

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(18)S
Sales Tax
May 23, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101013B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its purchases and rentals of tangible personal property and/or services used directly in the production and staging of its live performances of the show [REDACTED] at the WaMu Theater at Madison Square Garden in New York City are exempt from sales tax under Tax Law section 1115(x).

We conclude that [REDACTED] qualifies as a live dramatic or musical arts performance in a theater as required by section 1115(x) but reach no conclusion on whether those purchases and rentals and services are exempt from sales tax under Tax Law section 1115(x).

Facts

Petitioner produced and presented the live show [REDACTED] over the course of three seasons from 2007 through 2010 at Madison Square Garden's 5,600-seat WaMu Theater in New York City. The winter-themed, family-oriented production ran for roughly two consecutive months each season, during which performances were staged at least five times per week and were open to the general public for an admission charge.

[REDACTED] represented a significant departure from the formula of prior productions developed under the [REDACTED] banner. Staged in a proscenium theater rather than [REDACTED] trademark "big-top" tent, the show was developed predominantly as a work of musical theater and geared mainly toward children. One of the chief distinctions between [REDACTED] and [REDACTED] touring big-top productions is [REDACTED] focus on telling a complete story with a sustained plot line. [REDACTED] tells the story of a young city-dwelling boy named [REDACTED] who laments the absence of snow, despite the city being in the grips of a cold winter. He thus sets off on a journey to find the reason for this and to bring snow back to the city. Along the way, he meets a host of characters, including urban street characters from the city, a group of dancing (puppet) sheepdogs, a chorus of singing lampposts, a lost shaman, the Priestess of the North, and numerous other whimsical characters. The group's travels lead [REDACTED] to the land of [REDACTED], a land without sunlight, where they encounter the People of the North, and where [REDACTED] and his entourage manage to restore sunlight, before flying home on a giant bird whose wings create a snowstorm bringing snow back to the city.

This story of a boy's quest to find snow is advanced through a combination of music, narrative lyrics, choreographed movement, spoken dialogue, miming, puppetry and constantly changing scenery. The show's 16 distinct and titled musical numbers drive the action on stage, with virtually every activity on the stage being punctuated by and/or choreographed to the live music. Many of the musical compositions in the show feature live vocal performances with spoken or sung lyrics that serve to advance the narrative. The songs are all original compositions, individually copyright protected through the

performance rights organizations ASCAP (the American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.).

Although some of the scenes in [REDACTED] feature elements often found in a traditional "circus" (such as juggling and acrobatics), such acts are in nearly every case woven into larger choreographed arrangements featuring the story's characters on stage simultaneously. The acrobatic acts are themselves generally choreographed to synchronize directly with the musical compositions. Unlike previous [REDACTED] productions that showcase elaborate acrobatic and aerial acts such as daring high-wire and trapeze stunts, the acrobatics in [REDACTED] play only a supporting role. In fact, out of the 26 distinct scenes in [REDACTED], a minority have acrobatics, juggling, or other circus-type "acts" as their primary focus. Most of the scenes are devoted to storytelling through choreography, movement, music, lyrics, scenery, and dialogue. A detailed scene-by-scene breakdown was also included as Exhibit 1.

The choice of the WaMu Theater as a venue also reflects Petitioner's departure from prior [REDACTED] productions. The ceiling of the theater's proscenium stage measures only 22 feet high, making it impossible to stage the type of aerial acrobatics (e.g. trapeze, highwire, etc.) featured in larger-scale productions staged under [REDACTED] 52-foot-high "big top" tent. [REDACTED] was developed specifically for the WaMu's much smaller stage as a recurring seasonal event. And the WaMu (formerly the Theater at Madison Square Garden) Theater has been host to numerous other theatrical performances, including productions of The Wizard of Oz, Madea's Big Happy Family, 101 Dalmations, and A Christmas Carol. The WaMu has never hosted a circus.

A DVD containing a complete performance of [REDACTED] at the WaMu Theater on December 11, 2009, was included with this ruling request. Petitioner asserts that the video demonstrates that [REDACTED] has all the normal characteristics of a "play" one could see in any New York City theater. The story is told through musical numbers, choreography, dancing, miming, acrobatics and dialogue. It has a sustained plot, and but for acrobatic acts sprinkled throughout several of the scenes, it is a basic Broadway musical. Nowhere is this clearer, Petitioner continues, than in the final scenes of the play, set to the composition [REDACTED] where all the characters join in a musical number featuring singing, dancing, and even a customary curtain call for all the characters.

