

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(41)S
Sales Tax
September 10, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071126A

On November 26, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from AK Productions LLC, 2517 Eastlake Avenue East, Suite 200, Seattle, Washington 98102. Petitioner, AK Productions LLC, provided additional information pertaining to the Petition on March 27, 2008.

The issue raised by Petitioner is whether its sales of emergency preparedness plans, training programs, and related products as described below are subject to sales tax.

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

Petitioner is headquartered in Seattle, Washington and is registered for sales tax in New York State. Petitioner provides customized fire, life safety, and emergency preparedness plans and training programs consisting of videos, brochures, and live training. Petitioner provides this service to schools, government organizations, corporations, and commercial office buildings.

Customers choose the topics to be included in their plan and/or training program. Some of the most common topics include fire, power failure, building safety systems, medical emergency, bomb threat, building evacuation, explosion, and natural disaster.

Petitioner's personnel travel to the customers' locations and develop custom evacuation maps, brochures, and training programs. Petitioner films training videos at customer locations that instruct tenants, employees, warden teams, and staff regarding the proper response to a variety of emergency situations. Petitioner also provides an online training system that delivers the customized emergency training videos to the tenants and staff in each client location.

The videos, brochures, and online training system are based on core materials proprietary to Petitioner. These core materials are customized for each project. Generally, about half the content of the training materials are standard, and half are custom.

Petitioner also conducts on-site drills and training programs for customer personnel and customizes live training programs and drills to each facility. Tenants and staff are instructed on the safety systems in place in that building, specific egress routes, reassembly points in the neighborhood, and other details about the building's emergency plan.

Building floor plan diagrams, emergency signage, and emergency response plans are completely customized to each facility. Petitioner's products can be separately purchased on an

a la carte basis and charges for such products are separately stated on its contract, bill, or invoice to its customer.

Applicable law and regulations

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

When used in this article for the 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:

* * *

(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. . . . Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. . . .

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax . . . 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:

(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, . . .

* * *

(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 . . . matter or by duplicating written or printed matter in any other manner. . . .

Section 1116(a) of the Tax Law provides for exemption from the sales and compensating use taxes with respect to purchases by New York State governmental entities, United States governmental entities, certain nonprofit organizations and other entities who have received New York State sales tax exempt organization status.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser’s designee, controls both the tax incidence and the tax rate.

Section 527.1(b) of the Sales and Use Tax Regulations provides:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Opinion

Petitioner provides customized fire, life safety, and emergency preparedness plans and training programs consisting of videos, brochures, and live training to schools, government organizations, corporations, and commercial office buildings. Petitioner also provides an online training system that delivers the customized emergency training videos to the tenants and staff in each client location. Petitioner’s products can be separately purchased on an a la carte basis.

The various products sold by Petitioner include tangible personal property (i.e., videos when sold as tapes or discs, brochures, evacuation maps, building floor plan diagrams, and emergency signage), instructional services (i.e., on-site drills, training programs, and emergency response plans) and intangible property (i.e., video training delivered online).

When tangible personal property composed of taxable and exempt items is sold as a single unit, sales tax is collected on the total price. See section 527.1(b) of the Sales and Use Tax Regulations. The rule has been extended to sales of taxable and exempt services and sales of services with tangible personal property. See *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S; *Salomon & Leitgeb CPA's, LLP*, Adv Op Comm T&F, July 23, 1997, TSB-A-97(44)S. In *Morton L. Coren, P.C.*, Adv Op Comm T&F, June 29, 1990, TSB-A-90(33)S, it was concluded that even though the components of a particular sale could be separately stated, calculated or estimated, if such components could not be separately purchased, the combination of items must be considered as one and, thus, subject to sales tax as a single purchase. See also *Penfold v State Tax Commission*, 114 AD 2d 696 [1985].

Receipts from the sale of Petitioner's videos when sold as tapes or discs, brochures, evacuation maps, building floor plan diagrams, and emergency signage are subject to sales tax pursuant to section 1105(a) of the Tax Law. Petitioner's instructional services, with the possible exception of emergency response plans discussed below, are not services enumerated in section 1105 of the Tax Law and charges for such services are generally not subject to sales tax. In accordance with section 527.1(b) of the Sales and Use Tax Regulations, were Petitioner to charge a single price for all of its products and services, the entire receipt would be subject to sales tax. However, in the present case, Petitioner sells each of its services separately from its sales of tangible personal property, and the charges for such services are billed separately from the charges for tangible personal property. Thus, with the possible exception of emergency response plans discussed below, only the receipts for the tangible personal property are subject to sales tax. See *Paul J. Carucci*, Adv Op Comm T&F, October 24, 1990, TSB-A-90(54)S.

