

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

TSB-A-98(33)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S971023B

On October 23, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from CAV Corp dba Soundtrack NY, 936 Broadway, 4th Floor, New York, NY 10010.

The issues raised by Petitioner, CAV Corp dba Soundtrack NY, are:

1. Whether Petitioner's direct dial digital transmission of radio commercials using an integrated service digital network (hereinafter "ISDN") line is subject to New York State and local sales and use taxes.
2. Whether studio time and hook up fees are subject to New York State and local sales and use taxes if no tangible personal property is created.
3. Whether the creation of a safety/backup dub at a New York studio is subject to New York State and local sales and use taxes.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner's New York recording studio uses direct dial digital, via ISDN lines, to transmit radio commercials that are recorded at the New York studio to receiving studios outside New York. Sometimes Petitioner transmits commercials from its New York studio to a switching center in California operated by a third party (Company A). Petitioner sends to Company A, along with the radio commercial, a list of the radio stations where the commercials are to be distributed. Company A sends the data it receives from computer to computer "fitting" the signal onto a single ISDN line by slowing the data down. This system is used primarily for distributing finished radio commercials to many radio stations located both within and outside of New York State.

Petitioner's clients use its recording studio to produce commercials. Petitioner charges its clients an hourly rate for studio time. Petitioner's employees operate the studio equipment under the direction of the client who supervises the production of the commercial. Petitioner also charges its clients a hook up fee for direct dial digital transmissions which relates to making the connection between Petitioner's audio codec box and the receiving or sending facility's codec box, i.e., for setting the equipment to be compatible with the other facility's equipment and then dialing up over ISDN telephone lines. The hook up fee is in addition to the usage or transmission charges that Petitioner passes on to its clients. In addition, Petitioner charges its client if it creates a safety/backup dub at the New York studio. A safety/backup dub stays in New York until its client requests that the dub be sent elsewhere.

Applicable Laws and Regulations

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property "

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five.

Section 1105(b) of the Tax Law imposes sales tax on "[t]he receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and from every sale, other than sales for resale, of a telephone answering service." (emphasis added)

Section 526.7(e) of the Sales and Use Tax Regulations provides as follows:

(1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

* * *

(6) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates.

Section 527.2(d) of the Sales and Use Tax Regulations provides, in part, as follows:

(d) Telephony and telegraphy; telephone and telegraph service.

(1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.

(2) The term telephony and telegraphy includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

* * *

Example 3: Message switching services, transmitted to a computer over lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

Example 4: Facsimile transmission services are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law.

Opinion

William J. Young, Adv Op Comm T&F, November 7, 1988, TSB-A-88(57)S, concluded that the creation of a radio or television commercial is considered the production of tangible personal property. Therefore, sales of television or radio commercials embodied in tangible form in an original negative film, video tape or sound track are subject to sales tax if the property is delivered to the customer or its designee in New York State.

In this case, Petitioner's New York recording studio uses direct dial digital, via ISDN lines, to transmit radio commercials that are recorded at its New York studio to out-of-state receiving studios or to Company A's switching center located in California. Petitioner sends to Company A, along with the radio commercial, a play list of radio stations for the commercial. Company A sends the data it receives from computer to computer "fitting" the signal onto

a single ISDN line by slowing the data down. This system is used primarily for distributing finished radio commercials to many radio stations located both within and outside of New York State. In addition, Petitioner may create a safety/backup dub at the New York studio which stays in New York until its client requests that the dub be sent elsewhere.

With respect to issue "1", to the extent Petitioner's transmissions of radio commercials using ISDN lines may constitute the sale of telephony or telegraphy or telephone or telegraph service under Section 1105(b) of the Tax Law and Section 527.2(d) of the Sales and Use Tax Regulations, since the commercials are being sent to a location outside New York, Petitioner's service is an interstate service. Petitioner's transmission charges in this case are not taxable under Section 1105(b) of the Tax Law.

Concerning issue "2", Petitioner's charges for studio time are charges for the rental of Petitioner's recording studio and of the equipment contained in the studio. Petitioner's studio equipment is considered to be transferred to Petitioner's clients, since the clients direct and control the use of the equipment. See Section 526.7(e)(6) of the Sales and Use Tax Regulations. The rental of real property such as a sound studio is not subject to New York State and local sales and use taxes. Therefore, the fees paid for studio time are not subject to New York State and local sales and use taxes if such fees are solely for the rental of real property. However, the rental of recording equipment may be considered the sale of tangible personal property and, therefore, subject to sales tax, unless it otherwise qualifies for exemption. The production exemption under Section 1115(a)(12) of the Tax Law may apply if equipment is used to produce tangible personal property for sale. See Section 528.13 of the Sales and Use Tax Regulations. If Petitioner's rental fee includes both the rental of a sound studio and the rental of taxable equipment, the entire fee is taxable unless the nontaxable charges for the sound studio rental are separately stated on the bill or invoice and are reasonably related to its true value.

The hook ups performed by Petitioner for its clients are incidental to the transmission services described above. Since Petitioner's transmissions of commercials are not taxable, the hook up fees are not taxable either.

As for issue "3", in accordance with William J. Young, supra, the fees paid for a safety/backup dub embodied in tangible form are subject to New York State and local sales and use taxes if delivered to the customer or its designee in New York State. Petitioner's charges to its clients for the production of safety/backup dubs, where the tapes are kept by Petitioner in New York for an

indefinite period of time until a client requests that its tape be sent to an out-of-state location, are subject to sales and use tax. It is noted, however, that if the safety/backup dub is used to produce other tapes for sale, that such safety/backup dub may qualify for exemption as production equipment under Section 1115(a)(12) of the Tax Law.

DATED: May 20, 1998

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

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