

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the temporary transfer of photographs for reproduction to its customer is taxable under any of its varying contractual agreements and whether its fee structure would change that answer.

We conclude, in general, that the sale of a photograph transferred to the customer via a tangible medium (paper, slide, negative, CD, etc.) is the sale of tangible personal property and is subject to sales tax under Tax Law § 1105(a) if delivered in New York, but royalty payments in return for temporary transfers of such photographs for purposes of reproduction are not taxable. Sales of photographic images delivered solely electronically are not subject to sales tax, whether transferred permanently or temporarily. Petitioner’s fee structures do not affect the taxability of its transactions. All expenses related to the sale of a tangible photograph are included in the taxable receipt and all expenses related to a nontaxable temporary transfer of a photograph for reproduction are nontaxable. A customer’s subsequent use of the transferred tangible photograph, or an archived digital copy of the photograph, may affect the taxability of the transaction.

**Facts**

Petitioner is a freelance commercial photographer based in New York City, operating as a sole proprietor. Petitioner is commissioned on a case-by-case basis by publications (newspapers, magazines, periodicals, books, catalogs, etc.) and commercial customers (design firms, architects, furniture, and housewares manufacturers, etc.) to create photographs for reproduction. Petitioner pays sales tax on its purchase of all taxable supplies, equipment, and services.

When engaged by a customer publication (“customer”), Petitioner captures the commissioned images at the specified location(s). Petitioner may take photographs in a traditional/analog manner (with film), or in a digital manner (digital image files). In the case of film, the film is processed by a photo lab to produce either positive transparencies or negatives. The customer then is provided with transparencies and/or photographic prints created from the negatives. In the case of digital capture, Petitioner electronically processes the RAW (an image file format) image files to a suitable format (Joint Photographic Experts Group [JPEG] or Tagged Image File Format [TIFF]) for reproduction and the customer is provided with a set of the digital files rendered on a CD or DVD. Alternatively, Petitioner may send the files to the customer electronically (email attachment, digital download, or file transfer protocol). As agreed to by the two parties, once the customer has reproduced the images provided by Petitioner, any physical

media used to transfer the images (transparencies, prints, CD, DVD, etc.) are returned, unaltered, to Petitioner; electronic files are not returned. On rare occasion, a customer will retain these materials in violation of the terms of the contract.

For each commission, Petitioner's agreement with the customer sets forth the specific reproduction rights granted to the customer. The contract specifies that Petitioner will be paid a specified fee, plus expenses to complete the commission. The fee and expenses are delineated as separate line items in Petitioner's invoice submitted to the customer. The invoice further states that "except as otherwise specifically provided herein, all photographs and rights therein, including copyright, remain the sole and exclusive property of Photographer." Furthermore, unless otherwise stated, the grant of rights is for one year from the invoice date and is limited, geographically, to North America only. On occasion, Petitioner will allow a corporate customer to grant reproduction rights to the customer's subsidiary, which may be located outside of North America. The terms of the invoice also declare that "customer will not make or permit any alterations, additions, or subtractions in respect of the photographs."

Petitioner maintains an archive of images he has created, both from prior commissions and from self-generated, non-commissioned work. From time to time, a customer will contact Petitioner to request permission to reproduce an image or images from Petitioner's archive for a specific purpose, such as reproduction in a periodical. Petitioner will supply the customer with an original positive transparency, photographic print, or digital image file on a CD or DVD for the purpose of making the necessary reproduction.

Petitioner's charges are separated into two main categories: a fee for the creation of the images, and the expenses required to accomplish the assignment. On occasion, customers will request that the entire cost for the photo shoot be set forth as a "flat fee," in which case there is no itemization of fees and expenses. When expenses are itemized, they may include line items for: film, processing (analog or digital), equipment rental (analog or digital) assistant(s), travel expenses, stylist(s), expendables (gels, filters, tape, batteries), and the like. Petitioner does not sell these products or services other than in connection with the transfer of photographs to its customer. On occasion, at the customer's request, the purchase of the film and its subsequent processing are billed directly to the customer by a third party photo lab. The fee structure and payment schedule are determined on a commission-by-commission basis. For example, Petitioner may charge its customers one fee for capturing the images and the related expenses in doing so, called a "day rate" or "creative fee," and a second fee that is based on the size and number of images published as reproductions (i.e. reproduction rights), sometimes called a "space rate." On occasion, third parties - other than the commissioning party - pay only the fee associated with reproduction rights to use the images.

Under the terms set forth on Petitioner's invoice, the customer assumes the obligation "to return all photographs prepaid, fully insured, safe and undamaged, by bonded messenger, air freight, or registered mail within thirty (30) days after the first use thereof as provided, but in all events (whether published or unpublished) within one (1) year after the date hereof." On

occasion, customers will pay Petitioner an additional fee to use previously reproduced images that Petitioner has provided to the customer, which the customer has archived.

### **Analysis**

Petitioner first asks about the taxability of transfers of photographs for purposes of making reproductions. Tax Law § 1105(a) imposes sales tax on receipts from retail sales of tangible personal property unless an exemption or exclusion applies. Photographs embodied in a digital format and delivered electronically (“digital photographs”) are not tangible personal property, whether the transfer is temporary or permanent. *See* TSB-A-05(34)S. Photographs printed on paper or other physical media or placed on a CD, DVD, hard drive, or other physical format (“tangible photographs”) and transferred to the purchaser via such media are tangible personal property. *See* Tax Law § 1101(b)(6); TSB-A-12(10)S; TSB-A-99(48)S. Thus, outright sales of tangible photographs are subject to tax. *See* Tax Law § 1105(a).

