

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

TSB-A-93 (66) S
Sales Tax
December 27, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930730A

On July 30, 1993 a Petition for Advisory Opinion was received from ECVS, Inc., 52 Ralph Street, Belleville, New Jersey 07109.

The issues raised by Petitioner, ECVS, Inc. are:

(1) Whether New York State and local sales tax should be collected on engineering, consulting and advisory services provided by Petitioner in a situation where taxable equipment is ultimately purchased by the client.

(2) Whether the purchase by a client of taxable equipment from Petitioner, the manufacturer, or another vendor is relevant in determining whether engineering, consulting and advisory services provided by Petitioner are subject to New York State or local sales tax.

Petitioner performs consulting, advisory, engineering and design, and installation and supervisory services for clients in the cable, broadcast and teleproduction industries in situations where equipment subject to sales tax is subsequently purchased and installed. Ultimately, a complete television facility may be designed and fabricated. However, clients may choose to purchase their equipment directly from the manufacturer. For a fee, Petitioner will handle the shipping, receiving and paperwork for such systems. System training for in-house personnel is also available.

Petitioner usually negotiates the contract for performing consulting, engineering and supervisory services for a client separate from the contract for equipment sales to the same client. Supervisory services consist of the supervision of the equipment installation.

Petitioner's consulting service consists of consulting with and advising the customer on the installation of a video production facility.

Petitioner's design and engineering services consist of preparing the design, plans and specifications necessary for the installation of the video production facility.

Petitioner's installation and supervisory services consist of supervision of the installation of the equipment according to the designs, plans and specifications prepared by Petitioner and approved by the customer, whether such equipment is purchased from Petitioner or a third party.

Section 1101(b)(3) of the Tax Law defines receipt as "[T]he amount of the sale price of any property and the charge for any service taxable ... without any deduction for expenses "

Section 526.5(e) of the Sales and Use Tax Regulations states as follows:

(e) Expenses. All expenses, including telephone and telegraph and other service charges incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses. The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	<u>5</u>
Total Due	\$200

Receipt subject to tax is \$200

Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$ 30
Travel	15
Parts	20
Meals	<u>5</u>
Total Due	\$ 70

Receipt subject to tax is \$70

Section 1101(b)(4) of the Tax Law defines retail sale as "[a] sale of tangible personal property to any person for any purpose "

Section 1105(a) of the Tax Law imposes tax on "[t]he receipts from every retail sale of tangible personal property, except as provided in this article."

Section 1105(c) of the Tax Law imposes tax on "[t]he receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter ... but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons ...

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale ...

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business ...

(4) Storing all tangible personal property not held for sale in the regular course of business ...

(5) Maintaining, servicing or repairing real property, property or land"

The effect of Section 1101(b)(3) of the Tax Law and Section 526.5(e) of the Sales and Use Tax Regulations is to treat as a single sale any sale in which any of the components cannot be singly purchased. Thus, even though the components of a particular sale can be separately stated, calculated or estimated, if they cannot be separately purchased, the combination of the items must be considered as one. Penfold v. State Tax Commission, 114 AD 2d 696 (1985).

Section 1105(c) of the Tax Law imposes tax on certain services as enumerated above. Design, engineering, consulting and advisory services, such as provided by Petitioner, are not included among the enumerated services. Therefore, in those instances where Petitioner enters into a contract to only perform a design, engineering, consulting or advisory services or any combination thereof, without the performance of any other service, the receipts from charges to the client for performing such services will not be subject to sales tax.

Generally, the installation of tangible personal property which does not result in a capital improvement will always be subject to the tax imposed under Section 1105(c)(3) of the Tax Law and generally, sales of tangible personal property will always be subject to the tax imposed under Section 1105(a) of the Tax Law.

Accordingly, in those instances where Petitioner enters into contract to install tangible personal property and/or to supervise the installation of tangible personal property without the performance of any other service, the receipts from charges to the client for performing such services will be subject to the tax imposed under Section 1105(c)(3) of the Tax Law.

In those instances where Petitioner enters into a contract for the purpose of only selling tangible personal property to a client the receipts from charges to the client for the tangible personal property will be subject to the tax imposed under Section 1105(a) of the Tax Law.

Where Petitioner performs consulting, advisory, engineering and designing, and installation and supervisory services and sells tangible personal property to the customer pursuant to a contract or contracts whereby the client does not have the option of electing to only purchase Petitioner's consulting, advisory, engineering and designing service, or Petitioner's installation service, or Petitioner's supervisory service, or to only purchase tangible personal property from Petitioner, or any combination thereof, the receipts from charges to the client will be considered as receipts from a single transaction pursuant to Section 1101(b)(3) of the Tax Law and Section 526.5(e) of the Sales

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and Use Tax Regulations and will be subject to the tax imposed under Section 1105(c)(3) of the Tax Law. Penfold v. State Tax Commission, supra.

In a transaction where the client contracts with Petitioner to perform consulting, advisory, engineering and design services for the client and to perform supervisory or installation services and to supply tangible personal property or any combination thereof pursuant to a contract or agreement whereby the client has the option of electing which services Petitioner is to perform and to purchase tangible personal property from Petitioner and whereby the sale of Petitioner's services or tangible personal property is not contingent upon the sale of the other, Petitioner's receipts from separately stated charges to the client for the consulting, advisory, engineering and design services will not be subject to New York State or local tax. However, Petitioner's receipts from charges to the client for supervisory or installation service will be subject to the tax imposed under Section 1105(c)(3) of the Tax Law and Petitioner's receipts from charges to the client for the sale of tangible personal property will be subject to the tax imposed under Section 1105(a) of the Tax Law if sold without installation or subject to the tax imposed under Section 1105(c)(3) of the Tax Law if sold installed.

In any instance where Petitioner only provides engineering, consulting and advisory services without performing any other service, and the client purchases equipment directly from a manufacturer or another vendor and not from Petitioner, Petitioner's receipts from charges to the client for Petitioner's services will not be subject to sales tax.

DATED: December 27, 1993

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

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