

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(51)S
Sales Tax
October 18, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080811A

Petitioner requests an Advisory Opinion concerning various charges related to the rental of its reusable pallets and whether or not these charges are eligible for certain exemptions from the sales and use tax. In particular, Petitioner asks about the resale exclusion under §1101(B)(4)(i)(A) of the Tax Law and the exemption afforded certain packaging materials under §1115(a)(19) of the Tax Law. Petitioner also asks if pallets rented to farmers for the purpose of transporting their finished crops to a manufacturing or processing facility would be exempt. We conclude that Petitioner's charges for the use of the pallets are not eligible for either the resale exclusion or the exemption afforded certain packaging material under the Tax Law. Because the farming process is completed by the time Petitioner's pallets are leased, the farming exemption is also inapplicable. However, Petitioner's occasional charges to a third party, who is not a part of the leasing contract with the manufacturer, for the transportation of the pallets back to one of its pooling facilities may be exempt from the sales and use tax in certain circumstances.

Facts

Petitioner is in the business of leasing reusable pallets to manufacturers, who use the pallets to package and ship their products to distributors or wholesalers. The pallets that Petitioner leases to the manufacturers are similar to pallets that are used once, but Petitioner's pallets are built to be more durable and are intended to be used as part of Petitioner's reusable Pallet pool. While the pallets may be combined with manufactured goods as part of the delivery process, they are at all times the property of Petitioner. Title to the pallets is never transferred to any other entity.

After the distributor receives the goods and the pallets used to deliver them, the manufacturer relinquishes all responsibility for and possession of the pallet. Arrangements are made between Petitioner's pooling manager and the distributor to recover the pallet. Regardless of the amount of time a distributor holds the pallet on its premises, the Petitioner's daily rental charge to the manufacturer ceases upon transfer of possession of the pallet from the manufacturer to the distributor. Although in limited circumstances Petitioner may charge the distributor for the transportation costs of returning the pallets to the pooling manager, Petitioner does not charge the distributor for any daily rental charges or other fees, except to the extent that a pallet is lost or damaged. In all instances, the distributor is barred from returning the pallet to anyone other than the pooling manager.

Petitioner maintains an accessible supply of pallets to meet the requirements of its various customers (the various manufacturers). Petitioner delivers the pallets to the manufacturer, and it receives payment both for the initial issue and the daily rental of the pallets. After receiving goods loaded on pallets from the manufacturer, the distributor stores the loaded pallets at its facility pending unloading of the products. The distributor is required to return the empty pallets to Petitioner. The distributor will never send back to the manufacturer a pallet that previously was used for packaging the manufacturer's products. When the pallets are returned to Petitioner, a portion of the pallets must be repaired before reuse due to the wear and tear that occurred during their use.

Petitioner has a billing system that assesses many charges in relation to the leasing and use of its pallets. These charges include the following:

1. The manufacturer is initially charged an "issue fee" when a pallet is sent from Petitioner's pooling manager to a manufacturer. This fee is a one-time flat fee charged to manufacturers on a per pallet basis.
2. The manufacturer may be assessed a fuel surcharge depending on the terms of the contract.
3. The manufacturer is charged a daily rental fee based upon the number of days that a particular pallet remains in the manufacturer's possession preceding shipment of its products to customers or distributors. This rental fee ceases when the manufacturer sends its product (packaged on the pallet) to the distributor.
4. The manufacturer is also charged a one-time flat fee referred to as a "transfer fee" when a manufacturer delivers its product (on the pallet) to the distributor.
5. To the extent that a pallet received by either a manufacturer or a distributor is lost while in its possession, the corresponding manufacturer or distributor is charged a "lost equipment fee" to recoup Petitioner's costs related to locating and recovering the lost pallet or purchasing a replacement pallet.
6. The distributors may be charged a collection fee for a portion of Petitioner's cost for transporting the pallets to the pooling site for inspection, potential repair, and redistribution into the pool.

Analysis

Petitioner poses a series of questions regarding the fees it charges for the lease of its pallets, and whether or not each is subject to tax.

1. Do Petitioner's charges related to the lease of pallets qualify as purchases [by its own customers] made for resale under New York State Tax Law § 1101(B)(4)(i)(A)?

Answer: No. Petitioner is in the business of leasing shipping pallets. The Tax Law treats leases of tangible personal property as "sales" of such property. Tax Law § 1101(6)(5). Accordingly, Petitioner's rentals of the pallets delivered to the manufacturers located in this State constitute retail sales of tangible personal property for purposes of State and local sales tax. Therefore, sales tax is due on the receipts for these rentals under Tax Law §1105(a) unless otherwise exempt. The charges for leasing the pallets are not sales for resale for the purposes of §1101(b)(4)(i)(A) of the Tax Law. That section provides in part: "(A) for resale as such or as a physical component part of tangible personal property."

In this instance, Petitioner's customers are not purchasing the pallets for resale to any other party. Petitioner never relinquishes title to the pallets, and they are ultimately required to be returned to the pooling manager for reuse. Moreover there is no plausible argument that Petitioner's customers ever subsequently lease or charge any other party for the use of the pallets. Petitioner's charges are therefore not eligible for the resale exclusion.¹ However, since Petitioner leases the pallets to its customers, Petitioner's purchase of the pallets

¹ Several bills have been considered by the Legislature to exempt receipts from the rental of this type of reusable pallet. None of these bills were ever enacted (*see* A10150, sponsored by Assemblyman Colton, March 5, 2002, for an example of such a bill).

so used would not be subject to tax because Petitioner's use of the pallets in its leasing business would qualify for the resale exclusion (*see* §1101(b)(4) of the Tax Law and 20 NYCRR 526.7(a)(2)).

