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

TSB-A-86(22)S
Sales Tax
May 28, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S860108A

On January 8, 1986, a Petition for Advisory Opinion was received from 1000 Island Balloon Co., 5300 Gatehouse Rd., Tully, N.Y. 13159.

The issues raised are (I) whether charges for hot air balloon rides are exempt from sales tax and, (II) if an exemption applies, whether the taxes Petitioner paid to the Tax Commission are refundable.

Petitioner operates a hot air balloon ride business. He states that he charges $75.00 per ride, the customary fee charged by local balloonists. He also states that from March 1, 1983 through August 31, 1985 he remitted sales tax to New York State on the fees charged for balloon rides even though he never collected any sales tax from his customers and never represented to his customers either verbally or in writing that sales tax was included in the fees charged for balloon rides. Petitioner never gave receipts to any of his customers.

Issue I

Section 1105 of the Tax Law imposes a sales tax on receipts from the retail sale of tangible personal property and from certain enumerated services. Transportation services are not among the services taxable under section 1105 of the Tax Law.

Section 1101(b)(5) of the Tax Law defines "sale" as any transfer of title or possession or both, rental, lease or license to use for a consideration.

Sales and use tax regulation section 526.7(e)(4) states that the "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."

Thus, if Petitioner transferred possession or control of the hot air balloon to his customers, Petitioner is deemed to have made a rental of tangible personal property. The fees charged for the rental of such a balloon constitute receipts subject to tax under section 1105 of the Tax Law. However, if Petitioner retained dominion and control over the balloon, Petitioner is considered to have provided a nontaxable transportation service. Generally, Petitioner is deemed to have retained dominion and control over the hot air balloon if Petitioner retained possession of the balloon, used his own discretion in operating the balloon or controlled the operation of the balloon through an employee and retained overall responsibility for the operation of the balloon.

Moreover, a hot air balloon is not a "place of amusement" for purposes of section 1101(d)(10) of the Tax Law. Fairland Amusements v. State Tax Commission, 66 NY2d 932. Accordingly, payments for its use are not "admission charges" taxed under section 1105(f)(1) of the Tax Law.

Issue II

Section 1139(a) of the Tax Law states, in part, that the Tax Commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally paid.

Regulation 534.2(c)(1) provides that "Any person who has erroneously, illegally, or unconstitutionally collected any tax from a customer and remitted such tax to the Tax Commission must repay such tax to the customer before the Tax Commission may refund any amounts to him."

Petitioner states it charges $75.00 per ride, the usual fee received by local balloonists, and does not give receipts to the passengers. Although it has remitted sales tax, Petitioner contends such amounts do not represent collections from patrons since it has never, either verbally or in writing, notified customers that the ride fees include sales tax.

Pursuant to Tax Law 1135(a) "[e]very person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately."

In addition, the Sales and Use Tax Regulations provide that it is statutorily presumed that all receipts from sales and all amusement charges of any type mentioned in subdivision (f) of section 1105 of the Tax Law are subject to tax until the contrary is established. The burden of proving that any receipt, amusement charge or rent is not taxable is on the vendor or the customer. To satisfy his burden of proof, a vendor must maintain records sufficient to verify all transactions. The sales record must provide sufficient detail to independently determine the taxable status of each sale and the amount of tax due and collected thereon. (20 NYCRR 533.2[a][1],[b][2]).

Accordingly, unless Petitioner's records are sufficient to document the exempt status of each transaction and to establish that in fact sales tax was not collected thereon, the Tax Department will be unable to determine whether the taxes Petitioner has remitted are refundable and Petitioner will have failed to meet his burden of proof under regulation section 533.2. See: Murray Saltzman v. State Tax Commission, 101 AD2d 910.

It should be noted that advisory opinions interpret the applicability of statutory and regulatory provisions in relation to the facts set forth in a Petition. Whether Petitioner has maintained records satisfactory for proving that a refund is due must be decided by administrative procedure upon Petitioner's filing of a request for refund.

DATED: May 28, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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