

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

TSB-A-04(4)S  
Sales Tax  
February 26, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S030102A

On January 2, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Gittelman & Company, P.C., 300 Colfax Avenue, P.O. Box 2369, Clifton, NJ 07015. Petitioner, Gittelman & Company, P.C., furnished additional information with respect to the Petition on April 17, 2003.

The issues raised by Petitioner regarding Petitioner's client XYZ Company, Inc. ("XYZ") are:

1. Whether fees for the production of a news story on a videotape, audio cassette, DVD or CD are subject to the New York State sales tax.
2. Whether fees for the wire feeds and the satellite uplinks used to transmit news stories to the national news outlets and radio newsrooms are subject to New York State sales tax.
3. Whether XYZ is eligible for the sales and use tax exemptions provided in section 1115 of the Tax Law for property and services used in the production of a film for sale.
4. Whether the various other media and public relations services provided by XYZ are subject to New York State sales tax.

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

XYZ is a media relations and public relations company specializing in broadcast communications. XYZ services its clients by providing video and audio promotions suitable for use by electronic media such as television, radio and Internet. XYZ provides media coverage for its clients which will create media exposure to further the distribution of products or services, or which will otherwise bring the public's attention to the client. XYZ provides all video and audio promotions and news stories to national news outlet networks, cable business programming and radio newsrooms without charge. XYZ may provide copies of promotional features and news stories to the client for editing and archive copy purposes only. The following services are provided by XYZ:

1. **News Video Releases**  
XYZ produces and distributes video news features (2 minutes in length) with an announcer voice track on videotape, audiocassette, DVD or CD and via satellite. These "features" are produced and distributed for immediate use and sent at no charge directly to news outlets for their use in whole or in part.

2. **B-Roll**  
XYZ produces and distributes, via satellite, video footage with natural sound and interview clips. The feature includes introductory slates that inform TV reporters of story details and editorial contacts. The feature is produced and distributed for on air use in whole or part by TV stations.
3. **Satellite Media Tours**  
From any location in the world, XYZ can set up interviews for its client's appointed spokesperson with up to 20 television stations per hour. Interviews are used at TV station discretion in whole or part.
4. **Satellite Conferences**  
XYZ can use a satellite to relay one or two-way audio and video between two or more locations. These satellite relays are used for national press announcements reaching print, television and radio reporters, or for conferencing. Material is used at a reporter's discretion.
5. **Electronic Press Kits**  
Video footage is packaged for entertainment reporters at TV stations.
6. **Public Service Announcements**  
XYZ produces messages presented to the public urging them to take action for their own benefit or for the benefit of others. These are sent to TV and radio stations for use at their discretion.
7. **Radio News Releases**  
XYZ delivers fully produced "ready to air" news reports to selected radio stations' newsrooms across the continent.
8. **Radio Media Tours**  
XYZ produces and arranges for hosted media tours from a studio or other predetermined locations. Back to back interviews are arranged for a client spokesperson with radio networks and individual stations. Interviews may be used live or taped at the station's discretion.
9. **Radio Features**  
XYZ produces audio material for use by stations as a daily or weekly series. Long or short formats can be selected with programs bundled on cassette or compact disk. The company also advises on syndication and broadcast usage of these radio features.
10. **On-Site Coverage**  
XYZ produces news stories on location at conventions and meetings with production for same day distribution via telephone to radio stations around the country.

11. **Internet Services**

XYZ develops and designs innovative services for its clients to reach the media through the Internet and through new electronic media.

To accomplish the above services, XYZ will engage in the following activities:

1. Consultation with the client to develop press releases and news stories.
2. Scripting and editing of video and audio materials.
3. The production of video and radio news features for national news outlets, network and cable business programming, and radio newsrooms.
4. Notification to the appropriate news outlets of the upcoming news stories.
5. Distribution of these materials via satellite or other transmission.
6. Equipment rentals to assure that the materials can be properly displayed.
7. Monitoring of the usage by the radio and television stations of these news stories.

In general, the means for notification of these public relations news stories include broadcast E-mail, broadcast fax, news wires and, in some cases, telephone calls.

**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:

\* \* \*

(4) Retail sale. (i) 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 where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

\* \* \*

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(a) of the Tax Law imposes a tax on “The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

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

Section 1105-B of the Tax Law provides, in part:

(a) Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property . . . for sale by manufacturing, processing . . . shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article.

(b) Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following 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:

\* \* \*

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment. This exemption shall include all pipe,

pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser.

\* \* \*

(38) (A) Machinery or equipment or other tangible personal property (including parts, tools and supplies) for use or consumption by a broadcaster directly and predominantly in the production (including post-production) of live or recorded programs which are used or consumed by a broadcaster predominantly for the purpose of broadcast over-the-air by such broadcaster or transmission through a cable television or direct broadcast satellite system by such broadcaster. . . .

