

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

TSB-A-97(11)S
Sales Tax

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941020A

On October 20, 1994, a Petition for Advisory Opinion was received from Richard W. Genetelli, C.P.A., 400 Madison Avenue, Suite 907, New York, New York 10017.

The issues raised by Petitioner, Richard W. Genetelli, C.P.A., are: (1) whether separately stated charges for each of the below listed services are subject to sales tax and (2) whether petitioner's client is required to pay sales or use tax on tangible personal property purchased for rental and/or consumed as part of the service being provided or if such purchases are exempt as sales for resale.

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

Petitioner's client, Company A, is in the business of leasing completely furnished business offices. Company A also provides for and arranges for services which are necessary to operate a business office. The services arranged for or provided by Company A are enumerated below. Company A provides each tenant with a monthly bill separately stating the charges for the rental of the office space, rental of the office equipment, as well as for the various business services.

Petitioner submitted a sample rate schedule which indicates that, generally, one hourly rate is charged for each category of services. For example, an hourly rate is charged for "Phone" services as a group, rather than separate charges being made for each phone service. Different hourly rates, however, are charged for each of the word processing services. Company A bills for the clerical services listed below in increments of six minutes. "Miscellaneous Service Charges" are, for the most part, not hourly rates but are computed on a per call basis (for call patching) or per page basis (for copying or faxing services). "Pass-Through Service Charges" are billed at cost plus 20 percent plus clerical charges when applicable. The charges for equipment rentals are based on an hourly rental rate.

Petitioner submitted a list of the services and equipment provided by Company A, which appears later in this Advisory Opinion.

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax...."

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.

(b) The receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and from every sale, other than sales for resale, of a telephone answering service.

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

* * *

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed.

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

* * *

(d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section):

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink

The taxability of the services provided by Company A, which are listed below, depends on the end result of the service contracted to be performed. For example, assume that Company A contracts for its employees to provide general clerical or office support services. The employees may perform some of the services listed below, such as recording messages or copying, as an incident of providing general office support, but Company A does not make separate charges to its tenants for these specific services. In this example, Company A is providing general clerical or office support services, which are not taxable services. However, if Company A contracts with its tenants to specifically provide a particular service, or separately charges for a particular service (e.g., the "Miscellaneous Service Charges" and "Pass-Through Service Charges" described above), then Company A must collect tax on the receipts from the sale of such service if the service is taxable.

The following is a list of the services and equipment provided by Company A, an indication of whether the services, if separately contracted for, and equipment may be taxable, and, if taxable, the section of the Tax Law which taxes them.

<u>Clerical Services</u>	<u>Taxable</u>	<u>Exempt</u>
<u>Phone</u>		
Paging	§1105(b)	
Appointment setting and confirmations		x
Reading messages to voice mail	§1105(b)	
Assisted Faxing out	§1105(b)	
Call-outs		x
Car Service		x
Courier Service		x
Florist Orders		x
Restaurant Reservations		x
Others		x
Call Patching	§1105(b)	
Call Screening	§1105(b)	
Message Relaying	§1105(b)	
Assisted Faxing In	§1105(b)	
<u>Office</u>		
Filing		x
Copying	§1105(c)(2) or §1105(a)	
Office Organization		x
In-house Deliveries		x

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Binding §1105(c)(2)
Special Requests Note

Concierge

Catering §1105(d)
Guest Coffee Service §1105(d)
Opening Offices x
Audio/Visual Set-up §1105(a) (only if related to equipment rentals)
Conference Room/Office Cleanup §1105(c)(5)
Miscellaneous Errands Note

Taxable Exempt

Special Mail Handling

Federal Express x
UPS x
Mass Mailings §1105(c)(2)
See: Pub 831
Registered/Certified Mail x

Reception Services

Greeting and Announcing Visitors x
Announcing Deliveries x
Recording Phone Messages §1105(b)
Scheduling Conference Room Time x

Word Processing (additional charges are made for rush orders and overtime work)

Basic Word Processing x
Enhanced Word Processing x
Graphical Design Note

Miscellaneous Service Charges

Call Patching §1105(b)
Self Service Copying §1105(a)
Faxes In §1105(b)
Faxes Out §1105(b)
Binding (covers available) §1105(a),(c)(2)

Additional Courtesy Office/Conference room time		x
Moving of Furniture, Pictures & Plants	Note	

Pass-Through Service Charges

	<u>Taxable</u>	<u>Exempt</u>
Catering	§1105(d)	
Postage		x
Federal Express		x
UPS		x
Messenger Service		x
Car Service	Note	
Printing	§1105(a),(c)(2)	
All Others	Note	

Equipment Rental

TV/VCR	§1105(a)
Overhead Projector	§1105(a)
MemoryWriter Typewriter	§1105(a)
Easel with Paper	§1105(a)
Binding Machine	§1105(a)
Special Requests	§1105(a)

Note: These transactions contain insufficient information to determine their taxability. See discussion below for further explanation of these transactions.

