

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-15(13)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110208A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] “Petitioner”. Petitioner asks whether its sale to a sporting goods and apparel manufacturer of marketing support services that assist in the retail marketing of the manufacturer’s products are subject to sales and use taxes. Petitioner also asks if it must collect sales tax on its entire charge because some of the services are taxable, or whether it may itemize charges for individual services on its invoices and collect sales tax only on the receipts for the taxable services.

We conclude that the installation of signage or the assembling of mannequins by Petitioner is a service subject to sales tax under Tax Law § 1105(c)(3) as the installing or servicing of tangible personal property. The other services provided by Petitioner are not subject to sales tax. If Petitioner sells both taxable services and non-taxable services to its customer for a single charge, the total receipts for the services are subject to sales tax. If Petitioner itemizes on the invoice or bill given to the customer a charge for taxable services that is reasonable, Petitioner would be required to collect sales tax only on the receipts for the taxable services.

Facts

Petitioner is a retail marketing agency that provides retail merchandising services throughout the country, including in New York. Its primary client (“Client”) has special relationships with retail store chains that carry Client’s products. When a large chain store retailer commits to ordering a specified volume of Client’s products, the retailer and Client may enter into an additional agreement, under which the retailer agrees to dedicate a portion of sales floor space exclusively to Client’s merchandise. In exchange, Client agrees to provide on-site marketing support for the dedicated area.

The dedicated area is referred to as a “Shop in Shop.” The Shop in Shop agreement allows Client to apply its custom branding to the dedicated area of the store. The branding includes graphics and special fixtures.

Client has two types of “Shop in Shop” agreements: “Soft Shop” and “Hard Shop.” In a contract for Soft Shop, Client supplies the retailer with graphics but the retailer supplies the

merchandising fixtures. In a Hard Shop contract, Client agrees to supply the retailer with both graphics and merchandising fixtures.

The objective of the in-store marketing support provided under a "Shop in Shop" agreement is to maintain Client's desired presentation of its products and to increase sales of these products. This in-store marketing support is aimed at maintaining a consistent look and feel across all retail locations for Client's merchandise. This is accomplished through the employment of graphics (e.g., logos, photographs, and advertising slogans), branded trade fixtures (in the case of Hard Shops) and consistent product presentation. For example, Client has standards for hanging, folding, lacing and placement of merchandise at retail locations, which it requires retailers to comply with at their Shop in Shop locations.

Client has retained Petitioner to provide services at the vast majority of its Shop in Shop locations. Petitioner has approximately 60 merchandising associates who perform in-store marketing work for Client. Six of the associates work at New York locations. Nationwide, Petitioner provides between 900 to 1,000 days of Shop in Shop marketing support services per month.

In providing the services, Petitioner is responsible for ensuring that Client's image is properly maintained at the Shop in Shop locations. Petitioner does this by executing visual merchandising tasks in accordance with Client's standards, providing retail store employees with instructions on the presentation standards to assist them in maintaining the Shop in Shop between visits, and providing retail store staff with marketing, product and technical information. In addition, Petitioner is required to furnish Client with real time market reports regarding the activities at an inspected Shop in Shop. The information provided to Client includes individual store sales trends, product replenishment issues, competitors' presentation of merchandise at the store, damage to or removal of Client trade fixtures or graphics, and questions asked by store staff. This information is contained in a written report submitted to Client. The report also includes photographs of the Shop in Shop.

A regular visit by one of the Petitioner's associates to a Hard Shop takes approximately 4.5 to 5 hours. During the visit, the associate does a walk-through of the Shop in Shop with the manager of the department. The associate makes inquiries about any questions, special requests or needs the store might have and collects information regarding product sales. The associate will also discuss with the manager new products and promotional campaigns. The walk through and discussion with the manager takes approximately one hour.

During an early stage of a Hard Shop visit, the associate will take photos of the Shop in Shop from various angles and makes notes as to any missing graphics or trade fixtures. This takes approximately 15 minutes.

Other tasks that an associate performs on a Hard Shop visit are to organize and restock merchandise in the Shop in Shop. This involves checking to make sure that products are in their proper location, display racks/shelves are stocked, and merchandise is organized by size, color

and category. As part of this process, the associate folds, hangs and or laces products per Client's standards, e.g., zippers closed, product and price tags tucked in, and apparel categories, colors and fabric types organized per Client's directives. These activities take two to three hours to complete. This organizing activity is done in large part to educate the retailer as to how Client wants its products displayed.

