

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

TSB-A-91 (21)S
Sales Tax
February 13, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S901017A

On October 17, 1990 a Petition for Advisory Opinion was received from KPMG Peat Marwick, 345 Park Avenue, New York, New York 10154.

The issue raised by Petitioner, KPMG Peat Marwick, is whether the business operations of XYZ as described below fall within the definition of a "hotel" as provided under Section 1101(c)(1) of the Tax Law and thereby become subject to the imposition of sales or use tax under the provisions of Section 1105(e) of the Tax Law.

XYZ Company (hereinafter XYZ) is a U.S. Corporation headquartered in New York City. XYZ operates as a lessor of furnished residential apartments within the City of New York. XYZ's tenants utilize the apartments as their residences.

XYZ's inventory of available residential apartments are at two locations. XYZ does not maintain nor provide restaurant services or facilities, security, 24 hours staff, health club, etc. at either location. XYZ's operations at each location are as follows:

Location A

XYZ has leased approximately half of the apartments in an apartment building located in Manhattan. XYZ subleases these apartments for periods ranging anywhere from one month to one year or longer. Each lessee (tenant) is bound by an executed lease to remit payment for residency of the apartment in monthly installments, in advance, for the term of the contract.

Location B

XYZ owns the majority of the outstanding stock of an existing cooperative housing corporation (coop) which owns a building in New York City. XYZ leases furnished apartments within this cooperative building to tenants for periods ranging anywhere from one month to one year or longer. Each lessee is bound by an executed lease to remit payment for residency of the apartment in monthly installments, in advance, for the term of the contract.

The tenants at Locations A & B, may subscribe to an optional service package from XYZ available at varying frequencies (i.e., 4 times per month, 8 times per month, etc.). The service package includes light cleaning, supplies, linen, and laundry.

The above service package is available at the option of the tenant for a separate charge in addition to the monthly lease payment. Once subscribed for, the tenant may cancel the services at any time during the lease term. Additionally, the lease contract also requires the lessee to pay to the

lessor a fixed amount per month which covers the cost of electricity, cable TV, and basic telephone charges incurred by the tenant for the duration of the lease.

Section 1101(c) of the Tax Law states, in part:

When used in this article for the purposes of the tax imposed under subdivision (e) of section eleven hundred five, the following terms shall mean:

(1) Hotel. A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term "hotel" includes an apartment hotel, a motel boarding house or club, whether or not meals are served.

Section 527.9 of the Sales and Use Tax Regulations states in part:

Hotel occupancy. [Tax Law, §1105(e) (a) Imposition. A sales tax is imposed on every occupancy of any room or rooms in a hotel, motel or similar establishment at the combined statewide and local sales tax rate in effect at the situs of such establishment, except that the tax shall not apply to (1) the charges for occupancy by a permanent resident, or (2) where the charge is \$2 or less per day.

(b) Definitions. As used in this section, the following terms shall mean:

(1) Hotel. A building or portion of it, which is regularly used and kept open for the lodging of guests. The term hotel includes but is not limited to an apartment hotel, a motel, bungalow or cottage colony, boarding house or club, whether or not meals are served.

Article 28 of the Tax Law imposes a sales tax applicable to (1) sales of tangible personal property, (2) sales of enumerated services, (3) the use of tangible personal property and services, (4) sales of gas, electricity, refrigeration and steam, and telephone and telegraph services, (5) occupancies of hotel and motel rooms, (6) food and beverages sold by restaurants and caterers, (7) admission charges to certain places of amusement and to cabarets and similar places, and (8) club dues.

Receipts from the sale of real property, whether conveyed in fee-simple or tenancy in common, are not included within the ambit of Article 28. Receipts from the leasing of, or the licensing to use, real property, are also generally not subject to tax under Article 28 of the Tax Law. Tax is imposed, however, in the instance where such leasing or licensing constitutes the rental of a hotel room located in New York. Re Miller, Addison, Steele, Inc. Adv Op Comm of T&F, August 7, 1981, TSB-A-81(13)S.

In Breezy Point Surf Club, Inc. v. State Tax Commission 67 AD2d 760, affd 48 NY2d 776, the Appellate Division held that:

New York State does not impose a sales tax on receipts from the rental of real estate (see Tax Law, §1105). Petitioners contend that the monies received from the cabana rentals are not "dues paid to any social or athletic club" (Tax Law §1105, subd. (f), par. (2)) but are instead receipts from the rental of real estate and thus not subject to the sales tax. We agree. The record discloses that there is a valid landlord and tenant relationship between the beach club and its members who elect to rent cabanas. Accordingly, the monies from these rentals are not dues subject to the sales tax. This decision is consistent with the position taken by the Department of Taxation and Finance which has stated that the rental of a "bungalow or apartment, having a private bathroom and kitchen in addition to sleeping rooms," is not subject to the sales tax (Opinion of Counsel, Dept. of Taxation and Finance, 1966-1. p. 78). Thus, where the facilities rented were for all practical purposes bungalows or apartments, the petitioners should not be required to pay a sales tax merely because they chose to call them "cabanas."

In the instant case, XYZ leases and subleases furnished apartments to lessee/tenants for periods ranging from one month to one year or longer. Unlike hotels, motels, apartment hotels or similar establishments as defined under Section 1101(c)(1) of the Tax Law and Section 527.9(b)(1) of the Sales and Use Tax Regulations, XYZ does not offer lodging or occupancy to transients on a regular or daily basis. To the contrary, XYZ rents real property and enters into valid landlord and tenant relationships with the lessee/tenants. Accordingly, as the Tax Law does not impose a sales tax on the receipts from the rental of real property, XYZ is not required to collect State or local sales tax on receipts directly applicable to the rental of its furnished residential apartments.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax---. .there is hereby imposed and there shall be paid a tax. .
.upon:

(a) The receipts from every sale of tangible personal property, except as otherwise provided in this article.

(b) The receipts from every sale, other than sales for resale, of. . .electricity, . . .and electric. . .service of whatever nature, and. . .of telephony. . .and telephone. . .service of whatever nature. . .

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property. . .or maintaining, servicing or repairing tangible personal property. . .except:

(ii) any receipts from laundering, dry cleaning. . .

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(5) maintaining, servicing or repairing real property.

In accordance with the provisions of Section 1105(b) of the Tax Law XYZ must collect sales tax on charges to the lessee/tenants for electric and telephone services. However, as XYZ is considered to be purchasing such services for resale purposes, XYZ may make tax exempt purchases of the electric and telephone services. Since cable television service is a service which is not specifically taxed under Section 1105 of the Tax Law, XYZ will not be required to pay sales tax on the purchases nor collect sales tax on the sales of the cable television service. N.Y.S. Cable Television Assn. v State Tax Commission, 59 AD2d 81.

Additionally, XYZ's receipts from the laundering service is specifically excluded from tax under Section 1105(c)(3)(ii) of the Tax Law. The charge for linen will also be exempt as a charge for laundering providing the major portion of such charge is for laundering or dry cleaning and the value of the article of tangible personal property bears no relationship to the charge for the services rendered. Re Linen Systems for Hospitals, Inc. Adv Op Comm of T&F, August 14, 1981, TSB-A-81(14)S. XYZ's receipts from the light cleaning service will be subject to tax under the provisions of Section 1105(c)(5) of the Tax Law. Where XYZ's receipts from such light cleaning service were for services performed prior to June 1, 1990 such receipts were excluded from the State tax provided the services were performed on a regular contractual basis for a term of 30 days or more and did not include window cleaning, rodent and pest control and trash removal from buildings. However, such services were subject to the New York City tax regardless of whether performed on a regular contractual basis of 30 days or more or otherwise.

XYZ's receipts from supplies provided to the lessee/tenants will be subject to sales tax under the provisions of Section 1105(a) of the Tax Law provided the sales of such supplies are subject to tax under the Tax Law. XYZ may purchase the supplies tax exempt where such purchases will be resold.

DATED: February 13, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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