With respect to the "Phone" services listed above, services such as reading messages to voice mail, call screening and message relaying may be taxable under Section 1105(b) of the Tax Law as telephone answering services. Other services such as paging, faxing and call patching may be taxable under Section 1105(b) as telephone and telegraph service. It should be noted that interstate or international telephone and telegraph service is not subject to tax. If, in addition to the "Phone" services, Company A purchases telephone and telegraph service from a utility and resells this service to its tenants, and also provides its tenants with related equipment, Company A is considered to be selling telephone and telegraph service, and, depending on the circumstances, tangible personal property as well. See Sections 527.2(d) and 527.5(a)(4) of the Sales and Use Tax Regulations. Company A must collect sales tax on charges made to its tenants for such telephone and telegraph service and related equipment.

The application of sales tax to some of the services provided by Company A may vary, depending on whether Company A only provides personnel to operate equipment owned or leased by its tenants, or whether Company A also provides the equipment and supplies necessary for performance of the service. For example, if Company A contracts to provide a copying service to its tenants and only provides personnel to operate the tenant's copying machine, then Company A is considered to be performing a service for the tenant which is taxable under Section 1105(c)(2) of the Tax Law. If Company A furnishes a copying machine and supplies, as well as personnel to operate the machine, then Company A is

considered to be selling tangible personal property (i.e., the copies) to the tenant. The receipts from the sale of tangible personal property are taxable under Section 1105(a) of the Tax Law. Similarly, binding services performed by Company A's employees may be considered to be either a taxable service under Section 1105(c)(2) of the Tax Law or the sale of tangible personal property, depending on whether Company A only provides personnel to run a tenant's binding machine, or also provides a binding machine and supplies.

Word processing services are not subject to tax. See Taxability of Services Provided by Temporary Service Contractors, TSB-M-87(13)S, October 28, 1987. Services performed by Company A that are similar to word processing and which incorporate graphic designs provided by a tenant into a document are also nontaxable. However, graphical design performed by Company A may be taxable as the sale of tangible personal property if Company A develops an original design for use by a tenant and transfers the design to the tenant in a tangible format such as a diskette.

"Miscellaneous Service Charges" for moving furniture may be taxable under Section 1105(c)(3) of the Tax Law if installation services are performed in connection with moving the furniture.

Petitioner indicates that the Pass-Through Service Charges are billed at cost plus 20% and clerical charges. Section 526.5(e) of the Sales and Use Tax Regulations provides that "All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts." Consequently, Company A's 20% mark-up and clerical charge (Pass-Through charges) carry the same tax consequence as the cost component of the charge. For additional information concerning temporary service contractors, see TSB-M-87(13)S, Taxability of Services Provided by Temporary Service Contractors. It should be noted that Pass-Through charges for "Car Service" are not taxable if Company A is providing a transportation service. If, however, dominion and control of the vehicle are transferred to the customer, Company A may be considered to be renting tangible personal property. See Section 541.2(p) of the Sales and Use Tax Regulations.

It is further noted that Company A is required to pay sales or use tax on tangible personal property used by it in rendering non-taxable services to its tenants. Company A may purchase for resale tangible personal property used in performing a taxable service if such property becomes a component part of the property on which the service is performed, or such property is transferred to the tenant in conjunction with the performance of the service. See Section 1101(b)(4)(i) of the Tax Law. If Company A purchases tangible personal property, such as office furniture, fax machines, photocopying machines, word processing equipment, televisions, VCR's, etc., for the sole purpose of resale, as such, by leasing the property to its tenants, then Company A may purchase such property for resale without the payment of sales tax. In that case, Company A would collect tax on such rentals to its tenants. If Company A purchases such equipment to use to provide fax service, copy service, word processing service, etc., then Company A would be using the equipment itself and not for resale, as such. In that case, Company A would be required to pay tax on its purchase of the equipment.

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When Company A provides taxable and nontaxable services to a tenant, sales tax must be collected on the entire charge, unless the charges for the taxable services are separately stated and such services may be purchased separately from the nontaxable services.

DATED: March 6, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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