If the stock of a particular product is low, the associate may replace the low stocked item with different items based on product availability. For example, if the supply of socks in the Shop in Shop is low, the associate may replace socks with caps and change graphics to reflect the change in stock. This process may entail moving display components. The restocking activity takes 15 minutes.

During final stages of the Hard Shop visit, the associate will scrutinize how competitors' products are being presented for sale in the store and take after photos of the Shop in Shop. The associate does another walk through of the Shop in Shop with the manager. If necessary, the associate reviews Client's product presentation standards with the manager. The associate then prepares a report of the visit for Client. These activities take one hour.

Two to four times a year, Client arranges for new graphics to be printed and delivered to Shop in Shop locations. Petitioner is responsible for placing the graphics in existing holders at the Shop in Shop. The graphics are installed pursuant to the instructions of Client. This installation activity takes 15 minutes.

The graphics that are changed on a regular basis are poster style graphics that slide into existing frames. Petitioner does not handle graphics that do not fit into frames or holders on fixtures. Thus, Petitioner does not hang signs from the ceiling.

At Soft Shop locations (locations where the retailer owns the fixtures), Petitioner provides visual merchandising services similar to those provided at a Hard Shop location, but the services are performed on a semi-annual basis in conjunction with the delivery of new graphics by Client. The installation of graphics takes about 15 minutes. The associate then spends about 1 hour and 45 minutes doing tasks performed during a regular Hard Shop visit. The Soft Shop visits take less time than Hard Shop visits because Soft Shop locations are smaller than Hard Shop locations.

When a retailer and Client agree to create a new Hard Shop or update the fixtures or floor plan for an existing Hard Shop, Client will design the new layout and hire a contractor to install the new fixtures. Petitioner is not responsible for doing any of this installation, but is hired by Client to oversee the installation process, and give directions about the placement of fixtures. Once the physical setup is completed, Petitioner's associates will perform the tasks done during a regular visit described above. Thus, at this time, the associate will pull Client's products from stock, organize the presentation of the products in the Shop in Shop and install graphics.

When a retailer and Client agree to create a new Soft Shop or update the fixtures or floor plan of an existing Soft Shop, Client designs the new layout, but the retailer is responsible for installing the new fixtures. Client contracts with Petitioner to perform the same services it performs for Hard Shop installations.

Client also owns and operates retail stores that sell Client's products. Petitioner performs services at those stores similar to those it performs retail stores not owned by Client. Occasionally, Petitioner will assemble and dress mannequins as part of a visit to a Client retail store.

Petitioner also provides showroom support for Client's wholesale showrooms. These services entail placing garments on hangers (and steaming them if necessary), placing footwear on stands or shelves in the showroom and ensuring that products are displayed in accordance with Client's presentation standards.

Petitioner does not sell tangible personal property to Client or to retailers. Petitioner does not offer to the public a standard package of marketing services. It tailors the services it provides to the specific needs of each customer. Petitioner does not provide to any other customer the same exact package of services it provides to Client.

Petitioner bills Client a single fee based on an agreed rate for services comprised of a variety of tasks. Regular visual merchandising services are billed at a flat rate. Any graphic changes performed at the Hard Shop are included in the flat rate. Graphic change services at a Soft Shop and services provided in conjunction with installations are billed at an hourly rate. All other services are billed at a flat rate. Petitioner has the capacity to separately bill for tasks performed during regular Shop in Shop visits.

Analysis

Petitioner is providing a variety of services under the rubric of marketing support services. Some of the services qualify as the installation of tangible personal property, which is taxable under Tax Law § 1105(c)(3).

Tax Law § 1105(c)(3) imposes sales tax on the receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, but expressly excludes from sales tax the services of laundering, dry-cleaning, tailoring, weaving, pressing, shoe repairing, and shoe shining. Installing means setting up tangible personal property or putting it in place for use. *See* 20 NYCRR § 527.5(a)(2). Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. *See* 20 NYCRR § 527.5(a)(3).