A temporary transfer of a tangible photograph can constitute a sale, since “sale” includes rentals, leases, and licenses to use. *See* Tax Law § 1101(b)(5); 20 NYCRR 526.7 (a) and (c). But, the temporary transfer of a tangible photograph is not a sale as long as (1) the customer merely takes possession or custody of the photograph for the sole purpose of making a reproduction; and (2) payment for the right to reproduce the image is in the nature of a royalty. *See* 20 NYCRR 526.7(f)(1); *Howitt v. Street and Smith Publications, Inc.*, 276 NY 345 (1938); TSB-A-99(48)S. These requirements are met here.

With regard to the first requirement, the temporary nature of the transfer, Petitioner’s contracts specify that the original photographs must be returned unaltered within one year from the date the customer receives the original photographs. A one-year transfer of possession qualifies as “temporary” for the purposes of this regulation. *See* TSB-A-88(48)S. Customers’ alteration of copies of the reproduced images does not convert the transaction to a taxable license to use because the original photographs are returned unaltered. *See* 20 NYCRR 526.7(f)(3).

With regard to the second requirement, royalties are payments made in relation to the continued exercise of the copyright, rather than a lump sum payment. *April Prods., Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 372 (1955) (contrasting payment of a royalty with payment of a lump sum); 75A N.Y. Jur. 2d *Literary and Artistic Property* § 31 (“royalties are payable during the entire term of the copyright, as opposed to payment of a lump sum or of installments not related to the usufruct of the copyright”). Petitioner’s charges for the use of a reproduction of a tangible photograph in a book, newspaper, periodical, or other printed medium are in the nature of a royalty, because Petitioner is paid for each new use of the reproduction, regardless of exactly how the amount of the payment is determined. *See* 20 NYCRR 526.7(f)(1); TSB-A-88(48)S. When customers request that the entire cost for the photo shoot be set forth as a “flat fee,” this is only a payment for a particular use and is not a payment for unlimited uses of the photo, which is the type of “lump sum” payment that fails the second requirement mentioned above.

Petitioner next asks whether its expense charges in relation to transfers of tangible photographs are subject to sales tax. As previously outlined, under Petitioner's standard contract, which requires the customer to return all tangible photographs in an unaltered condition within one year of receipt, the transfers of the photographs are temporary and therefore nontaxable. Accordingly, all related expense charges also are nontaxable. *See* Tax Law § 1101(b)(3). If Petitioner transferred a photograph permanently, it would be a sale and yield a different result. *See* Tax Law § 1105(a). As relevant here, "receipt" is defined as the amount of the sale price of any property and the charge for any taxable service, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery. *See* Tax Law § 1101(a)(3). Accordingly, the portion of Petitioner's invoices billed as expenses that are incurred in connection with Petitioner's sale of a tangible photograph cannot be excluded from the total receipts subject to tax. The entire amount of the invoice is considered to be the sales price paid by Petitioner's customers for the tangible photographs resulting from the commissioned assignments, whether Petitioner's invoice shows one "flat fee" or a commission along with a series of fees and expenses. *See* TSB-A-89(20)S. Therefore, Petitioner's expense charges in relation to permanent transfers of tangible photographs are subject to sales tax. In the event that, at the customer's request, Petitioner has the third-party lab bill the customer directly for Petitioner's purchase of film or processing service, tax remains due on those purchases.

Petitioner next asks about the tax consequences when a customer, contrary to Petitioner's standard contract, retains possession of the tangible photographs permanently, makes unauthorized alterations to the tangible photographs, or grants reproduction rights to third parties without Petitioner's consent. Such actions on the part of the customer, particularly if a pattern of such action develops, could undermine the claim that the intent of both parties at the time of sale was for royalty payments to be made for the temporary transfer of the tangible photograph for purposes of reproduction only. This possibly would subject to tax the consideration for the original transfer of the tangible photograph. *See* 20 NYCRR 526.7(f)(1); *D.J.H. Const., Inc. v. Chu*, 145 AD2d 716 (3d Dep't 1988). Whether such subsequent use would cause payment for the original transfer to be taxable is a question of fact that is not suitable for resolution in an Advisory Opinion.

Finally, Petitioner asks about the customer's subsequent use of the reproduced image that the customer has made from a tangible photo temporarily transferred by Petitioner and digitally archived by the customer. The use of an archived digital image in that circumstance does not involve the transfer of tangible personal property and, therefore, is not taxable. *See* TSB-A-05(34)S; TSB-A-88(48)S. However, a subsequent use of an archived digital image in a manner that could result in the payment for such use to not be considered a royalty (e.g., a charge to use the archived image indefinitely) would undermine the claim that the intent of both parties at the time of sale was for royalty payments to be made for the temporary transfer of the tangible photograph for purposes of reproduction only. This could subject to tax the consideration for the transfer of the tangible photograph, as well as the payments for the subsequent uses of the reproduced image, particularly if a pattern of such subsequent use occurs. *See* 20 NYCRR

526.7(f)(1); *D.J.H. Const., Inc., supra*. Again, whether such subsequent use would cause those payments to be taxable is a question of fact that is not suitable for resolution in an Advisory Opinion.

If Petitioner discovers that its customer is using the tangible photograph or archived image in such a manner as described above, then Petitioner should collect and remit sales tax from that customer on all consideration received for that commission. Alternatively, if the Department discovers any such use, then it may assess Petitioner for the sales tax Petitioner should have collected.

DATED: November 24, 2020

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DEBORAH R. LIEBMAN  
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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.