New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(40)S
Sales Tax
October 12, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S000110A

On January 10, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from 25 East 86th Street Corporation, c/o Orsid Realty Corp., 156 West 56th Street, New York, NY 10019.

The issues raised by Petitioner, 25 East 86th Street Corporation, are:

(1) Whether charges by Petitioner, a cooperative housing corporation, to its tenant-shareholders for garaging rights it has purchased from a third party garage operator constitute receipts subject to tax under Section 1105(c)(6) of the Tax Law.

(2) Whether Petitioner qualifies as a "homeowner's association" within the meaning of Section 1105(c)(6) of the Tax Law.

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

Petitioner is a cooperative housing corporation as defined in §216(b)(1) of the Internal Revenue Code ("IRC"). Petitioner owns and operates an apartment house in Manhattan ("the Building"). Every one of its tenant-shareholders owns and/or resides in a residential dwelling unit in the Building. The Building does not contain a garage, and Petitioner does not otherwise own a garage. Many of Petitioner's tenant-shareholders garage their personal automobiles in multi-car garages located in the immediate vicinity of the Building that are open to the public. Those tenant-shareholders deal directly with the operators of those garages ("Operators").

It is proposed that Petitioner will purchase from Operators a number of garaging rights and resell those garaging rights to such of its tenant-shareholders who wish to purchase them for the purpose of garaging their personal automobiles ("the Participating Members"). Each Participating Member will deal only with Petitioner and not with any Operator. Petitioner will pay the Operators for every garaging right purchased by it, whether or not it resells such garaging right and whether or not the Participating Member pays it for such garaging right. Petitioner owns no motor vehicles and will not itself make use of any garaging right that it purchases.

Applicable Authority

Section 1105(c) of the Tax Law imposes sales tax upon receipts from the sales, except sales for resale, of certain enumerated services, including:

(6) Providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles. . . . Provided, however, receipts for such services paid to a homeowner's association by its members shall not be subject to the tax imposed by this paragraph. For purposes of this paragraph, a homeowner's association is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents.

Section 1107 of the Tax Law provides, in part:

(a) General. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes, at the rate of four percent, which except as provided in subdivisions (b) and (d) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. . . .

(b)(8) The tax imposed by subdivision (a) of this section shall not be imposed on . . . receipts from the services described in paragraph six or seven of subdivision (c) of section eleven hundred five. . . .

(c) Tax on sale of service of parking, garaging or storing of motor vehicles. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five, eleven hundred ten and subdivision (a) of this section, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes at the rate of six percent on receipts from every sale of the service of providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged

in providing parking, garaging or storing of motor vehicles . . . provided, however, that receipts for such services paid to a homeowner's association by its members shall not be subject to the tax imposed by this subdivision. For purposes of this subdivision, a homeowner's association is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision; and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents. . . .

Section 1109(a) of the Tax Law provides, in part:

General. In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within the territorial limits of the metropolitan commuter transportation district created and established pursuant to section twelve hundred sixty-two of the public authorities law, and there shall be paid, additional taxes, at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. . . .

Section 1212-A(a) of the Tax Law provides, in part:

Any city in this state having a population of one million or more . . . is hereby authorized and empowered to adopt and amend local laws imposing in any such city: (1) a tax on receipts from every sale of the service of providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles, in any county within such city with a population density in excess of fifty thousand persons per square mile, at the rate of eight per centum, on receipts from every sale of such services, except receipts from the sale of such services to an individual resident of such county when such services are rendered on a monthly or longer-term basis at the principal location for the parking, garaging or storing of a motor vehicle owned or leased (but only in the case of a lease for a term of one year or more) by such individual resident. . . .

Section 11-2049 of the New York City Administrative Code provides, in part:

. . .there is hereby imposed within the city of New York, and there shall be paid, a tax at the rate of eight percent on receipts from every sale of the service of providing parking, garaging or storing for motor vehicles by persons operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles, in every county within the city of New York with a population density in excess of fifty thousand persons per square mile, as determined by reference to the latest federal census; provided, however, that receipts for such services paid to a homeowner's association by its members shall not be subject to the tax imposed by this section. For purposes of this section, a homeowner's association is an association (including a cooperative housing or apartment corporation) (i) the membership of which is comprised exclusively of owners or residents of residential dwelling units, including owners of units in a condominium, and including shareholders in a cooperative housing or apartment corporation, where such units are located in a defined geographical area such as a housing development or subdivision; and (ii) which owns or operates a garage, parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles located in such area for use (whether or not exclusive) by such owners or residents. The tax imposed on the receipts described in this section is in addition to the tax imposed on such receipts under subchapter one of this chapter or section eleven hundred seven of the tax law, as the case may be.

