

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

TSB-A-82(19)S  
Sales Tax  
May 31, 1982

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S811211A

On December 11, 1981 a Petition for Advisory Opinion was received from Peat, Marwick, Mitchell & Co., 111 Washington Avenue, Albany, New York 12210.

The issue raised is whether the sale and leaseback of tangible personal property which qualifies under the "safe harbor lease" provision of the Internal Revenue Code (I.R.C., §168(f)(8)), would result in sales tax liability where (a) title to the property is not transferred to the lessor and (b) where title to the property is transferred to the lessor. In each case, sales tax is paid by the original purchaser at the time the property is purchased.

In the hypothetical situation presented in this Petition, a taxpayer acquires tangible personal property for its own use, paying the appropriate sales tax on the initial purchase. Because of its tax situation the taxpayer cannot utilize certain federal tax benefits otherwise available with respect to the property, such as the investment tax credit and accelerated cost recovery deductions. The taxpayer therefore enters into a sale - leaseback arrangement with a third party. Under the agreement, the purchaser/lessor makes a down payment to the taxpayer (seller/lessee), and is to pay the balance of the purchase price monthly. These monthly debt amortization payments are substantially equal to the rental payments paid by the taxpayer to the purchaser/lessor. Thus, although there is a monthly exchange of checks, the cash position of each party does not change subsequent to the payment of the initial down payment. The sale - leaseback qualifies under the "safe harbor lease" provision of the Internal Revenue Code, and is treated accordingly for federal income tax purposes.

Petitioner further describes the situation as follows: "Despite the characterization of the transaction as a sale-leaseback of tangible personal property, there is no substantial transfer of the property. In all material respects, taxpayer (lessee) remains the owner of the property. Lessee maintains possession continuously; it assumes all responsibility for maintenance and insurance of the property. The contract specifies that title does not pass to the purchaser/lessor. Alternatively, the contract may provide that title does pass to the lessor. The only purpose of the sale-leaseback transaction is to transfer to the lessor the right to utilize the federal investment tax credit and accelerated cost recovery deductions. As noted in the previous paragraph, although the parties each make monthly payments to the other, the amounts are substantially the same, so neither experiences an economic change."

Section 1105(a) of the Tax Law imposes the State sales tax on the "receipts from every retail sales of tangible personal property . . . ." The term "retail sale" is defined, in pertinent part, in section 1101(b)(4)(i) of the Tax Law as "A sale of tangible personal property to any person for any purpose,

TSB-A-82(19)S  
Sales Tax  
May 31, 1982

other than (A) for resale . . . ." The term sale is defined, in section 1101(b)(5) of the Tax Law, so as to include "Any transfer of title or possession or both, . . . rental, lease or license to use . . . for a consideration . . . ."

It follows from the foregoing that where there is no transfer of either title or possession from the seller/lessee to the purchaser/lessor, there is no sale to the purchaser/lessor within the meaning of section 1101(b)(5) of the Tax Law, and there can accordingly be no such sale back to the seller/lessee. Accordingly, no sales tax liability would arise from such a transaction. However, where, as a part of the transaction, title is transferred to the purchaser/lessor for a consideration, the same will generally constitute a sale. Such sale will not constitute a retail sale because the purchase is made for the sole purpose of resale. Such resale, however, in the form of a lease, will constitute a retail sale with the meaning of section 1101(b)(4)(i) and (5) of the Tax Law, and the receipts therefrom will be subject to tax under section 1105(a) of the Tax Law. See Technical Services Bureau Memorandum TSB-M-82(5). It should be noted that under certain limited circumstances a transfer of title as part of a sale-leaseback or other leasing transaction may not result in the creation of a sales tax liability. See in this regard Matter of Sherwood Diversified Services, Inc., 382 F. Supp. 1359; Matter of Petrolane-Northeast Gas Service, 79 A.D. 2d 1043; 20 NYCRR 526.7(c)(3).

DATED: May 12, 1982

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau