

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S110627A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether it owes sales tax with respect to twelve types of charges it imposes on its customer (Customer).

We conclude that three of the charges Petitioner imposes on Customer for sales of recorded tapes, equipment purchases and servicing of equipment are subject to sales tax. However, most of Petitioner's charges to Customer are not subject to sales tax because they constitute receipts from the sale of a service that is not among those subject to sales tax or the sale of a product that is delivered in non-tangible form.

Facts

Petitioner operates an audio/visual broadcast production studio in New York City. Petitioner provides services primarily to Customer, a Japanese television station that broadcasts content in Japan. Customer pays Petitioner to rebroadcast its content in the United States. Petitioner provides a 24-hour broadcast of the content that is supplied by Customer. The content provided by Customer is saved to a server for rebroadcast to viewers in the United States without the use of any tangible storage media such as tape. Occasionally, Petitioner must also produce original content that is digitally incorporated into the video broadcast.

The equipment at the New York broadcast studio operated by Petitioner is owned by Customer, which has agreements with cable affiliates in the United States for the broadcast of content. Customer is not licensed by the Federal Communications Commission. Petitioner does not receive any revenue from or have any contracts with the cable subscribers receiving the broadcasts in the United States. The Petitioner's revenue comes from the service of operating the studio.

Petitioner's revenue is derived from 12 types of revenue streams. Petitioner issues separate invoices for each revenue stream.

1. **Broadcasting Studio** -- The broadcasting studio charge covers the costs (including labor) of operating the broadcast studio. The operation entails receiving a broadcast signal from Japan, digitally recording it to a server, and then rebroadcasting it to cable operators in the United States. The charge includes the constant monitoring of the signal (24 hours a day, 7 days a week), as well as the production work for the original content created at the New York studio that is added to the broadcast. Examples of production work would be the video editing required to produce and insert a local weather report into programming, or inserting a stock graphic into the original

- programming before it is rebroadcast. All video editing is done electronically. No tapes or other tangible media are produced.
2. Anchor -- Petitioner charges Customer for the services performed by an anchor person it keeps on staff. The anchor hosts a weekly talk show that Petitioner produces and also does voice-over work for some of Customer's programming. The talk show is not broadcast live. It is recorded in the studio and the recording is stored electronically on Petitioner's server. All editing is done electronically, although a backup tape is produced for internal use in case of emergency. The backup tape is not provided to Customer. The television show is included in the programming that Petitioner transmits to cable television operators. The anchor person also provides voice-overs for local commercials produced by Petitioner that are included in Customer's programming.
 3. Content Production -- Petitioner bills Customer for work performed by a research assistant employed by Petitioner. The research assistant performs administrative office work, as well as computer research for some of the content that may end up as part of the talk show. The charge is listed on the invoice as a "Production Assistant Fee."
 4. Caption Production -- Petitioner bills Customer for the services of translating Japanese-language television shows and transcribing English subtitles into Customer's programming. This work is all performed electronically.
 5. Production Expenses -- Petitioner bills Customer for reimbursement of out-of-pocket expenses (e.g., food and travel) incurred by Petitioner's employees while filming on location. Petitioner pays sales tax on these purchases and then charges Customer for the expense. Petitioner does not include any type of mark up on the amounts charged. The on-location filming is done to produce content for Customer's programming. To the extent that this content is transferred to or on behalf of Customer, it is done electronically.
 6. Production -- Customer is charged for the cost of producing local commercials that are included in the programming that Petitioner's transmits on behalf of Customer. The Japanese programs transmitted by Customer to Petitioner contain Japanese commercials. Petitioner digitally edits out those commercials and inserts local commercials that it has produced and recorded. These charges may also include a fee for dubbing a finished commercial. Petitioner does not have a contract with the advertiser or receive any revenue from the advertiser. Petitioner is paid by Customer for producing the local commercials.
 7. In-Flight -- Petitioner helps Customer place its programming on airline flights. The Petitioner downloads content from Customer's transmissions and then records the content onto tapes that are transferred to the airline at JFK International Airport. Customer has a contract with the airline to provide the tapes and pays Petitioner for producing them. Once the tapes are shown by the airline, they are returned to

- Petitioner. Petitioner imposes a separate charge for delivery of the tapes to JFK. Petitioner also charges Customer for picking up the used tapes from the airline.
8. Equipment Purchase -- These charges relate to the purchases of equipment used in the studio. Occasionally, equipment at the studio has to be replaced so that Petitioner can continue providing its broadcast services. Petitioner states that, in some instances, it purchases the new equipment, pays the applicable sales tax, and immediately resells it to Customer at cost. In other instances, Customer directly purchases the equipment for use in the studio. Petitioner never uses the equipment while it has title to the property. Alternatively, Petitioner is considering making purchases of equipment as a disclosed purchasing agent of Customer.
 9. CM Department -- CM charges are for activities related to the production of the commercials, such as graphic editing, voice-over services and music and mixing services. While the charges are similar to the "Production" category detailed above, the commercials covered by the CM charges are not produced using local, "in-house" talent. That is, Petitioner works on commercials transmitted to it by Customer, which will be broadcast after editing by Petitioner.
 10. World TV -- Petitioner charges Customer for broadcasting two live channels. In order to broadcast in the United States, Customer must use Petitioner's local station to transmit the signal. Petitioner provides the real time stream for these stand-alone channels. Petitioner will also edit out Japanese commercials and insert local commercials electronically.
 11. Computer Maintenance -- Petitioner services and maintains computer equipment owned by Customer that is located in Petitioner's studio. The computer equipment being maintained is not used directly and predominantly in the production or transmission of programming.
 12. U.S. Nippon Communications Network -- A local nonprofit station broadcasts content from Customer in a 30 minute segment once a week. Petitioner records the content and provides a tape to the nonprofit. Petitioner then invoices the nonprofit for the content and the nonprofit pays Petitioner directly. The nonprofit has a contract with the Petitioner's Customer to purchase and use the programming.

Analysis

We address the taxability of each of Petitioner's charges separately below.

Broadcasting Studio

The Broadcasting Studio charge is for a service that is not subject to sales tax. Petitioner receives electronic transmissions containing programming from Customer and stores the programming on a server. The programming is then retransmitted as is, or is edited by Petitioner to

incorporate local content (e.g. a local weather report) before retransmission by Petitioner. Petitioner does not provide Customer or any other party with copies of the programming on tangible media as part of this service. Accordingly, we conclude that Petitioner is not selling or servicing tangible personal property. *See* TSB-A-98(8)S. Further, Petitioner is not providing a telecommunication service subject to sales tax because it adds content to the programming received from Customer and, thus, is not acting as a passive conduit for the transmission of electronic messages. *Id.*

Anchor

Anchor charges are charges for a service that is not subject to sales tax (production of programming delivered to Customer in electronic form). Voice-over services and other charges billed to a customer for the production of programming transmitted to Customer or its designee in electronic form are not taxable. *See* TSB-A-04(26)S; TSB-A-98(8)S. Thus, the fee for having a performer appear in, or do voice-over work for, recorded programs is not subject to sales tax.

Content Production

Content Production charges are charges for the administrative and research work done by Petitioner's research assistant. Therefore, they are charges for a service that is not subject to sales tax. The Petitioner is the consumer of the assistant's research. Therefore, the assistant's research work does not constitute the sale of an information service because the information produced by the assistant is not provided to Customer.

Caption Production

Caption Production charges are not taxable because they are the charges for a service that is not subject to sales tax, i.e. the production of programming delivered to Customer in electronic form.

Production Expenses

The charge for Production Expenses is not taxable because the charge is a reimbursement for expenses incurred as a part of the service of producing programming delivered to Customer in electronic form, which is not a service subject to sales tax. However, Petitioner correctly paid sales tax on its purchase of expense items, such as restaurant meals and other taxable property and services, because it was the retail consumer of these items.

Production

Production charges for commercials are not subject to sales tax because Petitioner is producing a digital product, which is not tangible personal property for purposes of sales tax. *See* TSB-A-01(15)S.

