

SALES TAX APPLICATION TO COMPANIES TELEVISIONING

FILMS OVER PAY TELEVISION SERVICES

Reproduced below is a recent letter from Deputy Commissioner and Counsel, Ralph J. Vecchio pertaining to the above subject. Names and dates have been deleted and substitution of alphabetic symbols, as shown below, have been made to replace names only.

X and Y = Companies which televise films
over pay television services.

"This is in response to your letter of _____ requesting advice as to whether the practices of "X" are subject to New York State sales or use tax.

I understand that from time to time certain motion picture distributors and producers, which own the copyrights or distribution rights to various feature films, grant "X" limited rights to televise the films over the "X" or "Y" pay television services. Pursuant to these licenses, "X" is permitted to transmit the films during specified license periods. For these rights, "X" pays royalties to the producers or distributors, which royalties are based on such factors as the length of the license period, the merits of the film, the number of cablecasts of the film and the number of persons who subscribe to these pay television services. The distributor or producer retains all rights to exploit the films that are not expressly granted to "X".

The distributors/producers agree to provide a celluloid "print" of each film to a mutually acceptable film laboratory in advance of its televising, so that the images on the print may be electronically transferred to videotape. The videotape, not the celluloid film print, is the source of the television transmission. The film print is owned by the distributor/producer. The videotape is purchased by "X" in bulk quantities (sales tax is paid on these purchases) and is at all times the exclusive property of "X". The film laboratories are located outside New York State and are independent businesses not controlled by "X". At no time does "X" have control or possession of any celluloid film print. No laboratory will make any videotape copies without explicit directions to that effect from the appropriate distributor/producer. "X" is not permitted to exhibit the film prints and does not do so. In no case does "X" use a film print to cablecast a film to its subscribers. The prints are returned by the laboratory to the appropriate producer/distributor promptly after the reproductions are made. The prints are not altered, edited or changed in any way.

The videotapes are prepared at "X's" sole expense; at no time does any producer/ distributor make any payment for the videotapes or have them in its possession.

After the print-to-videotape transfers are made, "X" uses the videotapes to transmit the film images to its local cable company affiliates; they in turn cablecast the images to their subscribers, who pay monthly fees for the privilege of viewing the films and other programming.

"X's" practices prior to _____ were substantially the same as its practices after that date described above. "X" obtained reproduction rights from distributors/producers, and the same steps were taken in transferring film images from film prints to videotape, and in using the videotapes to make television transmissions. However, in many cases the film-to-tape transfers were made in New York State, either by independent film laboratories or by "X's" own studio. In other words, in those cases "X" itself, or a film laboratory in New York, took possession of the film prints for the sole purpose of transferring the film images onto videotapes that were supplied, owned and used by "X" in the television transmission process.

The issue presented then is whether the transfer of film prints to "X" or its agent for the purpose of transferring the film images to "X's" tapes is subject to sales tax.

Section 526.7(f) of the Regulations on the Sales and Use Taxes provides, in part, as follows: '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 NY 345 and Matter of Frissell v McGoldrick, 300 NY 370.'

In receiving the right to televise movies, "X" receives the right to reproduce movies, within the meaning of Sec. 526.7(f)(1), of the foregoing regulations, Under Sec. 526.7(f)(2) of the foregoing regulations, the transfer of movie prints to "X", solely for reproduction purposes, does not constitute a license to use. The delivery of prints to New York State is, therefore, not subject to sales tax. In those cases, where an independent laboratory performs the reproduction process for "X", the price charged "X" for the service is subject to sales tax. (Tax Law 1105(c) (2)).

Deliveries of movie prints by producers and distributors to out-of-state laboratories for purposes of reproduction are not subject to sales or use taxes. In these cases "X" furnishes out-of-state laboratories with its own tapes for processing, and receives its tapes from the laboratories bearing the images from the movie prints. The movie prints themselves do not enter New York State in these transactions. They are not, therefore, subject to sales or use taxes. Under section 1110(D) of the Tax Law, a use tax is imposed on the use of tangible personal property upon which processing services have been performed. The tax is based on the cost of the processing service. "X" must therefore pay a use tax on its own tapes in these transactions, based on the prices charged by out-of-state laboratories for their reproduction services.

If a tax is legally due and paid without any right to refund in another state on the processing services, section 1118(7)(a) of the Tax Law provides an exemption from use tax to the extent of the tax paid the other state. The exemption under section 1118(7)(a) only applies if the other state grants a corresponding exemption for New York State sales or use taxes paid.

Based on the facts outlined above, we conclude that transfers of movie prints by producers and distributors to "X" or independent laboratories solely-for reproduction purposes are not subject to sales or use taxes, whether the transfers occur within New York State or outside New York State. If the film processing services are performed within New York State, the sales and use tax consequences for "X" will be as favorable as if the processing services are performed outside New York State."