\* \* \*

(C) For purposes of this paragraph: (i) the term "broadcaster" means a television or radio station licensed by the federal communications commission, a television or radio broadcast network or a cable television network. The term "television or radio broadcast network" means an organization which produces and/or purchases programs intended for transmission by affiliated television or radio stations licensed by the federal communications commission and which has distribution facilities or circuits available to such affiliated stations during all or some portion of one or more days during each week. The term "cable television network" means an organization which produces and/or purchases programs intended for transmission either by direct broadcast satellite systems or by cable systems pursuant to an affiliation or similar agreement and which has distribution facilities or circuits available to such direct broadcast satellite systems or such cable systems during all or some portion of one or more days during each week. For the purpose of subparagraph (B) of this paragraph, the term "broadcaster" shall not include cable system operators and direct broadcast satellite system operators. Provided, however, for the purpose of subparagraph (A) of this paragraph, such term shall also include a cable system operator or a direct broadcast satellite system operator solely with respect to machinery or equipment or other tangible personal property (including parts, tools and supplies) for use or consumption by it directly and predominantly in the production (including post-production) of live or recorded programs intended for transmission to its viewers over its system; . . .

(39) Tangible personal property for use or consumption directly and predominantly in the production, including editing, dubbing and mixing, of a film for sale regardless of the medium by means of which the film is conveyed to a purchaser. For purposes of this paragraph, the term "film" means feature films, documentary films, shorts, television films, television commercials and similar productions.

\* \* \*

(c)(1) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly *and exclusively* in the production of tangible personal property . . . for sale, by manufacturing, processing, assembling, generating, refining, mining or extracting shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article. (Emphasis added)

\* \* \*

(bb) 1. Receipts from the sale of services described in paragraph two or three of subdivision (c) of section eleven hundred five of this article, and consideration given or contracted to be given for, or for the use of, such services, shall be exempt from tax under this article when rendered with respect to property exempt under paragraph thirty-nine of subdivision (a) of this section.

2. Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of a film for sale, as described in paragraph thirty-nine of subdivision (a) of this section, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term "retail sale" or "sale at retail" means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

\* \* \*

(c) *Resale exclusion.* (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

\* \* \*

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

\* \* \*

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

\* \* \*

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

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 527.3(b)(5) of the Sales and Use Tax Regulations provides:

Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. . . . Sales of tangible personal property such as layouts, printing plates, catalogs, mailing devices or promotional handouts, tapes or films by an advertising agency for its own account are taxable sales of tangible personal property. (See section 527.1 of this Part.)

Example 5: An advertising agency is hired to design an advertising program and to furnish art work and layouts to the media. The fee charged by the agency to its client for this service is not subject to the tax. However, if the layout and artwork is sold by the advertising agency prior to use by it to the customer for his use, the advertising agency is making a sale of tangible personal property which is subject to sales tax.

## Opinion

As a media and public relations company, XYZ provides its clients with a variety of broadcast communications services through video and audio promotions suitable for use by electronic media such as television, radio and the Internet. XYZ provides this media coverage through a variety of production and distribution services. XYZ begins by consulting with the client's personnel to develop press releases and news stories, scripting, editing and ultimately producing video and radio news features for national news outlet networks, cable business programming and radio newsrooms. XYZ notifies the appropriate news outlets of the upcoming news stories, distributes the press releases and news stories to the news outlets via satellite or other transmission, and monitors the usage of these stories to evaluate how effective they are in the media. XYZ does not charge the news outlets for these transmissions or for the use of the press releases and news stories.

XYZ provides media coverage for its clients which will create media exposure to further the distribution of products or services, or otherwise bring the public's attention to the client. Generally, the services XYZ performs may be considered a form of advertising, the receipts of which are not subject to sales tax. Furthermore, XYZ's services do not otherwise constitute a service described in section 1105(c) of the Tax Law. Therefore, XYZ's receipts from the sale of these services, including fees for the production of press releases and news stories as described above, are not subject to sales and use tax, provided that they are not otherwise performed for clients in conjunction with the sale of tangible personal property. See *Greenstone & Rabasca Advertising Inc.*, Adv Op St Tx Comm, September 9, 1986, TSB-A-86(35)S.

The transmission of the news stories by XYZ is accomplished through the use of wire feeds and satellite uplinks. Thus, there may be telegraphic or telephonic transmission of a signal. However, the essential object of XYZ's service is to provide news stories to national news outlets and not to provide telecommunication services to its clients. The use of these telecommunication services is incidental to XYZ's provision of advertising and public relations services and is not considered a sale of telecommunication to its clients. Thus, any fees charged by XYZ to its clients for wire feeds or satellite uplinks are not considered receipts from taxable sales by XYZ. XYZ's purchases of telecommunication services for its use, however, are taxable under section 1105(b) of the Tax Law, unless such services are interstate or international in nature. See *Satellite Signals Unlimited, Inc.*, Adv Op St Tx Comm, October 15, 1984, TSB-A-84(26)S.