In-Flight

This charge includes Petitioner's charges for producing recorded tapes and delivering the recorded tapes to the airline at JFK International Airport. Thus, the charge is subject to sales tax as a sale of tangible personal property. See TSB-A-2004(26)S. The In-Flight charge also includes a fee for picking up the used tapes from JFK International Airport. Because Customer never keeps the tapes and they are routinely returned to Petitioner, Petitioner's charge for picking up the used tape is a component of the sale of tangible personal property and subject to sales tax. See TSB-A-08(64)S. Petitioner's purchase of blank tapes on which it records the content that will be delivered to the airline qualifies as a purchase for resale. Therefore, Petitioner's purchase of the blank tapes will not be subject to sales tax. In this situation, Petitioner should timely provide the vendor with a properly completed Form ST-120 – *Resale Certificate*.

Equipment Purchase

Petitioner described 3 ways in which replacement equipment could be purchased for the studio: (1) Petitioner purchases the equipment and resells to Customer; (2) Customer purchases the equipment directly; and (3) Petitioner purchases the equipment as Customer's disclosed purchasing agent. When Petitioner purchases replacement equipment for the studio, it does not qualify for the resale exemption. Only purchases made exclusively for resale come within the exemption. See *Michelli Contracting Corp. v. State Tax Comm'n*, 109 AD2d 957 (3d Dep't 1985); TSB-A-84(15)S. Here, Petitioner uses the equipment in the performance of its services for Customer. Thus, the equipment is not purchased exclusively for resale to Customer. In these circumstances, Petitioner would owe sales tax when it makes a purchase, and must collect sales tax from Customer when it charges Customer for the equipment, unless Customer is entitled to claim an exemption. Similarly, when Customer directly purchases equipment that is delivered to the New York studio, it must pay sales tax unless an exemption applies.

If an agency relationship is present, the sale of taxable tangible personal property is deemed to be a retail sale from the supplier to Customer. See 20 NYCRR § 541.5(c)(2). To establish an agency relationship, there must be a manifestation that the agent consents to act on the Principal's behalf and has authority to bind the Principal. See *Matter of Hooper Holmes v. Wetzler*, 152 AD2d 871 (3d Dep't 1989); *Matter of Swet*, TSB-D-91(10)S. This requires that purchases must be billed directly from the vendor to Customer or, if billed to Petitioner, it must be specified that Petitioner is acting as an agent of Customer. In addition, payment must be made directly by Customer to the supplier or, if payment is made by Petitioner, it must come from a special fund created specifically for this purpose. Finally, the purchased items must be delivered directly to Customer. See 20 NYCRR § 541.5(c). If Petitioner meets the requirements described above and makes a purchase of equipment as a disclosed purchasing agent for Customer, Petitioner would pay sales tax to the supplier as Customer's agent, unless Customer is eligible for some exemption.

We cannot opine in this Advisory Opinion about whether Customer is eligible for an exemption. However, if an exemption applies, Customer, or Petitioner, as Customer's agent, should timely provide the supplier with a properly completed exemption document. In these circumstances, Petitioner would not be required to collect sales tax when it charges Customer for reimbursement of the purchase price of the equipment.

The CM Production charges are charges for services related to the production of commercials that are received electronically from Customer and broadcast by Petitioner. No tangible copy of the commercial is provided. Accordingly, these charges are not subject to sales tax because they are not charges for the sale of tangible personal property or one of the services subject to sales tax.

World TV

The service of rebroadcasting two live television channels is not among the services subject to sale tax. Accordingly, the charges for this service are not subject to sales tax.

Computer Maintenance

Petitioner's maintenance of Customer's equipment constitutes the servicing of tangible personal property, which is subject to sales tax under Tax Law § 1105(c)(3).

U.S. Nippon Communications Network

Petitioner's charges for providing recorded tapes to the nonprofit station constitute receipts from the sale of tangible personal property, which are subject to sales tax if the tapes are delivered to the nonprofit station in New York. If the nonprofit station is an exempt organization under Tax Law § 1116 and is purchasing the recorded tapes directly from Petitioner, Petitioner's receipts from the sale of the recorded tapes would be exempt from sales tax. Petitioner should request exemption documentation from any nonprofit that claims to be an exempt organization for purposes of New York State and local sales tax.

DATED: November 12, 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.