

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(15)S
Sales Tax
April 18, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000510A

On May 10, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Universal Music Group, 800 Third Avenue, New York, New York, 10022.

The issues raised by Petitioner, Universal Music Group, are whether:

- 1) Petitioner's sale of music delivered electronically over the Internet is a sale of tangible personal property subject to sales or compensating use tax.
- 2) Petitioner's sale of music delivered electronically over the Internet is an information service subject to sales or compensating use tax under Section 1105(c)(1) or 1105(c)(9) of the Tax Law.
- 3) Petitioner's sale of music delivered electronically over the Internet is an entertainment service subject to sales tax under Section 1105(c)(9) of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a unit of Vivendi Universal, a global media and communications company. Petitioner's worldwide operations encompass the development, manufacture, marketing, sales and distribution of recorded music through a network of subsidiaries, joint ventures and licensees in 63 countries around the world.

Petitioner has established headquarters in New York for the digital distribution of music over the Internet. Through subsidiaries and joint ventures, Petitioner's business will include the development of new methods of digital distribution of music through a variety of channels such as the Internet, cable, satellite, wireless and other platforms, as well as other related functions.

Through subsidiaries and joint ventures, Petitioner plans to sell digitized music over the Internet to customers located throughout the United States, including customers located in New York. Petitioner will digitize its copyrighted catalog of music and store the digitized catalog with a third party for distribution over the Internet. Customers, using their personal computers, will order music over the Internet. Payment will be made using a credit card serviced by a third party financial institution. The music will be delivered electronically in digital form and stored on the customers' computer hard drives. Customers will then be able to play the music on their computer. In order to have the capability to download music, customers will be required to download and install software on their computer hard drives. The software is available from third party vendors

over the Internet at no cost to the customer. Petitioner does not furnish any such software to its customers.

The downloaded music will remain on the customers' personal computers and is not capable of being copied to a compact disc ("CD"). It is anticipated that future technology will permit limited copying of digitized music to CDs or to a chip for play on handheld electronic devices. Under current technology, Petitioner will know whether customers are located within the United States; however, the location of a customer within a particular state or local jurisdiction is not determinable.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such....

(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 means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature....

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, 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, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

* * *

(9)(i) The furnishing or provision of an entertainment service or of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as entertainment or information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however, that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner nor (ii) shall the provision of cable television service to customers be taxed under this paragraph.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail...(C) of any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five....

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

Sale, selling or purchase. (Tax Law Sec. 1101(b)(5))

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(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

Opinion

Petitioner's copyrighted catalog of digitized musical recordings will be stored with a third party for distribution to Petitioner's customers over the Internet. Petitioner, through subsidiaries and joint ventures, will sell its digitized music recordings in electronic form, over the Internet to customers located within and outside of New York State. The Stock Market Photo Agency, Inc., Adv Op Comm T&F, November 12, 1999, TSB-A-99(48)S, concluded that "receipts from the electronic transfer of digital photographic images over the Internet represent receipts from the sale of an intangible and are not subject to sales tax." Also, see New York Society of Renderers, Adv Op Comm T&F, July 1, 1998, TSB-A-98(43)S. Based on the foregoing, Petitioner's sale of digitized music recordings over the Internet constitutes the sale of intangible property and is not subject to sales or compensating use tax under Section 1105(a) or 1110(a)(A) of the Tax Law.

Additionally, Petitioner's sale of digitized music recordings delivered electronically over the Internet does not constitute the provision of a taxable information service or an entertainment service within the meaning and intent of Section 1105(c)(1) or 1105(c)(9) of the Tax Law.

DATE: April 18, 2001

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