

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

TSB-A-14(21)S
Sales Tax
June 13, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130926A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether all of the equipment it purchases for the operation of a bicycle rental service is exempt from State and local sales and use taxes as purchases for resale.

We conclude that the purchases of the bikes are exempt, but the purchases of other equipment are subject to sales and use taxes.

Facts

Petitioner has entered into a contract with the City of New York Department of Transportation (NYCDOT) to operate a bicycle rental program (Program). The Program provides Users with access to thousands of bikes located at hundreds of stations in and around New York City. Petitioner purchases and retains title to all bikes and bike station equipment but allows the users access to the equipment under a specific rental agreement.

The equipment of the bike rental service consists of: bicycle stations (“Station”), automated pay station kiosks (“Pay Stations”), separate stands that allow the docking of bicycles (“Bike Docks”), and bicycles (“bikes”). The Pay Station, and Bike Docks are part of the Bike Station. The bikes attach and lock to the Bike Station at the Bike Dock. The bike relays information through the Bike Dock with a network of cabling connecting all of the other Bike Docks and running through the Bike Station to the Pay Station.

A User may access a bike by purchasing a 24-hour pass, a 7-day pass, or an annual membership. In the case of the 24-hour pass and the 7-day pass, the User provides a credit card at the Pay Station in order to gain access to the system. The User then receives an access code that must be entered at the Bike Dock to release the bike from the Bike Station. The User is allowed to use the bike for a 30 minute interval without any additional charge. Every customer is subject to overtime fees for failure to return the bike to the Bike Station within the 30 minute usage period. An annual member is granted use of a bike for a 45 minute interval without incurring overtime fees. An annual member also receives a coded plastic “key” to access bikes from the Bike Station. A User returns the bike by properly docking the bike at the Bike Station so the bike’s information can be read by the system and logged in as “returned.” If the bike is not returned within 24 hours, it is deemed lost or stolen and the User is charged a lost/stolen bike fee.

Before renting a bike, the User must agree to the “Bicycle Rental Agreement, Liability Waiver, and Release” (hereinafter, the “Agreement”). An annual member must sign the agreement at the time he or she purchases the annual membership. A User who obtains a 24-hour or 7-day pass must acknowledge acceptance of the Agreement by selecting “Agree” at the Pay Station and electronically signing the Agreement. The Agreement explicitly states that, in addition to renting the bike, the User is also renting, and has full access to, the Bike Stations, Pay Stations, and the Bike Docks.

The Petitioner collects New York sales tax on all fees and charges paid by its Users, including the 24-hour and 7-day access passes, the Annual Membership fees, all overtime fees and charges, a lost access key charge, and the lost/stolen bike fee.

Analysis

Article 28 of the New York Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, unless otherwise exempted. *See* Tax Law § 1105(a). The term “sale” means “any transfer or title, possession or both . . . for a consideration” and includes a rental. *See* Tax Law § 1101(b)(5). Property purchased for resale is not considered a “retail sale” and is not subject to sales tax. Tax Law § 1101(b)(4)(i)(A). The statute does not define the term “resale,” but the Court of Appeals has deemed its definition coextensive with the term “sale.” *See Echostar Satellite Corp. v. Tax Appeals Tribunal*, 20 N.Y.3d 286 (2012). Tax Department Law and Regulations define the terms “rental, lease and license to use” to include 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. 20 NYCRR § 526.7(c)(1). 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. *Id.* However, the characterization of an agreement as a lease will not be conclusive if the true nature of the transaction indicates otherwise. *See Greene & Kellogg, Inc. v. Chu*, 134 A.D.2d 755 (3d Dep’t 1987). “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. 20 NYCRR § 526.7(e)(4).

We conclude that Petitioner is renting the bike to the User. A User pays a fee to remove the bike from the Bike Station. During the rental period, the User has actual custody and possession of the bike, has dominion and control over the bike, and directs how it is used during the rental period. This satisfies all three attributes of property ownership that can be transferred in a lease. Therefore, the Petitioner’s purchase of the bike is exempt from State and local sales and use taxes as a purchase for resale.

We further conclude that Petitioner is not renting the various parts of the Bike Station to the User, and, therefore, its purchase of the Bike Station does not qualify as a purchase for resale. Petitioner asserts that the bike and Bike Station are one single piece of equipment with multiple components, and that each component is effectively useless without the other. Petitioner characterizes the lease agreement as the simultaneous rental of all components.

We disagree with Petitioner's characterization of the User's access to the Bike Station equipment as a rental. The bike and Bike Station are separate pieces of equipment fully capable of being separated, both literally and figuratively. The User is paying a fee to rent the bike for a set interval of time. The Bike Station is Petitioner's means of securing the bike, delivering the bike to the User and tracking the use of the bike. The Bike Station holds numerous bikes and the Petitioner retains control over the Bike Station at all times. To the extent that the User operates any part of the Bike Station (e.g., the Pay Station), he or she does so according to directions established by Petitioner. To the User, the Bike Station is merely the means of paying for and obtaining the rental of the bike. The user is not actually renting the Bike Station or the Pay Station or Bike Docks that are part of the Bike Station.

Based on the foregoing, Petitioner must pay State and local sales or use tax on its purchase of the Bike Station equipment. However, the Petitioner is exempt from sales and use taxes on the purchase of the bikes as a purchase for resale.

DATED: June 13, 2014

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.