

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

TSB-A-99(32)S
Sales Tax
June 24, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990114B

On January 14, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sales Tax Solutions, Inc., 575 Madison Avenue, 10th Floor, New York, New York 10022. Petitioner, Sales Tax Solutions, Inc., furnished additional information on March 15, 1999.

The issue raised by Petitioner is whether the provision of storage space in a building as described below is subject to New York State and local sales and use taxes.

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

Petitioner's client (hereinafter the "Client") entered into an oral agreement with a non-related company (hereinafter "Company A") to provide unoccupied storage space in one of the Client's buildings located in Long Island City, New York. Company A pays a monthly fee and has full rights to one specific floor of the building, except for one room used by the Client as a boiler room. There are no restrictions as to what items can or cannot be stored in the building. Currently the space is being considered for storage of trucks, although Company A is free to use the space for other purposes based on its needs. Company A's employees can enter and leave the building at their discretion throughout the day. Company A may make tenant improvements, but any permanent improvements shall remain with the building and shall not be removed at the end of the lease. The primary business of the Client is manufacturing and bottling soft drink beverages within New York State.

Applicable Laws and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) 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 . . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration . . .

Section 1105 of the Tax law imposes sales tax, in part, on:

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

* * *

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

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

Section 526.8(c) of the Sales and Tax Regulations provides, in part:

Tangible personal property does not include:

(1) Real property.

Section 527.6 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. Storage is the provision of a place for the safekeeping of goods, without regard to the manner of payment or length of time of the service.

(b) Imposition. (1) The tax is imposed on the sale, except for resale, of the service of storing tangible personal property, and the rental of safe deposit boxes and similar space.

(2) While the tax is imposed on the service of providing storage space, it is not imposed on the lease of real property for storage. A lease can be distinguished from the provision of storage space, in that under a lease, the tenant contracts for a certain amount of footage in a specific location, the tenant has unlimited control of access to the space, and may supply his own racks, cabinets and other physical facilities.

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Example 2: A person stores his goods in a warehouse, in whatever space the warehouse company has available. The charges for such storage are taxable.

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Storage is the service of providing a place for the safekeeping of goods, without regard to the manner of payment or length of time of the service. A lease of real property can be distinguished from the service of providing storage space provided the lessee enters into a lease for a specific location, the lessee has unlimited control of access to the space, and the lessee may supply his own racks, cabinets and other physical facilities. See Section 527.6(b)(2) of the Sales and Use Tax Regulations. The Client has entered into an oral agreement with Company A for the use of one specific floor of the Client's building, for a monthly fee, whereby Company A has full rights to this floor without restrictions as to what items can or cannot be stored and Company A's employees can enter and leave the building at their discretion throughout the day. Accordingly, the Client's charges to Company A for occupancy of space in the Client's building are for the lease of real property and, therefore, are not subject to sales tax.

DATED: June 24, 1999

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

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