Analysis

Section 1105(a) of the Tax Law imposes the State's sales tax on every retail sale of tangible personal property. Article 29 of the Tax Law authorizes the imposition of local sales and compensating use taxes. Section 1210(a)(1) authorizes every county outside New York City and every city, including New York City, to impose sales and use taxes similar to the State's sales and use taxes. Every county and several cities, including New York City, impose the section 1210(a)(1)/1105/1110 sales and use taxes. For all matters pertinent here, these county and city sales and use taxes ("local taxes") are identical to each other and to the State's sales and use taxes. Among other things, that means the local taxes have the same definitions and the same exemptions as the State's taxes. The Commissioner's Regulations applicable to the State's sales and use taxes apply with equal force and effect to the local taxes.

Tax Law section 1115(x)(1) exempts from sales and use taxes tangible personal property for use or consumption directly and predominantly in production of live dramatic or musical arts performances in a theater or other similar place of assembly (but not including a roof garden, cabaret or other similar place), with a seating capacity of one hundred or more chairs that are rigidly anchored to the construction or fixed in place so as to prevent movement in any direction, but only where it can be shown at the time such tangible personal property is purchased that such performances are to be presented to the public in such theater or other similar place on a regular basis of at least five performances per week for a period of

at least two consecutive weeks, the content of each such performance shall be the same and a charge is or is to be made for admission to the place where such performances occur. For purposes of the foregoing, the term "place of assembly" means a place of assembly with a stage in which scenery and scenic elements are used, as described in section 27-232 and subdivision (a) of section 27-255 of the Administrative Code of the City of New York (as such section and subdivision existed on January 1, 1978), and for which an approved seating plan is required to be kept, as described in section 27-528 of the City's Administrative Code (as such section existed on January 1, 1978), whether or not such theater or other similar place is located in New York City. Nothing in section 1115(x)(1) shall be construed to exempt tangible personal property which is permanently affixed to, or becomes an integral component part of, a structure, building, or real property. Section 1115(x)(2) exempts services described in paragraph two or three of subdivision (c) of section eleven hundred five of this article when rendered with respect to property exempt under section 1115(x)(1). Section 1105(c)(2) services consist of 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 that person for resale, upon which those services are performed. Section 1105(c)(3) services consist of installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, 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.

The phrase "live dramatic or musical arts performances" as used in section 1115(x) must be read in *pari materia*, or construed together, with the same phrase used in section 1105(f)(1), which provides an exclusion from sales tax for admission charges to those kinds of performances. Tax regulations section 527.10(d)(2) provides that live dramatic and musical arts performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances.

From the information provided by the Petitioner, it appears that [REDACTED] satisfied the requirements in section 1115(x) that there were performances presented to the public on a regular basis for at least five performances a week for a period of at least two consecutive weeks, with the content of each performance being the same and a charge for admission made. Further, the WaMu Theater at Madison Square Garden, with 5600 seats, qualifies as a theater.

We also conclude that [REDACTED] qualifies as a live dramatic and musical art performance. Although other productions of Petitioner have been determined to be "circuses" (see TSB-A-99(25)S, TSB-A-98(1)S), the [REDACTED] production is significantly different than those productions. In both of those Advisory Opinions, it was determined that the traditional elements that are characteristic of a circus (i.e., acrobats, gymnasts, trapeze artists, clowns, etc). were predominant over the elements of the production that are characteristic of a live dramatic or musical art performance. The opposite is true of the [REDACTED] production. In [REDACTED], there are acrobatic and gymnastic elements. However, those elements further the continuing story line and choreography of the production, rather than being the focus of the scenes in which those elements are used. Like the ice skating in the Ice Capades, the acrobatic and gymnastic movements are parts of scenes that are combined to form the entire performance and are "integrated with music, scenery, costuming and lighting to produce the desired effect." See, *Matter of Metromedia, Inc. v. State Tax Commission*, 75 AD2d 341 (3d Dept., 1980).

While we conclude that [REDACTED] qualifies as a live dramatic or musical arts performance in a theater as required in section 1115(x), we express no opinion on whether or not the tangible personal property purchased or rented by Petitioner or the services rendered with respect to that property for this production qualify for the exemption. Petitioner presented no facts specifying what tangible personal

property was purchased or rented and how the property was used or what services were rendered. Thus, we cannot opine on the eligibility of the tangible personal property or services for the exemption.

DATED: May 23, 2011

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.