

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

TSB-A-92 (60) S
Sales Tax
July 30 , 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920527A

On May 27, 1992, a Petition for Advisory Opinion was received from Alan/Anthony, Inc., 145 Avenue of the Americas, 2nd Floor, New York, New York 10013.

The issue raised by Petitioner, Alan/Anthony, Inc., is whether the one-time sale of reproduction rights of photographs is subject to sales and use taxes.

Petitioner is considering offering a new service, in which it would act as sales representative for a group of photographers. In this capacity, Petitioner would present customers such as newspapers, magazines and advertisers with a free catalog of photographic images from which they would choose photographs.

When a customer selected an image, Petitioner would provide a photographic transparency or print to the customer, who would reproduce it in one issue only of a newspaper, magazine or brochure. The customer would then return the unchanged transparency to Petitioner.

Petitioner would bill the customer for the sale of one-time reproduction rights in the photograph. Ownership of the photographs would be retained by the photographer and the transaction would involve only the right to reproduce the photographic image once. Petitioner would receive a commission on the sale of the right to reproduce and would pay the photographer the amount billed less commission.

It is also anticipated that Petitioner would, on occasion, purchase photographs outright from photographers. In this case, Petitioner would pay the sales tax to the photographer for purchase of the photograph. In such situations, Petitioner would sell one-time reproduction rights to customers and would retain the entire amount received as revenue.

Section 1105(a) of the Tax Law generally provides for the imposition of tax upon every retail sale of tangible personal property, with certain exceptions not relevant herein.

The term "sale" is defined for purposes of Section 1105(a) of the Tax Law by Section 1101(b)(5) of the Tax Law as follows:

"Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or an agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

Section 526.7(f) of the Sales and Use Tax Regulations provides, in part, exemption from sales and use taxes in the following instances:

(f) Reproduction rights

(1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. See Howitt v. Street and Smith Publications, Inc., 276 N.Y. 345 and Matter of Frissell v. McGoldrick, 300 N.Y. 370.)

Accordingly, pursuant to Sections 1105(a) and 1101(b)(5) of the Tax Law the outright sale of the photographs from a photographer to Petitioner would be subject to sales tax.

Concerning the sale of a reproduction right, pursuant to Section 526.7(f) of the Sales and Use Tax Regulations the granting of a right to reproduce a photographic transparency or print is not a taxable license to use or a sale since the customer merely takes temporary possession or custody of the photograph and payments for the right to reproduce are made in the nature of a royalty. This would be so whether the photograph is owned by the photographer or Petitioner. Therefore, the sale of one-time reproduction right of the photographs would not be subject to sales or use taxes.

It is noted that if the right to reproduce the photographs furnished to its customers cannot be purchased separately from the sale of other taxable services provided by Petitioner, the combination of the items listed must be considered as one, and the entire charge for all items would be subject to sales tax.

DATED: July 30, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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