Section 526.6(c)(1) of the Sales and Use Tax Regulations states, in part:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Technical Services Bureau Memorandum TSB-M-91(7)S, dated March 1, 1991, entitled State and Local Sales Tax Imposed on Parking Fees June 1, 1990, provides, in part:

The services of parking, garaging and storing motor vehicles are taxable when provided by an owner or operator of a parking lot, parking garage (except as otherwise excluded) or any other place engaged in providing parking, garaging or the storage of motor vehicles. . . .

* * *

The tax imposed on parking, garaging and storing is a broadbased tax that affects nearly any individual, organization, business or governmental entity that makes a charge for the privilege of parking, or garaging or storing a motor vehicle. Anyone making a charge for parking is a "vendor" under the Sales Tax Law. . . . (Emphasis added)

* * *

The lease of a parking lot or portion of a parking lot for the purpose of parking is subject to the tax on parking.

Example (6) A business tenant in a commercial building leases 50 parking spaces of the building parking lot from the landlord. The business tenant allows its employees to park in these spaces free of charge. The business tenant is purchasing parking from the landlord. The landlord is required to collect sales tax from the business tenant on the lease charge attributable to the parking spaces.

The lease of real property (including a parking lot) for other than the purpose of parking is not subject to sales tax.

* * *

The resale certificate may only be used by a vendor who is buying parking, garaging, or storage services or spaces exclusively for the purpose of reselling those services or spaces to another party or parties. The vendor who furnishes a properly completed resale certificate will not be required to pay sales tax on the purchase of these services, but is required to collect sales tax on such services when they are resold. The resale certificate may not be used to purchase parking if any portion thereof is not resold.

Example (8) A business tenant in a commercial building leases 50 parking spaces in the building's parking lot from the landlord so that it may provide parking for its employees. In turn, the business tenant will sell monthly permits to its employees. The building landlord will not be required to collect sales tax from the business tenant if the tenant provides the landlord with a properly completed resale certificate. The tenant is required to collect sales tax on its sale of parking permits to its employees. If, however, the business tenant intends to resell only 45 of the parking spaces and use the other 5 spaces for its executives, the business tenant may not use a resale certificate to purchase all 50 spaces for resale, it must make a separate purchase of the 5 spaces it does not intend to resell and pay the appropriate tax on the charge for those 5 spaces.

Technical Services Bureau Memorandum TSB-M-98(8)S, dated September 1, 1998, entitled Expanded Exclusion for Parking Charges Paid to Homeowners' Associations by their Members, provides that the following conditions must be met in order for a homeowner's association to be eligible for the sales tax exclusion for parking charges:

- The homeowners' association must own or operate the garage, parking lot, or other parking facility (whether or not it is operated exclusively for its members).

- The homeowners' association must be an association whose membership is comprised exclusively of owners or residents of residential dwelling units (such as single-family homes, condominium units, or cooperative housing or apartments).

- The dwelling units must be in a defined geographical area, such as a housing development or subdivision, and the parking facility must be located within that defined geographical area. Emphasis added

- The parking charges must be paid to the homeowners' association by its members.

Opinion

Petitioner is a cooperative housing corporation that owns and operates a residential apartment house in Manhattan. Since the apartment house does not contain a garage, and Petitioner does not otherwise own a garage, Petitioner is considering purchasing a number of garaging rights from the operators of multi-car garages located in the immediate vicinity of its apartment house. Petitioner plans to resell these rights to its tenant-shareholders who wish to purchase them, for charges imposed by Petitioner, for the purpose of garaging their personal automobiles.

