computer or other device and may be copied to a limited number of CDs, personal computers, or handheld electronic devices. The catalog of videos available for download will consist of copyrighted content that Petitioner is licensed to distribute, but that is not owned by Petitioner. Video content may include the following:

1. MTV- style music videos and other short clips including sports;
2. movie clips and short motion pictures (e.g., animated shorts from unaffiliated studios); and
3. individual television episodes.

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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, . . .

* * *

(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. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. 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. . . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information

which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, . . .

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner. . . .

Section 1110 of the Tax Law provides, in part:

Imposition of compensating use tax (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, . . .

A Guide To Sales Tax for the Film Industry, Publication 28 (5/05), at p. 11, provides, in part:

Sale of a film

Unless otherwise exempt, sales and use taxes are imposed on the **total selling price** of a film. The vendor selling the film is responsible for collecting sales tax based on the rate of tax in effect in the taxing jurisdiction where the film or tape is delivered. There is no New York sales and use tax imposed on the outright sale of a film when the film is delivered out of state. A film is deemed to be delivered where the original negative is delivered.

* * *

It should be noted, however, sales tax is not imposed on the outright sale of a film or the granting of a license to exhibit or use the film to a distributor or broadcaster, when the film is delivered electronically or digitally, whether such delivery takes place within or without New York State.

Opinion

Petitioner will store a digitized catalog of videos and video content on a server located in California. The videos will be offered for sale to its customers and will be delivered to them electronically over the Internet. Customers will store the videos on their computer or other device.

Generally, absent some exempt use, the sale of a hard copy of a film is subject to sales tax. However, sales tax is not imposed on the sale of a film when the film is delivered electronically or digitally, whether such delivery takes place within or without New York State. See Publication 28, *supra*.

While receipts from the sale of prewritten software delivered electronically are subject to the sales tax pursuant to sections 1101(b)(6) and 1105(a) of the Tax Law, sales of music and photographs delivered electronically are not considered to be sales of software. In the same way that audio content (music) and visual content (photographs) delivered electronically are not subject to sales tax, the receipts from sales of videos that are delivered to customers electronically over the Internet and downloaded for use on the customer's computer or other device likewise are receipts from the sale of an intangible and are not subject to sales or compensating use tax under section 1105(a) or 1110(a)(A) of the Tax Law. (See *Universal Music Group*, Adv Op Comm T&F, April 18, 2001, TSB-A-01(15)S; *Martin R. Timm*, Adv Op Comm T&F, September 27, 2005, TSB-A-05(34)S.)

Information and entertainment services delivered via telephony and telegraphy are subject to sales tax pursuant to section 1105(c)(1) or 1105(c)(9) of the Tax Law. However, Petitioner states that the video content will not be broadcast "live" or in "real-time," and that customers cannot watch the videos while they are being downloaded. The use of the Internet to sell and electronically deliver a video for download to a customer's computer or other device, as described in this Opinion, does not constitute the provision of a taxable information service or entertainment service within the meaning and intent of section 1105(c)(1) or 1105(c)(9) of the Tax Law.

DATED: April 12, 2007

/s/
Jonathan Pessen
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Technical Services Division

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