

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

TSB-A-85(2)S
Sales Tax
April 5, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S830107A

On January 7, 1983, a Petition for Advisory Opinion was received from Hudson River Estates Inc., 40 Beaver Street, Albany, New York 12207.

The issue raised is whether New York sales tax is applicable to the sale or lease of a Relocatable Modular Office Building (hereinafter "RMOB") which has been classified as real property for purposes of the New York real property tax.

The pertinent facts are as follows. On October 27, 1982, Hudson River Estates Inc., a wholly owned subsidiary of the Delaware and Hudson Railway Company (hereinafter "D & H"), leased a Relocatable Modular Office Building (RMOB) from Arthur Industries Inc. for use by D & H office personnel at its railroad shops in Colonie, New York. Arthur Industries, Inc. delivered the RMOB sections to Petitioner's site by truck, fully installed the building as well as its foundation and made all utility connections. The installation consisted of concrete piers set into the ground. The modular sections of the RMOB were set upon the piers by crane and affixed to the foundation by metal straps. The RMOB was also attached to an existing "steelox" type building on a permanent block foundation by means of a hallway connecting the two buildings. Petitioner states that the RMOB may be removed without causing any damage to itself or the existing structure and that Arthur Industries Inc. has done this on many occasions. Moreover, Petitioner states that D & H owns the realty upon which the RMOB rests and that it has not been moved since it was installed at the Colonie site.

Although Petitioner is currently leasing the RMOB from Arthur Industries, the lease contains a purchase option as well as numerous other relevant provisions. The terms of the purchase option provide that 100% of all rentals paid (\$34,492.00 per year) shall be applied to the purchase price so that if Petitioner exercises the option at the end of the three year rental term, the purchase price will be \$74,858.50. Additionally, the terms of the lease itself put responsibility on the lessee to pay all taxes, assessments and governmental charges levied upon the RMOB during the term of the lease as well as to procure various types of insurance. The lessor, on the other hand, retains full legal title to the RMOB during the term of the lease and retains the right to remove the RMOB from the leased premises upon expiration of the lease. The lessor also remains responsible for repairing and maintaining all utility connections and structural components.

Section 1105(a) of the Tax Law imposes a sales tax on "The receipts from every retail sale of tangible personal property except as otherwise provided in this article." It necessarily follows, therefore, that the sale of real property is not subject to the tax imposed by section 1105(a) of the Tax Law. Accordingly, any addition to real property which qualifies as a capital improvement to real property is exempt from the tax imposed under section 1105(a) of the Tax Law.

Section 1101(b)(5) defines the term "sale" to include a rental or lease. Section 1101(b)(9) defines "capital improvement" in pertinent part as follows:

An addition or alteration to real property which:

- (i) Substantially adds to the value of real property, or appreciably prolongs the useful life of real property; and
- (ii) Becomes part of the real property or is permanently affixed to real property so that removal would cause material damage to the property or article itself; and
- (iii) Is intended to become a permanent installation. . . .

As the above definition indicates, each of three requirements must be met in order for an addition or alteration to qualify as a capital improvement and to be exempt from sales tax.

Petitioner contends that the lease payments for the RMOB should not be subject to sales tax since the building is taxed as real property for purposes of the Real Property Tax Law. This contention, however, is without merit in light of Roberson v. State Tax Commission, 65 AD 2d 898, 410 N.Y.S. 2d 693 (1978). In Roberson, the Court held that the section of the Real Property Tax Law classifying structures as real property for real estate tax purposes did not determine the status of such structures under the sales tax law. Thus, there is no reason to find the classification of RMOB's under the Real Property Tax Law determinative in this case.

As to the first requirement of Section 1101(b)(9), there is little doubt but that the RMOB substantially adds to the value of the real property upon which it sits. Indeed, the building is not only valuable in and of itself, but it also facilitates the Petitioner's business upon premises which the Petitioner owns.

As to the second requirement of Section 1101(b)(9), however, there is no evidence to indicate that the RMOB is either permanently affixed to the real property or that removal would cause material damage to the real property or to the RMOB itself.

Attachment by metal strapping and various utility connections is insufficient to establish that the RMOB has become part of the real property (See: In the Matter of the Application of Stephen T. Koseba, Determination of the State Tax Commission, TSB-H-79(49)S). Furthermore, Petitioner states in its petition that "the RMOB could be removed without any damage to itself or the existing structure. Arthur Industries has done this on many occasions." In Charles R. Wood Enterprises, Inc. v State Tax Commission, 67 AD 2d 1042, 413 NYS 2d 765 (1979), the Court denied a sales tax exemption precisely because the structures in question could be removed without material damage.

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Finally, as to the third requirement of section 1101(b)(9), there is no evidence to indicate that the installation of the RMOB was intended to be permanent. Rather, all evidence is to the contrary.

The terms of the lease of the RMOB provide that the lessor retains title during the three year rental term. Additionally, the lessor retained the right to remove the RMOB from the leased premises upon expiration of the lease. Although an option to purchase was provided, there is no indication that Petitioner actually intended to exercise the option in order to obtain legal title or that the lease was a disguised financing arrangement giving the Petitioner an incentive to exercise the option. The fact that the RMOB, owned by one corporation, was located on property owned by another corporation indicates that the requisite intention to make a permanent installation was absent. (See: Broadway Mobile Home Sales Corp., v State Tax Commission, 67 AD 2d 1029, 413 NYS 2d 231 (1979)).

Additionally, the RMOB is specifically designed to be movable. It must be assumed that the Petitioner intended to use the structure in the manner for which it was designed. The inherently movable nature of the structure further indicates that the installation was not intended to be permanent. (See: In the Matter of the Petition of Raised Computer Floors Inc., Decision of the State Tax Commission, TSB-H-84(12)S).

Accordingly, since the installation of the RMOB fails to meet the second and third requirements of section 1101(b)(9), it cannot be classified as a capital improvement. Arthur Industries, Inc. is required to collect sales tax on each lease payment made on the RMOB because such payments are payments for the rental of tangible personal property.

DATED: March 19, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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