Sections 1115(a)(39) and 1115 (bb) of the Tax Law provide an exemption from sales and use tax for film producers' purchases of tangible personal property and services used or consumed directly and predominantly, or in the case of utility services, directly and exclusively, in the production of film for sale. XYZ provides its clients with media services. Where XYZ has been hired to place news stories with the media, XYZ is deemed to be providing an advertising service and is not engaged in the production of property for sale. The films XYZ produces for placement



with the media are used by XYZ in the performance of its services and are not sold by XYZ to the media outlets or to XYZ's customers. As XYZ is not producing such films for sale to its clients or the media, no exemption pursuant to sections 1115(a)(39) and 1115(bb) applies. XYZ does not appear to be producing any tangible personal property for sale to its clients. Therefore, the exemptions under sections 1105-B and 1115(a)(12) of the Tax Law for machinery or equipment, parts, tools or supplies used directly and predominantly in the production of tangible personal property for sale, and repair or maintenance services performed on such exempt items, would not apply to XYZ's purchases of property and services. The exemption under section 1115(c) for utility services used directly and exclusively in the production of tangible personal property for sale also would not apply.

As XYZ is providing a nontaxable service and is not making sales of tangible personal property, XYZ may not purchase tangible personal property or services for resale. XYZ would be required to pay sales tax on its purchases. See section 526.6(c)(7) of the Sales and Use Tax Regulations.

If, however, XYZ produced press releases and news stories on videotape, audio cassette, DVD or CD, and sold such tangible products to clients for the client's own use, these sales would be subject to New York State and local sales taxes under section 1105(a) of the Tax Law when delivered by XYZ to a client or its designee in New York State. If XYZ were engaged in the production of films for sale, rather than in production of film for use in its performance of advertising services, XYZ would be eligible for the exemptions pursuant to sections 1115(a)(39) and 1115(bb) of the Tax Law on its purchases of property used directly and predominantly in the production of film for sale and on its purchases of services to such property. Property and services used in the production of tangible personal property other than film, such as audio cassettes or CDs for radio features, for sale may qualify for exemption under sections 1105-B, 1115(a)(12) and 1115(c) of the Tax Law. Purchases by XYZ of tangible personal property for resale as such or as a component part of tangible personal property produced by XYZ for sale would be exempt purchases for resale. See section 1101(b)(4)(i) of the Tax Law.

As discussed above, however, under the circumstances presented in this case, the videotapes, audio cassettes, DVDs and CDs produced by XYZ do not appear to be sold by XYZ to its clients. The clients are purchasing public relations and advertising type services from XYZ. Copies of promotional features and news stories on videotape, audio cassettes, DVDs and CDs may be provided to clients as an edit copy, or archival copy. Assuming these copies are merely "edit" or "archive" copies, and are not master copies which are suitable for use by the customer as a broadcast tape or otherwise, it appears that such copies are not sold but are provided to the customers as a mere incident to the nontaxable services provided by XYZ.

The rental of any equipment by XYZ, such as a projector, to display the promotional features or news stories that it produces is a purchase of tangible personal property subject to sales

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tax pursuant to sections 1105(a) and 1101(b)(5) of the Tax Law. Where the use of the equipment includes the services of an equipment operator, then the wages paid to the operator, if separately stated, may be excluded from the receipts subject to tax. See section 526.7(e)(6) of the Sales and Use Tax Regulations.

It should be noted that XYZ does not qualify as a broadcaster as defined in section 1115(a)(38)(C)(i) of the Tax Law, and, therefore, the exemptions provided under sections 1115 (aa) and 1115(a)(38) for purchases of equipment and services by broadcasters do not apply.

In regard to the radio media tour services, XYZ produces and arranges hosted media tours for its clients. XYZ's arranging for a host and coordination of the interview to be conducted by the radio station does not constitute a service described in section 1105(c) of the Tax Law. Were XYZ itself to produce the media tour as a promotional feature and transmit it to the radio station, such service would appear to be a form of advertising and, as previously noted, the receipts for such services are not subject to sales tax.

XYZ also may develop and design innovative services for its clients to reach the media through the Internet. If the object of these services is for XYZ to design and develop a Web site for its clients or to design and place promotional information regarding the client on third party Web sites, the receipts from the sales of these services are not subject to the taxes imposed pursuant to section 1105(c) of the Tax Law. If, however, such services constituted the sale to the client of prewritten software, the receipts from such sale would be subject to state and local sales taxes. See *Pegasus Internet, Inc.*, Adv Op Comm T&F, June 25, 2002, TSB-A-02(13)S.

DATED: February 26, 2004

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