

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-89 (5)S
Sales Tax
February 9, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S881219A

On December 19, 1988, a Petition for Advisory Opinion was received from the Photo Lab, Inc. d/b/a Photo U.S.A., P.O. Box 3843, 106 Boulevard, Salem, Virginia, 24153.

The issue raised is whether the film processors, disc processors and disk conversion kits purchased and used by Petitioner to conduct its business of photofinishing qualify for exemption from sales and use tax pursuant to Section 1115(a)(12) of the Tax Law.

Petitioner is engaged in the photofinishing business. Photofinishing is a process which consists of producing a photographic print from film. Petitioner's photofinishing process begins at the point where a customer brings in exposed photographic film for processing. The film is placed in an envelope containing the customer's name and telephone number. Both the film and the envelope are marked with identical numbers.

The first step in the production process consists of passing the film through a series of tanks of chemicals in a processor which results in a negative. In the second step, the equipment is used to pass light through the negative onto photographic paper and the photographic paper is then passed through a series of tanks of chemicals. During this process, some of the chemicals through which the photographic print passes become component parts of the final product, the photographic print.

At the end of the production process, both the negative and photographic prints are placed in the identically numbered envelope for protection and delivery. This entire package which consists of the negatives, photographic prints and envelope is then delivered to the customer who is charged sales tax on the total price of the package.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property, except when purchased for resale. Section 1105(c) imposes a tax on certain services, including the services of producing, fabricating processing printing or imprinting tangible personal property which has been furnished by the customer, except when such services are purchased for resale.

The term "processing" is defined by sales and use tax regulation section 527.4(d) as "the performance of any service on tangible personal property for the owner which effects a change in the nature, shape, or form of the property." Example 2 of section 527(d) provides that "[t]he developing of film by a photographic laboratory is a taxable processing service."

Section 1115(a)(12) of the Tax Law exempts from tax: "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property ... for sale, by manufacturing, processing "

Sales and use tax regulation section 528.13(c) defines the terms "directly" and "predominantly" as follows:

- (1) Directly means the machinery or equipment must, during the production phase of a process:
 - (i) act upon or effect a change in material to form the product to be sold, or
 - (ii) have an active causal relationship in the production of the product to be sold, or
 - (iii) be used in the handling, storage or conveyance of materials or the product to be sold, or
 - (iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

- (2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.
* * *

- (4) Machinery or equipment is used predominantly in production if over 50 percent of its use is directly in the production phase of a process.

In the first step of Petitioner's process, Petitioner develops a negative from film furnished by the customer. This process consists of passing the film through a series of tanks of chemicals in a processor. In these tanks, the latent image contained on the film becomes visible and fixed. This process results in a negative. Thus, Petitioner is not producing tangible personal property for sale to its customer since the film is already owned by the customer. Accordingly, Petitioner is providing a service that is subject to sales tax pursuant to Section 1105(c)(2) of the Tax Law. However, Petitioner's machinery and equipment used in such process does not qualify for exemption under section 1115(a)(12) of the Tax Law because such machinery and equipment is not used to produce tangible personal property for sale.

In the next step of the production process, Petitioner utilizes each negative to produce a photographic print. The photographic print is the final product and constitutes tangible personal property for sale. Accordingly, machinery and equipment used by Petitioner directly and predominantly to produce photographic prints for sale qualifies for exemption from sales and use tax under Section 1115(a)(12) of the Tax Law.

DATED: February 9, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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