

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-04(12)S  
Sales Tax  
May 20, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030221A

On February 21, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brandi Merolla, President, Merolla Displays, Inc., 671 Skipperene Rd, Narrowsburg, NY 12764. Petitioner, Brandi Merolla, provided additional information pertaining to the Petition on October 23, 2003.

The issue raised by Petitioner is whether the services she provides to record companies are subject to sales or compensating use tax.

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

Petitioner is an independent contractor who offers the following service to record companies. When a record company has an artist it wants to promote, it will send Petitioner a two-dimensional poster of that artist. The flat two-dimensional poster has been designed and produced by the record company for display in retail record stores for advertising purposes. Using the two-dimensional poster, Petitioner creates (using other necessary supplies which are sometimes furnished by the record company) an enlarged three-dimensional version of the poster. The three-dimensional poster provides a more attention getting look when incorporated into a display. Petitioner delivers the three-dimensional version of the poster to the record stores in her own vehicle and arranges the display in a designated location. The designated location is a space in the record store which has been rented to the record company. Petitioner states that on occasion the record company has also provided other property (e.g., curtains) for use in the display to further draw the record store customer's attention to the display area. Occasionally, if the three-dimensional posters are large, the record company may arrange for one of its employees, a merchandiser who is responsible for placing the record company's products for sale in the store, to be available to assist Petitioner with the three-dimensional posters. Once the promotion for a recording artist is over, Petitioner is responsible for removing and destroying the old three-dimensional poster, and placing and arranging a new promotional display.

Petitioner provided samples of the two-dimensional posters as part of its Petition. Along the bottom of every poster are the words "For promotional use only. Not for sale."

**Applicable law and regulations**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

\* \* \*

(2) Producing, 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, upon which services are performed.

Section 1115(d) of the Tax Law provides:

Services otherwise taxable under paragraph (1), (2), (3), (7) or (8) of subdivision (c) of section eleven hundred five shall be exempt from tax under this article if the tangible property upon which the services were performed is delivered to the purchaser outside this state for use outside this state.

Section 1115(n) of the Tax Law provides, in part:

(1) Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

\* \* \*

(4) Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service.

(5) Services otherwise taxable under paragraph two of subdivision (c) of section eleven hundred five performed on promotional materials exempt under paragraph four of this subdivision shall be exempt from tax under this article.

Section 1131(4) of the Tax Law provides, in part:

“Property and services the use of which is subject to tax” shall include . . . all services rendered to a person within the state, whether or not such services are performed within the state, upon tangible personal property the use of which is subject to tax under section eleven hundred ten of this article or will become subject to tax when such property is received by or comes into possession or control of such person within the state. . . .

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 526.7(e)(1) of the Sales and Use Tax Regulations provides:

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.

Section 527.4 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition.* (1) Section 1105(c)(2) of the Tax Law imposes a tax on the receipts from services of producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the property.

\* \* \*

(c) *Fabricating.* *Fabricating* is the alteration or modification of tangible personal property to the specifications of the purchaser of the service, without changing the identity of the property. . . .

*Example 1:* An individual purchases sheet metal from a supplier and takes the sheet metal to a metal shop to be cut, perforated, and bent to the individual's specifications, for the individual's own use. The metal shop's charge for these services is taxable.

\* \* \*

(f) *Resale.* (1) When the services enumerated in this section are rendered on property held for resale, the services are not taxable.

## **Opinion**

Unless specifically exempted or excluded, New York State and local sales taxes are imposed on the receipts from every sale, other than sales for resale, of specifically enumerated services as provided in section 1105(c) of the Tax Law. See section 525.2(b) of the Sales and Use Tax Regulations. Petitioner performs services for its customers, the record companies, by transforming two-dimensional advertising posters into three-dimensional versions of the same posters and arranging the posters in designated spaces in record stores. Petitioner's customers furnish Petitioner with the posters and some of the supplies necessary for Petitioner to perform this service. When a customer furnishes tangible personal property upon which alterations/modifications are made, the sale of the services of producing, fabricating or processing are being provided to that customer. These services are subject to sales tax under section 1105(c)(2) of the Tax Law when delivered or used in New York State unless purchased for resale or performed on property intended for resale. See section 527.4(c) of the Sales and Use Tax Regulations. Accordingly, Petitioner's service of transforming two-dimensional posters into three-dimensional posters constitutes a taxable service where delivery or use of the posters occurs within New York State. Since the three-dimensional posters are not resold by the record companies, Petitioner's receipts for posters delivered in New York State are subject to sales tax. See sections 526.7(e) and 527.4(f) of the Sales and Use Tax Regulations.

Therefore, Petitioner's sales of producing, fabricating, or processing services are subject to sales or compensating use tax if delivery or use of the three-dimensional posters occurs in New York State. When Petitioner provides such services and delivers the posters to a location outside of New York State, the receipts are not subject to New York State or local sales tax regardless of the customer's business location. See section 1115(d) of the Tax Law, and sections 525.2(a)(3) and 526.7(e) of the Sales and Use Tax Regulations.

The three-dimensional posters constitute promotional materials as defined in section 1101(b)(12) of the Tax Law. The purchase of promotional materials upon which section 1105(c)(2)

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services have been directly performed, that are mailed or shipped, or caused to be mailed or shipped, via common carrier, United States postal service or like delivery service by a purchaser without charge to the purchaser's customers or prospective customers in New York State is exempt from sales and compensating use tax. See section 1115(n)(4) and (5) of the Tax Law.

In Petitioner's case, the three-dimensional posters are not shipped or delivered by common carrier, United States mail or similar delivery services as required for purposes of the exemption under section 1115(n)(4) of the Tax Law. The three-dimensional posters are placed by Petitioner in retail outlets for viewing by the retail record stores' customers and prospective customers when they enter the store. The posters do not promote or solicit purchases by the retail record store to which they are delivered and in which they are displayed. In addition, these posters are intended to solicit purchases by the record stores' customers who ultimately consume the record companies' products. Thus, the posters also fail to qualify for the exemption under section 1115(n)(4), because they are not shipped or mailed to the customers or prospective customers whom the posters are designed to solicit. See *Henry Goldwasser*, Adv Op Comm T&F, November 30, 1999, TSB-A-99(55)S; *AAA Western and Central New York, Inc.*, Adv Op Comm T&F, November 5, 1998, TSB-A-98(74)S. Accordingly, the services Petitioner provides are not exempt under section 1115(n)(5) of the Tax Law since the three-dimensional posters are not exempt under section 1115(n)(4). Therefore, Petitioner's charges to her customers for these services are subject to sales tax when the three-dimensional posters are delivered and used in locations in New York State.

DATED: May 20, 2004

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