

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

TSB-A-96 (72) S
Sales Tax
December 6, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960826B

On August 26, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Nicholas J. Silvestri, CPA, 62 North Main Street, Florida, New York 10921.

The issue raised by Petitioner, Nicholas J. Silvestri, CPA, is whether the sale of audio/video media to attorneys or the parties in legal proceedings will be subject to New York State and local sales and compensating use taxes.

Petitioner submits the following facts as the basis for this Advisory Opinion. A future enterprise will be established to provide audio/video production, editing, duplication and computer graphics relative to accident reconstruction, discovery, etc. to any litigating party and its attorneys. The fee charged will be based on costs for personal services of a technician, the use of production equipment and media.

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property. Receipts are defined in Section 1101(b)(3), in part, to mean "[t]he amount of the sale price of any property and the charge for any service taxable under this article "

Section 1101(b)(4) of the Tax Law defines the term "retail sale", in part, to mean "(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property .

Section 1101(b)(5) of the Tax Law states as follows:

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any agreement therefor, including the rendering of any services, taxable under this article, for a consideration or any agreement therefor.

Section 526.8 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The term "tangible personal property" means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

* * *

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings;

In Video Memories Associates, Ltd., and Michael Marano, as Officer, Det Tax App Trib, March 14, 1996, TSB-D-96(16)S, the Tax Tribunal held that a videotape photographer was required to collect sales tax on his receipts because he was transferring a videotape to his customers for a fee, and this constituted a taxable sale of tangible personal property. In sustaining the Administrative Law Judge's determination, the Tax Tribunal quoted the conclusion to the Administrative Law Judge's determination as follows:

It is undoubtedly true that part of what petitioners sell is their expertise and the service of taping events. However, it is the videotape memorializing the special event that the customer is seeking. Petitioners' expertise is just one of the elements that goes into making the video. While the videotaping of an event by itself would not be taxable, when petitioners go to an event, videotape the event, and transfer the videotape to the customer for a fee, petitioners are making a retail sale of tangible personal property pursuant to Tax Law § 1105(a), and the entire receipt is subject to sales tax (Dynamic Telephone Answering v. State Tax Commission, 135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801, 527 NYS2d 767).

Accordingly, based on the foregoing, the entire fee charged by a future enterprise for the transfer of audio/video media to its customer will be subject to State and local sales and use taxes.

DATED: December 6, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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