Petitioner's sales of videos, brochures, evacuation maps, building floor plan diagrams, and emergency signage are sales of tangible personal property the receipts from which are subject to sales tax under section 1105(a) of the Tax Law. If, however, Petitioner's customer is an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law, Petitioner need not collect sales tax on these sales. In lieu of collecting the sales tax from such customers, Petitioner should obtain a properly completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1), or, in the case of a governmental entity, a copy of a governmental purchase order or a contract signed by an authorized governmental representative to substantiate the exempt nature of the transaction. Petitioner must retain such documents with its sales records for a period of three years from the due date of the sales tax return covering the sales tax reporting period in which the sale was made, or the date such return was filed, whichever is later. See Parts 529 and 533 of the Sales and Use Tax Regulations.

Petitioner's provision of the services of conducting live training programs and on-site drills constitute instructional services that are not enumerated as taxable in section 1105(c) of the Tax Law. Therefore, the charges for these services are not subject to sales tax. See *Canine Containment Distributing Company*, Adv Op Comm T & F, January 9, 2006, TSB-A-06(2)S; *Little Chefs, Ltd.*, Adv Op Comm T & F, July 25, 2002, TSB-A-02(34)S; *Hodgson, Russ,*

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Andrews, Woods and Goodyear, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *Economic Cycle Research Institute, Inc.*, Adv Op Comm T & F, July 23, 1997, TSB-A-97(42)S.

Petitioner's emergency response plans that are developed for a specific customer and cannot be applied to Petitioner's other customers do not appear, based on the facts provided in this Opinion, to be taxable services under section 1105(c) of the Tax Law. Such services might be considered an information service for purposes of section 1105(c)(1) of the Tax Law. However, if these plans are designed for specific customers and are not applicable to other customers, such service would appear to meet the exclusionary provision in section 1105(c)(1) which excepts information which is personal and individual in nature and not substantially incorporated into reports provided to other customers from the tax. Provided that no tangible personal property is transferred to the customer in connection with this service, receipts from the sale of the service would not be subject to sales tax. See *Greenstone & Rabasca Advertising, Inc.*, Adv Op St Tx Comm, September 9, 1986, TSB-A-86(35)S.

In *Morton L. Coren, P.C.*, *supra*, the petitioner's client, a behavioral scientist, conducted interviews with employees of his customers and developed strategies for training his customers' employees. He prepared oral and/or written reports and discussed his recommendations with his customers. In addition to the consulting services, the behavioral scientist produced videotapes for his customers to be used for training employees in selling techniques, customer services, and other matters. The cost of producing the tapes included both professional and production services including consultation with customers. The advisory opinion concluded that the behavioral scientist had to collect sales tax on his entire charge for the tapes, including any portion of the charge for the tapes which represented the charge for consulting services that were performed in connection with the preparation of the tapes. The advisory opinion indicated, however, that if the consulting services were supplied and billed pursuant to a separate contract or agreement apart from the contract or agreement for the sale of the tapes, then the charges for the consulting services would not be subject to sales tax. However, the separately stated charge for the tapes would still be subject to sales tax.

Accordingly, if Petitioner does not create or transfer any tangible personal property in connection with providing emergency preparedness planning, Petitioner's charge for this service will not be subject to sales and use taxes to the extent that the service is personal or individual in nature and is not subject to tax under section 1105(c)(1) of the Tax Law. However, if the provision of the service of emergency preparedness planning results in the sale of tangible personal property such as a training video, such service is considered an expense of Petitioner in making a sale of tangible personal property and the entire receipt is subject to sales tax under section 1105(a) of the Tax Law unless the service is contracted separately from the contract to produce the training video or other tangible personal property. See *Morton L. Coren, P.C.*, *supra*.

Petitioner provides an online training system that delivers customized emergency training videos to the tenants and staff in each client location. While receipts from the sale of prewritten

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software delivered electronically are subject to sales tax pursuant to sections 1101(b)(6) and 1105(a) of the Tax Law, sales of music and photographs delivered electronically are not considered to be sales of software. In the same way that audio content (music) and visual content (photographs) delivered electronically are not subject to sales tax, sales of videos that are delivered to customers electronically over the Internet and downloaded for use on the customer's computer or other device likewise are sales of an intangible and are not subject to sales or compensating use tax under section 1105(a) or 1110(a)(A) of the Tax Law. See *Universal Music Group*, Adv Op Comm T&F, April 18, 2001, TSB-A-01(15)S; *Martin R. Timm*, Adv Op Comm T&F, September 27, 2005, TSB-A-05(34)S; *Apple Computer, Inc.*, Adv Op Comm T&F, April 12, 2007, TSB-A-07(11)S.

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/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.