2. Do charges related to the lease of pallets used for packaging, shipment, and ultimate sale of tangible personal property qualify for exemption as packaging material under New York State Tax Law § 1115(a)(19)?

Answer: No. The pallets do not qualify as packaging material under Tax Law § 1115(a)(19). That section exempts “[c]artons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser.” The phrase “actually transferred” means that the packaging material is physically transferred to the purchaser for whatever disposition the purchaser wishes (*see* 20 NYCRR 528.20(b)(4)). Because the pallets in question are required to be returned to Petitioner, and because the Petitioner never relinquishes title to the pallets, they are not “actually transferred” to the Petitioner's customers for the purposes of the packaging material exemption (*see*, 20 NYCRR 528.20 (c)(1)). Upstate Farms Cooperatives, Inc v Tax Appeals Tribunal, 290 AD2d 896, 736 NYS2d 786 (3d Dept Jan 31, 2002); Genesee Brewing Co., Inc., Tax Appeals Tribunal, DTA No. 817305, May 9, 2002; TSB-A-09(34)S).

3. Do charges related to the lease of pallets to customers qualifying as agricultural producers qualify for exemption under New York State Tax Law § 1115(a)(6)(a)?

Answer: The answer would depend on the particular facts and circumstances. If Petitioner's pallets are used only to ship the finished agricultural products raised by the agricultural producers to distributors or wholesalers for sale, that use would not be exempt. Section 1115(a)(6)(a) exempts: “[t]angible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.” When Petitioner's pallets are used to transport products to a distributor or wholesaler, this is after the point at which the production process has ceased. Therefore, the lease of the pallets will not qualify for the exemption from sales and use tax under Tax Law § 1115(a)(6) for tangible personal property used in the production phrase of farming. Production ends when the farm product has reached a stage where it will be processed or converted into a related product (*See* 20 NYCRR 528.7(c)(1)(ii)). That is the case here when the farmers are renting the pallets for the purpose of transporting their grown produce to a manufacturing or processing facility, or some form of distributor. However, if a farmer were to rent the pallets for use predominantly (more than 50% of the time) in the production for sale of tangible personal property by farming (*e.g.* such as transporting farm produce from the fields to a storage facility located on the farm), (s)he could provide Petitioner with a completed form ST-125, *Farmer's Exemption Certificate*.

4. Do charges for the fuel surcharge fee qualify as nontaxable proceeds pursuant to an exclusion or exemption related to Questions 1-3 above?

Answer: No. Expenses incurred by a vendor in making a sale are not deductible from receipts (*see* 20 NYCRR 526.5(e); TSB-A-09(34)S). Fuel surcharges by a vendor to a customer that are part of the cost of transporting tangible personal property to the customer are part of the vendor's receipts subject to sales tax when the sale of the property is subject to sales tax (*See* §1101(b)(3) of the Tax Law). Accordingly, Petitioner's fuel surcharges associated with the rental of its pallets are subject to sales tax because they are components of the rental receipts. However, this answer may differ if a farmer is using the pallets predominantly in the production for sale of tangible personal property by farming (*see* 1(3) above).

5. Do charges for the daily rental fee qualify as nontaxable proceeds pursuant to an exclusion or exemption related to Questions 1-3 above?

Answer: No, unless the daily rental fee is made to a farmer using the pallets predominantly in the production for sale of tangible personal property by farming (*see* 1(3) above).

6. Do charges for the transfer fee qualify as nontaxable proceeds pursuant to an exclusion or exemption related to Questions 1-3 above?

Answer: No, unless the transfer fee is made to a farmer that is using the pallets predominantly in the production for sale of tangible personal property by farming (*see* 1(3) above).

7. Are lost equipment fee charges excluded from sales and use tax because there is no consideration for the sale of tangible personal property?

Answer: No, the lost equipment fee itself constitutes consideration for the lost pallet. A charge made by a vendor to a customer as a deposit on tangible personal property rented or leased is not deemed to be a taxable receipt. However, any deposit not refunded or any fee charged because a pallet is lost constitutes a taxable receipt. (*see* 20 NYCRR §526.5(j)). Therefore, Petitioner will have to collect sales tax on all lost equipment fee charges it imposes.

8. Do charges related to the transfer fee of pallets qualify as an exempt nontaxable service under §526.5(g)(1) of the sales and use tax regulations?

Answer: No. The transfer fee imposed by Petitioner upon manufacturers for the use of its pallets would not be exempt pursuant to §526.5(g)(1) of the sales and use tax regulations. Because Petitioner's leasing fee to the manufacturer is subject to tax, its additional transfer fee charged to the manufacturer when the pallet is used is considered to be part of the taxable receipt. *See* 20NYCRR §526.5(g)(1).

Based on these facts as we understand them, the collection fee Petitioner charges to the distributors for transporting the pallets back to the pooling location would be exempt from tax, if it is separate and apart from the leasing charge Petitioner imposes to the manufacturer for the use of its pallets.

DATED: October 18, 2010

/S/

DANIEL SMIRLOCK

Deputy Commissioner and Counsel

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.