

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

TSB-A-96 (91) S
Sales Tax
December 27, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960319B

On March 19, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Gentile, Wiener, Penta & Co. CPA's PC, 42 Memorial Plaza, Pleasantville, NY.

The issues raised by Petitioner, Gentile, Wiener, Penta & Co. CPA's PC, are:

1. Whether a graphics firm must collect sales tax on any or all of its design services.
2. Whether a graphics firm must register as a vendor for sales tax purposes.
3. Whether a graphics firm must pay sales tax on its purchases of materials used in its design service.

Petitioner submits the following facts as the basis for this Advisory Opinion. A graphics firm designs brochures, logos, marketing literature and, occasionally, advertisements. The graphics firm pays sales tax on the purchase of its supplies, including typesetting and photography. The graphics firm gives its customers a computer disk containing the designed item. In most cases, the customers then contract with a printer to print the designed item and pay the printer directly.

The graphics firm bills its customers in one of three ways. In the first case (used for about 75% of the billings) the graphics firm includes a statement which reads "Reproduction rights only, ownership of mechanical belong to Graphics firm." In the second case (used for about 10% of the billings) the graphics firm releases the logo or other design to the customer and does not make a statement regarding reproduction rights or ownership. In the third case (used for about 15% of the billings) the customer is billed a predetermined monthly amount for a predetermined amount of months.

Section 1105(a) of the Tax Law imposes sales tax upon "[t]he receipts from every retail sale of tangible personal property"

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)(8)(i)(A) of the Tax Law defines the term "vendor" as "A person making sales of tangible personal property or services, the receipts from which are taxed by this article."

Section 526.7(f) of the Sales and Use Tax Regulations provides, in part:

Reproduction rights. (1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. (See Howitt v. Street and Smith Publications, Inc., 276 N.Y. 345 and Matter of Frissell v. McGoldrick, 300 N.Y. 370.)

(3) Where some use other than reproduction is made of the original work, such as retouching or exhibiting a photograph, the transaction is a license to use, which is taxable.

Example 1: A person contract^s with an artist for a right to reproduce one of the artist's paintings on a book cover. No other right is given by the artist for the use of his painting. The person who obtains the reproduction right to the painting may have copies made and returns the painting to the artist without alteration, change or correction, and without having destroyed or publicly exhibited the painting. The transfer is not held to be a transaction subject to the sales tax, as a rental, lease or license to use.

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

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;

The sale by the graphics firm of a right to reproduce a design where the payment by the client is in the nature of a royalty is not subject to tax. The transfer of a computer disk in conjunction with the sale of a reproduction right, for the sole purpose of making the reproduction, is also not subject to tax. See Section 526.7(f) of the Sales and Use Tax Regulations. If the client's use of the computer disk is not limited to reproduction purposes, then the transfer of the disk to the client for a consideration will be considered a sale of tangible personal property that may be subject to tax under Section 1105(a) of the Tax Law.

In this case, a graphics firm designs brochures, logos, marketing literature and advertisements. The graphics firm pays sales tax on the purchase of its supplies, including typesetting and photography. The graphics firm gives its customers a computer disk containing the design. Unless the agreement with a client and the invoice clearly indicate that only design reproduction rights are being sold to the client and the computer disk is being transferred for reproduction purposes only, the graphics firm in this case will be considered to be making sales of tangible personal property that may be subject to sales or compensating use tax. See Vignelli Associates, Ltd., and Massimo Vignelli and Elena Vignelli, Individually and as Officers, Dec St Tx Comm, February 11, 1981, TSB-H-81(26)S.

In situations where the graphics firm transfers a computer disk containing a designed item to its customer and includes on its invoices a statement that the graphics firm only grants to the customer reproduction rights and that ownership of the mechanicals remains with the graphics firm, pursuant to Section 526.7(f) of the Sales and Use Tax Regulations the transfer of the computer disk containing the design does not constitute the sale of tangible personal property and is, therefore, not subject to sales and use taxes, provided that the agreement with the customer also clearly provides that the customer is only receiving reproduction rights and may only use the disk for reproduction purposes. However, in this case purchases by the graphics firm of supplies, including typography and photography, are subject to sales tax since the supplies are not purchased for resale as such or as a physical component part of tangible personal property to which title is being transferred.

It should be noted that if a logo or corporate identity system is designed in the transaction described in the preceding paragraph, the transaction is considered a sale of tangible personal property that may be subject to sales or compensating use tax. Generally, a client has complete rights to its own logo or corporate identity system. The graphics firm in this case is selling more than a reproduction right to this design. The transfer of the computer disk for a consideration in this case is, therefore, a sale of tangible personal property.

In instances where the graphics firm transfers a computer disk containing a designed item and does not include on its invoice, or in the customer agreement, a statement that the graphics firm only grants to the customer reproduction rights and that ownership of the mechanicals remains with the graphics firm, the transfer of the computer disk for a consideration constitutes the sale of tangible personal property that may be subject to sales tax.

If the graphics firm makes taxable sales of tangible personal property, the design firm is a vendor and must register with the Department of Taxation and Finance for the collection of sales tax. See Sections 1101(b)(8)(i)(A) and 1134 of the Tax Law.

The sale of the computer disk may be exempt from tax if the disk is used by a customer directly and predominantly in the production of tangible personal property for sale. See Section 1115(a)(12) of the Tax Law. However, if the computer disk is not used to produce tangible personal property for sale, the sale of the computer disk is not exempt.

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If a computer disk is delivered to a customer, or to a customer's printer or fabricator, outside of New York State, the sale of the computer disk is not subject to sales tax. See Section 526.7(e) of the Sales and Use Tax Regulation. If a computer disk is sold to an organization that is exempt from tax under Section 1116(a) of the Tax Law, the sale is not subject to sales tax.

Since the graphics firm, in some instances, is considered to be selling tangible personal property, some of its purchases, e.g., computer disks, may qualify for the resale exclusion from sales tax. See Section 1101(b)(4)(i) of the Tax Law. In addition, the graphics firm's purchases of pens, paper and other art materials may be exempt from State and local sales and compensating use taxes if the property purchased is used directly and predominantly in the production of tangible personal property for sale. See Sections 1105-B and 1115(a)(12) of the Tax Law, and Section 528.13 of the Sales and Use Tax Regulations. In order to make exempt purchases of tangible personal property, the graphics firm must give its suppliers a properly completed resale certificate (Form ST-120) or exempt use certificate (Form ST-121) within 90 days after the date of delivery. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

DATED: December 27, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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