

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

TSB-A-96 (10)S
Sales Tax
February 21, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950627A

On June 27, 1995, a Petition for Advisory Opinion was received from Arteffects, Inc., 1115 Midtown Tower, Rochester, New York 14604.

The issues raised by Petitioner, Arteffects, Inc., are:

1. Whether Petitioner's charge for its consultation with a client regarding the enhancement of the client's image and/or for improving internal communications among the client's workforce is subject to sales and use taxes. Petitioner charges an amount based on an hourly rate and does not create or transfer any tangible personal property to the client.
2. Whether Petitioner's charge for the recommendation to its client for the creation of a videotape and/or slide presentation to assist in internal communication techniques, when Petitioner hires a commercial production company to create a video and/or produce slides for the client, is subject to sales and use taxes. The production company delivers the completed videotape and/or slide presentation to Petitioner and bills Petitioner directly. In turn, Petitioner transfers the video and/or slides to the client and charges the client separately for (1) the consultation service and (2) the video and/or slides. In some cases, the charges may not be separately stated.
3. Whether Petitioner's charge for the creation of a logo for its client is subject to sales and use taxes. Petitioner consults with the client, prepares several proposed logos and transfers the final logo to the client.
4. Whether Petitioner's charge for the coordination of corporate communication meetings for its client, including the design and preparation of banners, posters, napkins and T-shirts is subject to sales and use taxes. Coordinating a corporate communications meeting may involve the service of locating a meeting room, arranging a menu for meals to be served to attendees, arranging to have podiums and microphones available, etc. The bill from Petitioner separately states the charges for (1) services and (2) the tangible personal property. On some occasions, however, an unitemized bill may be presented.

5. Whether Petitioner's charges for the performance of the services and transfer of tangible personal property set forth in issues 1 through 4 are subject to sales and use taxes when the client presents Petitioner with a Direct Payment Permit.

Petitioner states the following facts. Petitioner is a New York corporation engaged in the graphic design and corporate communications business. Its principal place of business is Rochester, New York.

Petitioner performs many functions. It creates graphic artwork for clients, such as logos and letterheads. Petitioner develops videos and/or slides for its clients' internal communications. Petitioner also develops promotional campaigns for its clients. Petitioner is not an advertising agency; it does not place ads or buy media time and space for its clients. Petitioner's services can be purchased separately.

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1101(b)(3) of the Tax Law defines receipts as "[T]he amount of the sale price of any property and the charge for any service taxable . . . without any deduction for expenses"

Section 1132(c) of the Tax Law authorizes the use of a direct payment permit to make purchases of tangible personal property or services "under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used."

Section 526.8 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 526.8. Tangible personal property.--(Tax Law, Sec. 1101(b)(6)).
(a) Definition. 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;

Section 532.5 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 532.5. Direct payment permit.--(a) General. A direct payment permit is a notice to a vendor that the holder thereof is authorized to pay directly to the Commissioner of Taxation and Finance any tax due on purchases made.

The vendor's responsibility for the collection of tax from the permit holder is waived upon receipt of such permit.

* * *

(e) Use of direct payment permits. (1) A direct payment permit may only be used by the holder who makes purchases of tangible personal property or services, the use of which is unknown to him at the time of purchase.

* * *

(2) A direct payment permit may not be used:

- (i) as a device to defer payment of the sales tax on purchases;
- (ii) as a substitute for a resale certificate or other exemption certificates; or
- (iii) as a device to transfer the permit holder's privileges to another person. (emphasis added)

In Greenstone & Rabasca Advertising, Inc., Adv Op St Tx Comm, September 9, 1986, TSB-A-86(35)S the State Tax Commission opined as follows:

A. Consulting and public relations services; planning and preparing advertising budgets, news releases, and publicity campaigns.

Petitioner is not required to collect tax on its charges to the client, provided no tangible personal property is transferred to the customer or its designees in connection with this service. All purchases by Petitioner, either for its own account or as agent for a principal, of material or taxable services to be used in performing these services are subject to sales tax (emphasis added)

In Morton L. Coren, P.C., Adv Op Comm T&F, June 29, 1990, TSB-A-90(33)S, the petitioner's client, a behavioral scientist, conducted interviews with employees of his customers and developed strategies for training his customers' employees. He prepared oral and/or written reports and discussed his recommendations with his customers. In addition to the consulting services, the behavioral scientist produced video tapes for his customers to be used for training employees in selling techniques, customer services and other matters. The cost of producing the tapes included both professional and production services including consultation with his customers. The advisory opinion concluded that the behavioral scientist had to collect sales tax on his entire charge for the tapes, including any portion of the charge for the tapes which represented the charge for consulting services that were performed in connection with the preparation of the tapes. The advisory opinion indicated, however, that if the consulting services were supplied and billed pursuant to a separate

contract or agreement apart from the contract or agreement for the sale of the tapes, then the charges for the consulting services would not be subject to sales tax although the charge for the tapes would still be subject to sales tax.

