

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

TSB-A-04(1)S
Sales Tax
January 28, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030320A

On March 20, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pitney Bowes Credit Corp., 27 Waterview Drive, Shelton, Connecticut, 06484. Petitioner, Pitney Bowes Credit Corp., provided additional information pertaining to the Petition on April 1, 2003.

The issues raised by Petitioner are:

1. Whether the agreements described below between Pitney Bowes Management Services (PBMS) and its customers are lease/rental agreements or whether PBMS is providing a service.
2. Whether PBMS is obligated to collect sales tax on certain parts of these agreements.

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

PBMS is an affiliated company of Petitioner and possesses a valid New York State Certificate of Authority to collect sales tax. PBMS offers its customers custom packages consisting of the provision of various pieces of office equipment and/or services. The details of the agreements between PBMS and its customers vary but the essence of the transaction is the same in each instance. PBMS charges its customers separately for various pieces of office equipment and services and customers may select which pieces of equipment or services are to be provided in the agreement. One of the pieces of equipment that may be provided in the agreements is a "convenience copier." "Convenience copiers" are photocopy machines provided for in the agreements, which are located on the customer's premises and fully maintained by PBMS.

PBMS installs the photocopy machines at the customer's place of business. PBMS charges its customers a base amount per photocopy machine, usually on a monthly basis, which allows the customer to make a certain number of copies per month. An additional charge per copy is assessed when the customer exceeds the number of copies allotted in the agreement. During the term of the agreement the customer may negotiate for a different (i.e., higher volume, color, etc.) photocopy machine.

As part of the agreement, it is PBMS's responsibility to maintain and, if necessary, to repair the photocopy machines and provide maintenance supplies such as toner and developer, and parts. The customer has exclusive use of the photocopy machines and has the right to direct the manner of their use. The customer's staff operates the photocopy machines choosing different control functions, and has the photocopy machines available for its use at any time during the agreed upon

period (usually three years). PBMS may or may not provide photocopy paper depending on the terms of the particular agreement.

Under these agreements, the customer has the right to terminate the agreement by providing written notice a fixed number of days prior to the desired termination date and paying, if applicable to the particular agreement, an early termination charge.

Applicable law 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, 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.

...

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, 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.

* * *

(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 . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale. (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) Resale exclusion. (1) 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.

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

Sale, selling or purchase.

(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(c) Rentals, leases, licenses to use. (1) The terms rental, lease and license to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale" or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement. . . .

* * *

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

Example 11: A company enters into an agreement with another company to lease a copying machine for two years, at a flat rental fee, payable in 24 installments, plus a fee per copy made. This transaction is taxable, as a sale, and the tax is applicable to the receipts from the flat rental fee and the per-copy fee.

Section 541.9(c) of the Sales and Use Tax Regulations provides, in part:

Rentals and leases of equipment and motor vehicles to contractors. (1) Rentals and leases of equipment to contractors.

* * *

(i)(c) If a contractor cancels a lease on equipment and the lessor charges a cancellation fee, such fee is included as a part of the total receipts upon which the tax is based.

Opinion

PBMS enters into agreements with its customers to, among other things, provide photocopying machines on the customers' premises. The specific terms of the agreements vary from customer to customer, but the essence of the transaction is the same in each instance. PBMS agrees to provide and maintain "convenience copiers" (photocopy machines) on its customers' premises for its customers' exclusive use for a fixed period of time for a fixed periodic payment with the exception that, where the customer exceeds an agreed upon number of copies during the payment period, an additional charge is assessed per excess copy. The agreement may be renegotiated to, for example, upgrade to a color photocopy machine or a higher capacity photocopy machine. The agreement may require PBMS to provide the photocopy paper or the customer to provide its own paper. During the term of the agreement, the customer may terminate the agreement by providing written notice as provided in the agreement. Where the customer elects to terminate the agreement prior to the agreed upon term, PBMS may assess an early termination charge to the customer.

PBMS transfers possession of the photocopy machines to its customers without transferring title. PBMS's customers have exclusive use of the photocopy machines and have the right to direct the manner of their use. Accordingly, the agreement between PBMS and its customer for use of the photocopy machines constitutes a rental or lease of tangible personal property rather than the provision of a service. See section 1101(b)(5) of the Tax Law and section 526.7(c) of the Sales and Use Tax Regulations. Separately stated charges by PBMS for such rentals are subject to the sales tax under section 1105(a) of the Tax Law.

Petitioner charges an additional amount per copy when the customer exceeds the number of copies allotted in the rental agreement. Such charges may be considered as an addition to the rental charge, similar to charges by lessors of vehicles for mileage above that agreed to in the rental agreement. See section 526.7(e)(4), Example 11 of the Sales and Use Tax Regulations. Such charges are taxable pursuant to section 1105(a) of the Tax Law.

Where the agreement between PBMS and its customer requires PBMS to provide paper for the rented photocopy machines, PBMS is required to collect sales tax on any additional amounts charged to its customer for photocopy paper. PBMS may purchase paper which is actually transferred to its customers, either as part of the rental of the photocopy machine or for an additional charge to the customer, exempt from tax as a purchase for resale.

Section 541.9(c)(1)(c) of the Sales and Use Tax Regulations provides that "If a contractor cancels a lease on equipment and the lessor charges a cancellation fee, such fee is included as a part of the total receipts upon which the tax is based." It follows that the same rule would apply to a cancellation fee in connection with the termination of a lease of photocopy machines or other office equipment. Therefore, PBMS is required to collect sales tax on the termination fee charged to its customer on the early termination of its lease of photocopy machines.

TSB-A-04(1)S
Sales Tax
January 28, 2004

The purchase of photocopier machines by PBMS, which it intends exclusively for rental to its customers, is exempt from sales tax as a purchase for resale. Purchases by PBMS of related maintenance supplies and repair parts which PBMS uses to maintain or repair the photocopier machines as part of the rental agreement, and which are actually transferred to its customers as part of such maintenance or repairs, are also exempt as purchases for resale. See section 1101(b)(4) of the Tax Law and section 526.6(c) of the Sales and Use Tax Regulations.

DATED: January 28, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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