

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(20)S
Sales Tax
May 22, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080805A

On August 5, 2008, the Department of Taxation and Finance received a petition by Marschallin + Sachs, Inc., 1133 Broadway, Suite 1330, New York, New York 10010, requesting an advisory opinion about whether receipts from its sale of certain design services are subject to New York State and local sales taxes. We conclude that if Petitioner's final design is delivered on tangible media, Petitioner's charges are subject to tax when delivered to customers within New York State. If the final design is delivered to clients outside New York State, or is delivered in electronic form to clients in New York State, Petitioner's charges are not subject to tax.

Facts

Petitioner provides various design services to clients located both in and out of New York State. Petitioner's services include the following: (1) designing logos and graphic images; (2) designing and writing content for brochures, direct mail pieces, exhibits, annual reports, advertisements and other printed publications; (3) designing Internet advertisements, banner ads and electronic newsletters; and (4) website planning and design.¹ The website design service includes creation of the HyperText Markup Language (HTML) code for the website graphics and layout. The code is unique to a particular client's website. Petitioner does not print or mail any printed matter. Petitioner does not grant a client a right to reproduce the end product of its design services; rather, all rights to the end product are fully transferred to the client. Petitioner currently delivers its final designs to its clients or to an outside vendor designated by a client (e.g., a printing vendor) on tangible media (e.g., disc), but is considering changing to electronic delivery.

Petitioner asks the following questions:

1. If the final design is delivered on tangible media, is Petitioner's entire charge subject to State and local sales tax?
2. If the final design is delivered electronically, is Petitioner's entire charge subject to tax?
3. If the final design is delivered electronically, but a copy or print is provided on tangible media for a separately-stated charge, are either the electronically delivered design or the tangible copies subject to tax?
4. If the final design is delivered to a printing vendor on tangible media, is Petitioner's charge subject to tax?

¹ Petitioner's design services do not include interior decorating or design services subject to sales tax under Tax Law section 1105(c)(7), and this opinion does not address those services.

5. If the final design is delivered to a client located outside New York State, is Petitioner's charge subject to tax?

Analysis

New York State and local sales taxes are imposed on all sales of tangible personal property, unless otherwise exempt, and on certain enumerated services. See Tax Law §1105. When Petitioner's final design is delivered to a client or a designated vendor (e.g., printing vendor) in tangible form, Petitioner is selling tangible personal property. The design services are an integral component of the sale of the tangible personal property. See Penfold v. State Tax Comm'n, 114 AD2d 696 (3d Dep't 1985); see also Tax Law §1132(c); Sales and Use Tax Regulations §527.1. Thus, Petitioner's entire charge to its client for the final design delivered in tangible form, including its design costs and other expenses, are subject to tax, regardless of whether those charges are separately stated, unless the purchase of the tangible personal property is otherwise exempt. See Tax Law §1101(b)(3); Sales and Use Tax Regulations §526.5(e); see also, Matter of Zagoren Group Inc., DTA Nos. 808189, 808190 (May 19, 1994); Sales and Use Tax Regulations § 526.8(a); Doyle Partners, TSB-A-06(32)S (December 29, 2006); Gentile, Wiener, Pena & Co. CPAs PC, TSB-A-096(91)S. Petitioner is required to collect the applicable sales tax at the State and local rates in effect at the place of delivery of the tangible personal property to its client or designated vendor. See Sales and Use Tax Regulations § 526.7(e)(1). Petitioner is not required to collect sales tax if the tangible personal property is delivered outside New York for use outside the state.

We note that Tax Law section 1115(n)(7) exempts the sale of "mechanicals, layouts, artwork, photographs, color separations and like property," if that property is purchased by someone who provides it to a printer for use directly and predominantly in the production of printed promotional materials exempt under section 1115(n)(4) (i.e., printed promotional materials that will be delivered without charge to customers or prospective customers by means of a common carrier, United States Postal Service or like delivery service), or in performing services exempt under section 1115(n)(5) (i.e., services otherwise taxable under section 1105(c)(2) performed on printed promotional materials exempt under section 1115(n)(4)), for sale by the printer to the person furnishing the property. Petitioner is not required to collect tax from its customer on the sale in tangible form of the property described if it accepts a properly completed exemption certificate (*ST-121 - Sales Tax Exempt Use Certificate*) from its customer in good faith that documents this exemption.

If, however, Petitioner delivers the final design to a client or designated vendor electronically, Petitioner is not selling tangible personal property. In that case, Petitioner's charges are not subject to State and local sales taxes. See Apple Computer Inc., TSB-A-07(11)S, April 12, 2007; Doyle Partners, TSB-A-06(32)S, December 29, 2006; Universal Music Group, TSB-A-01(15)S, April 18, 2001.

If Petitioner delivers the final design to a client or designated vendor electronically, but also separately offers an optional tangible copy of the final design for a separately-stated charge, the separately-stated charge for the tangible copy is subject to tax. The separate offering of a tangible copy will not cause

the entire charge to be subject to tax, provided that the charge for the tangible copy is separately stated and reasonable in relation to the overall charge. See Tax Law §1132(c); Sales and Use Tax Regulations §527.1.

These conclusions represent the current position of the Department. To the extent that *Pegasus Internet, Inc.* (TSB-A-02(13)S), *K2 Design, Inc.* (TSB-A-97(43)S), or any other advice from the Department suggests a contrary conclusion with respect to website design, it does not represent current policy.

DATED: May 22, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.