The service of supervising installation work performed by a third party does not itself qualify as the service of installing tangible personal property. That is, such supervisory work is not a service subject to sales tax under Tax Law § 1105(c)(3). Nor does the supervisory activity

described by Petitioner constitute a taxable interior design service under Tax Law § 1105(c)(7). Supervision of installation work may be an element of a taxable design service if the vendor providing the supervisory service has created the design that is being implemented or the supervisory work includes making interior design decisions, such as the placement of tangible personal property. *Compare* TSB-A-91(47)S. Therefore, any charge by Petitioner for supervising the construction or the renovation of a Shop in Shop done in accordance with precise design specification set by Client is not subject to sales tax.

The handling of merchandise that is ready to be sold in order to place the product in a preferred form of presentation at a retail store (e.g., organizing merchandise by color, fabric or size; placing clothes on hangers; or folding clothing merchandise in a precise way) is not a taxable service to tangible personal property. This type of handling of merchandise does not constitute servicing or maintaining tangible personal property because the condition of the property does not change. *Cf.* TSB-A-97(12)S. Nor does Petitioner's movement of merchandise from a stock or storage area of a retail store to the sales floor constitute the installation of tangible personal property for purposes of Tax Law § 1105(c)(3), because Petitioner is not using the merchandise to create a sample display. *Compare* TSB-A-88(3)S. Similarly, Petitioner's handling of merchandise does not constitute the processing of tangible personal property for purposes of Tax Law § 1105(c)(2), because no change in the basic nature, shape or form of the property is occurring. *See* 20 NYCRR § 527.4(d). The conclusion that Petitioner is not performing taxable services to tangible personal property when it works on the presentation of merchandise offered for sale is substantially buttressed by the training aspect of the service - Petitioner performs these tasks in part to demonstrate to retail staff how the products should be presented for sale.

While the cleaning and pressing of clothing are services to tangible personal property, these services are expressly excluded from sales tax. Therefore, Petitioner's pressing of garments that are to be displayed at a wholesale showroom is not a taxable service.

Petitioner's installation of signs at retail stores is a taxable service to tangible personal property under Tax Law § 1105(c)(3). The installation service is subject to sales tax irrespective of the circumstances under which it is performed. Thus, the installation work is taxable both when done as a planned part of a visit (e.g., Client has directed that new signs be installed) and when the installation work is contingent on the Petitioner determining a need to change signs upon an inspection of a Shop in Shop.

The assembling of a mannequin constitutes a taxable service to tangible personal property because tangible personal property (a mannequin) is being installed or serviced. However, the mere placement of clothes on an installed mannequin is not a taxable service because neither the clothes nor the mannequin is being installed for purposes of Tax Law § 1105(c)(3). *See* 20 NYCRR § 527.5. Similarly, placing garments on hangers and placing footwear on stands or shelves in a showroom is not a taxable service.

Petitioner's sale of installation services does not qualify for the resale exclusion because the tangible personal property being serviced is not being sold. *See* 20 NYCRR § 527.5(b)(1).

Petitioner is not providing a taxable information service when it provides Client with reports about a Shop in Shop. The reports furnished are personal and individual in nature and are not substantially incorporated into reports furnished to others. Therefore, the reports come within the exclusion from the tax imposed on information services by Tax Law § 1105(c)(1).

Petitioner is not providing an integrated service product when it provides services to Client. Petitioner does not have a standard service package that it offers for sale to the public. All of its services are customized. Client dictates what services Petitioner is to perform. Further, the various services that Petitioner provides to Client are discrete in that they are divisible from each other and none are necessary to be performed in order to provide any of the other services. For example, Petitioner could have worked on the presentation of merchandise without changing graphics. It exercises no special skills in installing graphics that would preclude the retailer or other party from performing this task. Thus, Petitioner is selling multiple services.

If a vendor sells both taxable and nontaxable services for a single fee, the full receipt is subject to sales tax. *See*, e.g. 20 NYCRR § 527.1(b); TSB-A-97(11)S. Thus, when Petitioner charges Client a single fee for multiple services that include any of the taxable installation services described above, the entire receipt for the package is subject to sales tax. If Petitioner were to bill a separate charge for the taxable service or services that is reasonable in price, only that charge would be subject to sales tax.

DATED: March 19, 2015

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.