With respect to Issue (1), pursuant to Section 1105(c)(6) of the Tax Law, the receipts derived from the providing of parking, garaging or storing of motor vehicles by persons operating a garage, parking lot or other business engaged in providing parking, garaging or storing for motor vehicles, except as otherwise excluded, are subject to sales tax. Parking consists of the act of providing temporary storage for a motor vehicle, for a consideration, either directly or indirectly (see DiMarco, Abiusi, Pascarella, &Firnstein, CPA's, Adv Op Comm T&F, February 11, 1991, TSB-A-91(18)S). Also, any person making a charge for parking, garaging or storing of motor vehicles, except as otherwise excluded, is a vendor for the purpose of collecting sales tax (see TSB-M-91(7)S, supra). Petitioner, although its activities do not include the actual operation of the garage, is engaged in providing parking for motor vehicles and is required, unless otherwise excluded, to collect sales tax on such services when they are resold to its tenant-shareholders (see DiMarco, Abiusi, Pascarella, &Firnstein, CPA's, supra; TSB-M-91(7)S, supra). The garage operators will be considered to be making sales of parking services to Petitioner since they will continue to maintain and operate the parking facilities as part of the transactions (see DiMarco, Abiusi, Pascarella, &Firnstein, CPA's,

supra). However, such sales will come within the resale exclusion contained in Section 526.6(c) of the Sales and Use Tax Regulations, if Petitioner is buying the parking services exclusively for the purpose of reselling them to another party or parties. Petitioner, upon furnishing a garage operator with a properly completed resale certificate, will not be required to pay sales tax on its purchase of the parking services.

Concerning Issue (2), parking charges paid to a homeowner's association, which includes a cooperative housing corporation, by its members are excluded from all sales taxes, including the parking taxes imposed in New York City. See Sections 1105(c)(6), 1107(c), 1109(a) and Section 11-2049 of the Administrative Code of the City of New York. Central to Petitioner's inquiry is the statutory requirement that in order for a homeowner's association to be eligible for this exclusion, the residential dwelling units of the association must be located in a defined geographical area such as a housing development or subdivision, and the parking/garaging for motor vehicles must be located in such area. In this case, where the garages are located on the premises of third parties in the "immediate vicinity" of Petitioner's apartment building, the question arises whether this condition will be met.

The Legislative Memorandum in Support for Chapter 389 of the Laws of 1997, which added the homeowner's association exclusion for parking receipts contained Section 1105(c)(6) of the Tax Law, indicates that the purpose of this provision is to exempt receipts from parking/garaging in condominium and cooperative housing units (1997 McKinney's Session Laws of New York, 2381). The Legislative Memorandum in Support for Chapter 344 of the Laws of 1998, which extended the homeowner's association exclusion to New York City parking taxes, stated that the homeowner's exclusion was intended to address an inequity where, prior to the amendment of Section 1105(c)(6), homeowners were exempt from the payment of sales tax on their own garages, whereas residents of co-ops were required to pay tax for parking their vehicles in their own buildings (1998 McKinney's Session Laws of New York, 1772-1773).

Section 1105(c)(6) of the Tax Law provides that in order for the homeowner's association exclusion to apply, the parking facility must be located within the homeowner's association's defined geographical area. See TSB-M-98(8)S, supra. Although the term "defined geographical area" is not defined in the Tax Law, the reference in Section 1105(c)(6) to "a defined geographical area such as a housing development or subdivision" indicates that such term refers to the defined boundaries of the homeowner's association where its members reside. There is nothing in the legislative history which supports a conclusion that third party garages in the immediate vicinity of Petitioner's apartment building would qualify. The parking facilities in this case are not part of the premises occupied by Petitioner's tenant-shareholders. Accordingly, Petitioner's charges for garaging rights to its tenant-shareholders are not excluded under the homeowner's association provisions in the Tax Law from the State and New York City sales taxes on parking. However, if the tenant-shareholder's primary residence is in Manhattan, the parking receipts may be exempt pursuant to Section 1212-A(a)(1) of the Tax Law from the 8% Manhattan additional parking tax. See Technical Services

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Bureau Memorandum, Change in the New York City Parking Tax Exemption for Manhattan Residents, November 7, 1996, TSB-M-96(13)S for additional information on the exemption from the 8% Manhattan parking tax for Manhattan residents.

DATED: October 12, 2000

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