

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

TSB-A-05(24)S
Sales Tax
June 22, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040714B

On July 14, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Steve Elliot, 1567 Wayne Port Road, Macedon, New York, 14502.

The issue raised by Petitioner, Steve Elliot, is whether charges for painting temporary signage on automobile windshields and buildings for automobile dealers are subject to sales tax.

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

Petitioner, a sole proprietor, is hired by automobile dealers to paint advertising copy on the windshields of automobiles for sale. The painting includes the listing of price, automobile options and any other information requested by the dealer and can be washed off by Petitioner's customer when the automobile is sold. Petitioner may also paint similar advertising copy on the windows of the automobile dealers' buildings.

Applicable law and regulations

Section 1101(b)(4) of the Tax Law defines *retail sale*, in part, as follows:

Retail sale. (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, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service *subject to tax*. . . . (Emphasis added.)

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . 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:

* * *

(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, upon which services are performed.

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith. . . .

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building. . . .

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths and sandpaper, even though limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Example 10: A shoe repairman purchases leather to be used for resoling shoes. His purchase of the leather is not a purchase for resale, even though the leather

will be transferred to the customer in connection with the performance of the service because the service he is performing is not taxable.

Section 527.3(b)(5) of the Sales and Use Tax Regulations provides, in part:

(5) Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. . . .

Example 5: An advertising agency is hired to design an advertising program and to furnish art work and layouts to the media. The fee charged by the agency to its client for this service is not subject to the tax. However, if the layout and art work is sold by the advertising agency prior to use by it to the customer for his use, the advertising agency is making a sale of tangible personal property which is subject to sales tax.

Opinion

Petitioner is hired by automobile dealers to paint advertising copy on the windshields of automobiles held for sale. The services provided by Petitioner do not constitute advertising services as described in section 527.3(b)(5) of the Sales and Use Tax Regulations as Petitioner does not act in a representative capacity, consult or develop advertising campaigns, or place advertisements with the media. The services provided by Petitioner do not constitute maintaining, servicing or repairing tangible personal property within the meaning and intent of section 1105(c)(3) of the Tax Law. Petitioner's services may, nevertheless, be subject to sales tax under section 1105(c)(2) of the Tax Law as producing, fabricating, processing, printing or imprinting tangible personal property. See *Matter of Ruth Outdoor Advertising Co.*, Dec St Tax Comm, April 3, 1981, TSB-H-81(102)S. However, section 1105(c)(2) of the Tax Law provides that tax is imposed on such services performed for a person who directly or indirectly furnishes the tangible personal property, *not purchased by him for resale*. The property on which Petitioner performs his services is held for resale. Therefore, Petitioner's services are excluded from the tax imposed under section 1105(c)(2) of the Tax Law and the charges for such services are not subject to sales tax.

Where Petitioner performs his services on real property, for example, by painting advertising copy on windows in his customer's building, such services likewise do not constitute maintaining, servicing or repairing within the meaning and intent of section 1105(c)(5) of the Tax Law. See *Matter of Ruth Outdoor Advertising Co.*, *supra*. Moreover, section 1105(c)(2) does not impose tax on printing or imprinting services performed on real property. Accordingly, were Petitioner to paint advertising copy on the windows of a customer's building, charges for such service would not be subject to sales tax.

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Petitioner's purchases of materials (paint, brushes, drop cloths, etc.) used to perform his services are retail purchases of tangible personal property subject to sales tax under section 1105(a) of the Tax Law. See section 526.6(c) of the Sales and Use Tax Regulations. Provided that Petitioner does not make sales of tangible personal property (e.g., sell signage in the form of tangible personal property) or taxable services (e.g., paint placards or signs provided by his customer), he would not be required to register for sales tax purposes.

It is noted that if Petitioner paints or repaints tangible personal property for the customer's use (as distinguished from his service of printing or stenciling property held by his customer for sale), receipts from the sale of such service are subject to sales tax under section 1105(c) of the Tax Law. If Petitioner sells signage to a customer for the customer's use, such sale is subject to sales tax as a sale of tangible personal property under section 1105(a) of the Tax Law.

DATED: June 22, 2005

/s/
Jonathan Pessen
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Technical Services Division

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