In The Design Council Ltd., Adv Op Comm T&F, June 28, 1995, TSB-A-95(23)S, the petitioner was engaged in producing mechanical drawings for its customers, who were predominately garment and textile manufacturers. The mechanical drawings, which were camera ready artwork, were used to produce a silkscreen or other printing process. Customers also used the mechanical drawings to produce hang tags, wrapping paper and box and bag designs. The advisory opinion concluded that the purchase of mechanicals is exempt from sales and use taxes if the mechanicals are used or consumed directly and predominantly to produce tangible personal property for sale.

With respect to issue "1", pursuant to Section 1105(c) of the Tax Law and Greenstone & Rabasca Advertising, Inc., *supra*, the providing of consulting services is not an enumerated service which is subject to sales and use taxes, provided that no tangible personal property is transferred to the customer in connection with this service. Therefore, since Petitioner will not create or transfer any tangible personal property in connection with providing this service, Petitioner's charge for this service is not subject to sales and use taxes.

Concerning issue "2", Petitioner's recommendation to its client for the creation of a videotape and/or slide presentation is not an enumerated service which is subject to sales tax pursuant to Section 1105(c) of the Tax Law. However, pursuant to Morton L. Coren, P.C., *supra*, when the service of producing the videotape and/or slides is coupled with the recommendation service, the entire charge for the videotapes and/or slides, including any portion of the charge which represents the charge for the recommendations made to the client that were performed in connection with the preparation of the tapes and/or slides, is subject to sales tax. If the recommendation service made to the client is supplied and billed pursuant to a separate contract or agreement apart from the contract or agreement for the sale of the videotapes and/or slides, and the charge for the recommendation service is separately stated, then the charges for the recommendations made to the client concerning the creation of a videotape and/or slide presentation would not be subject to sales tax. The charge for the videotapes and/or slides would still be subject to sales and use tax.

With respect to issue "3", pursuant to Section 526.8 of the Sales and Use Tax Regulations, artistic items such as sketches, paintings, photographs, moving picture films and recordings are considered tangible personal property. A logo would fall within the ambit of an artistic item and, thus, would be considered tangible personal property. Pursuant to Section 1105(a) of the Tax Law sales tax is imposed upon the receipts from every retail sale of tangible personal property unless otherwise exempt. In accordance with the policy expressed in The Design Council Ltd., *supra*, if the logo created and transferred by Petitioner to its client will be used by the client directly and predominantly in the production of tangible personal property for sale, the receipts from the sale of the logo will not be subject to sales or use tax. Petitioner will not be required to collect sales tax provided it receives a properly completed Exempt Use Certificate from its customers.

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With respect to issue "4", pursuant to Section 1105(c) of the Tax Law Petitioner's service of coordinating corporate communication meetings is not an enumerated service which is subject to sales and use taxes. However, when the service of coordinating the meeting is coupled with the design, preparation and sale of banners, posters, napkins and T-shirts for sale, an unitemized charge which represents a charge for coordinating the meetings performed in connection with the design, preparation and sale of the banners, posters, napkins and T-shirts is subject to sales tax. If the charge for the service of coordinating the meeting is stated on the customer billing separately from the charge for the sale of banners, posters, napkins and T-shirts, then the charge for coordinating the meeting for the client is not subject to sales tax. The separately stated charge for the sale of the banners, posters, napkins and T-shirts is subject to sales or use tax. The separately stated charges for coordinating the meeting and for the sale of the banners, posters, napkins and T-shirts must be reasonably related to the true value of the services and property being sold.

Concerning issue "5", pursuant to Section 1132(c) of the Tax Law and Section 532.5 of the Sales and Use Tax Regulations, if Petitioner receives from its customer a Direct Payment Permit in connection with the performance of services or the sale of tangible personal property, Petitioner is not responsible for the collection of tax from the permit holder on the receipts from the services or sale of tangible personal property. However, the Direct Payment Permit holder may only use the permit where it cannot determine the taxability of its purchases. The permit holder should not use the permit to avoid tax when it purchases tangible personal property or services that are known to be subject to sales or use tax.

DATED: February 21, 1996

s/DORIS S. BAUMAN
Director
Technical Services Bureau

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