

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-90 (30)S
Sales Tax
May 31, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890914A

On September 14, 1989 a Petition for Advisory Opinion was received from Crushing Enterprises, Inc., 157 West 57th Street, New York, New York 10019.

The issues raised by Petitioner, Crushing Enterprises, Inc., are whether its receipts from "demo fees" constitute receipts from the sale of tangible personal property or any of the services enumerated in Section 1105 of the Tax Law, and if so, are such receipts subject to the sales tax imposed under Section 1105(a) or 1105(c) of the Tax Law.

Petitioner operates a business of the type commonly referred to in the music industry as a "jingle" house. Petitioner creates or composes musical jingles for use in advertising campaigns by advertising agencies.

Creating a jingle entails the composing and combining of lyrics and a musical score. Upon creation of a jingle, the lyrics and musical score are reduced to a written piece of paper called a "lead sheet". Petitioner then produces a "demo tape", which is a nonbroadcast quality cassette recording of the jingle lyrics with instrumental accompaniment.

Petitioner presents the lead sheet and the demo tape as a job proposal to the advertising agency client. The advertising agency reviews the proposal for the purpose of determining whether or not to accept the jingle.

Petitioner generally receives a "demo fee" of approximately \$1,000.00 upon delivery of such lead sheet and demo tape to the advertising agency. The demo fee is, in substance, a fee for the advertising agency's option to acquire the rights to the jingle.

If, after reviewing the lead sheet and demo tape, the advertising agency chooses to accept the jingle and exercise its option to acquire the copyright to such jingle, the advertising agency then pays Petitioner an additional "creative fee" for the creative work. Upon Petitioner's receipt of such payment, all rights in the work, including copyright rights, are transferred to the advertising agency.

If the advertising agency chooses to not accept the jingle, the advertising agency will notify Petitioner of such decision and Petitioner will retain all rights to the jingle. Petitioner can then use or adapt the jingle for a different advertising campaign.

Generally, no copyright rights or rights of use, beyond the right to review the work, are transferred to or vest in the advertising agency until payment of the creative fee occurs. The creative fee is usually many times larger than the demo fee. If the advertising agency does not accept the jingle, then Petitioner does not receive a creative fee but does retain the demo fee.

The demo has no intrinsic value as it is not of broadcast quality and cannot be incorporated into a commercial. In accordance with industry practice no permanent rights, including copyright rights are transferred to the advertising agency upon presentation of the demo tape and the lead sheet to such advertising agency. Regardless of whether the advertising agency accepts or rejects the jingle, the demo tape and lead sheet are either returned to Petitioner or discarded by the advertising agency. Petitioner retains the master tape of the jingle. If the advertising agency accepts the jingle, the advertising agency will enter into a separate production arrangement either with Petitioner or with another party to produce a broadcast tape of such jingle.

The providing of a demo tape and lead sheet constitutes only the transfer of an option to buy the copyrights and other property rights in the jingle created by Petitioner and the demo fees received are payments for the transfer of such intangible property rights, with the transfer of the tangible property consisting of the tapes being merely incidental to the transfer of the intangible rights.

Sales tax is paid on purchases of blank cassette tapes and paper, purchases and rentals of equipment, and studio time used to prepare the demo tape.

Section 1101(b)(4) of the Tax Law defines retail sales as "[a] sale of tangible personal property to any person for any purpose "

Section 1101(b)(5) of the Tax Law defines sale, selling or purchase as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, "

Section 1105(a) of the Tax Law imposes on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1105(c) of the Tax Law imposes tax on "[t]he receipts from every sale except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter. . .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.

(2) Providing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale.. .

(3) Installing tangible personal property. . .or maintaining, servicing or repairing tangible personal property. . .not held for sale in the regular course of business.

(4) Storing all tangible personal property not held for sale in the regular course of business
. . .

(5) Maintaining, servicing or repairing real property, property or land. . ."

The providing of the demo tape and lead sheet to the customer constitutes the transfer of a right to review and evaluate the jingle and a right to an option to purchase the copyright and to produce the jingle for use in a commercial. The demo fee of \$1,000.00 represents consideration for the purchase of such intangible rights and the transfer of the demo tape and lead sheet is merely incidental to the purchase of the intangible rights.

Accordingly, the demo fee will not be subject to New York State or Local Sales or Use Tax in transactions where the customer does not accept the jingle and either returns the demo tape and lead sheet or discards them. The provision of Section 1105(a) of the Tax Law does not apply to such transactions as there has not been a transfer of title or possession. Moreover, the provisions of Section 1105(c) do not apply as Petitioner has neither performed nor made a sale of any of the services enumerated therein.

However, in transactions where the customer accepts the jingle and exercises the option to purchase the copyright, the demo fee and the creative fee collected from the customer will be considered as receipts from a single transaction in which the transfer of title to and possession of tangible personal property occurs. The tangible personal property may be in the form of an air quality tape, a finished written score or the retention of the demo tape by the customers for the purpose of rerecording for air quality purposes. Accordingly, the total receipts in such transactions will be subject to the tax imposed under the provision of Section 1105(a) of the Tax Law.

DATED: May 31, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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