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

TSB-A-83(16)S (Corrected Copy)
Sales Tax
March 28, 1983

This replaces TSB-A-83(16)S, which was previously distributed and should be destroyed.

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S821130A

On November 30, 1982 a Petition for Advisory Opinion was received from Joseph Granatelli, 45-50 216th Street, Bayside, New York 11361.

Petitioner inquires as to the sales tax obligations, if any, of a supplier of video games and a store owner, under the following circumstances. The supplier installs video games in a store, and is responsible for the repair and maintenance of the games. Once a month the supplier visits the store, removes the money from the machines, and gives fifty per cent of such gross receipts to the store owner.

Receipts from the operation of coin operated amusement devices, including video games, are not subject to sales tax. Bathrick Enterprises, Inc. v. Murphy, 27 AD 2d 215. There is thus no sales tax due on the receipts from the operation of the games by customers.

The rental of tangible personal property constitutes a sale the receipts from which are subject to State and local sales taxes. Tax Law §§ 1105(a), 1101(b)(5). However, although Petitioner characterizes the transaction in question as a "rental" of the machines, in actuality the store owner is granting a license to the supplier to use real property. Thus, by retaining the right to exclusive access to the money contained in the machines, the owner thereof has failed to effect a transfer of "actual, exclusive possession," the prerequisite to the establishment of a "sale." Bathrick Enterprises v. Murphy, supra. See also Rowe Cigarette Service v. Graves, 247 A.D. 852, in which retention of such control as is present herein, with respect to cigarette vending machines, was held to constitute the owner of the machines the responsible vendor for tax purposes. Such a finding of responsibility is clearly grounded on a determination that the owner did not relinquish exclusive possession of the cigarette machine to the proprietor of the store in which it was placed. In accord with Rowe is Matter of Faculty-Student Association of State Universities College at Plattsburgh, Inc., State Tax Commission, February 20, 1981, TSB-H-81(58)S. Another instructive case, albeit from a foreign jurisdiction, is State v. Wards, 550 So 2d 732, in which the court stated the following: "We may observe, as a matter of common knowledge, that many places of business rent space in their establishments to third persons who may and do conduct their own and different businesses in such space or department so rented. Such space or department becomes, and is, a separate place of business, the business of such third party. If, therefore, a vending machine owner rents (method of payment immaterial) space for a vending machine and such space becomes his place of business (special or limited), in the conduct of his business he thereby makes himself, under the foregoing tax statutes, liable for the tax to the state within the terms of the general sales tax and the vending machine statute in question." Id., at 736.

Accordingly, no sales tax is due on the store owner's receipts, as no sales tax is imposed on the sale or rental of, or license to use, real property. It may be noted that the supplier's purchase and use of the machines, since they are not purchased for resale, are subject to applicable sales and use taxes.

DATED: March 11, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau