

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

TSB-A-92(54) S
Sales Tax
July 1, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920206E

On February 6, 1992, a Petition for Advisory Opinion was received from Damar Aviation, 7271 State Fair Blvd., Baldwinsville, N.Y. 13027.

The issue raised by Petitioner, Damar Aviation, is whether it was liable for collecting sales tax on receipts from monthly charges to a lessee for the rental of an aircraft owned by Petitioner.

Petitioner, the owner of an aircraft, entered into a verbal contract with Kamp Airport (hereinafter "lessee") whereby the lessee would lease the aircraft from Petitioner for rental and training purposes. Petitioner did not collect sales tax on the receipts from the monthly rental charges received from the lessee.

Petitioner contends that the lessee used the aircraft for rental purposes and for pilot training purposes and that the lessee collected sales tax whenever a taxable rental occurred.

Petitioner does not indicate whether a sales tax resale or other exemption certificate or some other form of documentation indicating that the leased aircraft was to be used exclusively for resale purposes was received from the lessee.

Section 1101 of the Tax Law states, in part:

(b) 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. . .

(5) Sale, selling or purchase. Any transfer of title or possession or both. . . rental, lease or license to use. . . , in any manner or by any means. . . for a consideration, or any agreement therefore, . . .

(6) Tangible personal property. . . personal property of any nature. . .

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.- - . . .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.

Section 1133 of the Tax Law states, in part:

Liability for the tax.-- (a). .every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.

Section 528.1 of the Sales and Use Tax Regulations states, in part:

(c) Exemptions from the sales and compensating use tax are strictly construed. For an exemption to be allowed, it must clearly appear that a transaction is eligible for the exemption. The burden of proving nontaxability is on the person claiming the exemption.

Section 1132 of the Tax Law states, in part:

(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a). .of section eleven hundred five, . . .are subject to tax until the contrary is established and the burden of proving that any receipt. . is not taxable hereunder shall be upon the person required to collect tax or the customer,. . .unless. . .a vendor, not later than ninety days after delivery of the property, shall have taken from the purchaser a certificate. . ., to the effect that the property. . .was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen . . ., the sale shall be deemed a taxable sale at retail.

Section 533.2 of the Sales and Use Tax Regulations states, in part:

(a) General. (1) For the proper administration of the Sales and Use Tax Law and to prevent evasion of the sales tax, it is statutorily presumed that all receipts from sales and purchases of property or services of any type mentioned in subdivisions (a) through (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of such section, and all amusement charges of any type mentioned in subdivision (f) of such section are subject to the 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.

Section 532.4 of the Sales and Use Tax Regulations states, in part:

(a) General. (1) It is presumed that all receipts for property or service of any type mentioned in subdivisions (a), . . .of section 1105 of the Tax Law, . . . are subject to tax until the contrary is established.

...

(b) Burden of proof. (1) The burden of proving that any receipt, amusement charge, or rent is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

...

(iii) A certificate or document in substantiation of an exempt sale is considered timely received by the vendor when it is received within 90 days after the delivery of the property or the rendition of the service.

(a) For the purposes of this section, the term "90 days after the delivery of the property" means that day which is 90 days after the date actual possession of the property or a portion thereof is transferred to the purchaser.

...

(3) When a vendor has met the criteria in paragraph (2) of this subdivision, it is protected from liability for failure to have collected tax from the purchaser and the burden of proving the nontaxability of such transaction rests solely on the purchaser.

...

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

(6) The fact that a vendor has failed to receive timely or proper documentation of the claimed exempt status of any particular transaction does not change the tax status of the transaction. Thus, a vendor which has timely protested a determination of tax always has the right to prove the nontaxability of any transaction through the presentation of proper documentation. However, the vendor has lost the opportunity to rely solely upon the receipt of the exemption certificate or document in satisfaction of its burden of proof as to its responsibility to collect tax.

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In the instant case, Petitioner's leasing of the aircraft to the lessee was a retail sale of tangible personal property under the provisions of Section 1101 of the Tax Law and subject to the tax imposed under Section 1105(a) of the Tax Law unless Petitioner can prove that the transaction was exclusively for resale purposes. If Petitioner obtained a sales tax resale certificate or some other form of documentation from the lessee which would substantiate that the lessee's use of the aircraft was exclusively for resale purposes as required under Section 1132(c) of the Tax Law and Section 533.2(a)(1) of the Sales and Use Tax Regulations, Petitioner would not be required to collect sales tax on the monthly rental charges for the aircraft.

Absent such resale certificate and in accordance with Sections 528.1(c) and 532.4 of the Sales and Use Tax Regulations the burden of proving that the receipts from the lessee's lease payments were not subject to State and local sales taxes falls directly on Petitioner and cannot be shifted to the lessee. If Petitioner fails to present substantiation to the contrary, Petitioner will be considered to be liable, under the provisions of Section 1133 of the Tax Law, for the tax imposed under Section 1105(a) of the Tax Law on the total of the lessee's payments to the Petitioner for the rental of the aircraft.

It is not within the scope of an Advisory Opinion to determine questions of fact such as whether Petitioner obtained a resale certificate or other proper documentation to substantiate that the receipts in question were excluded from the tax imposed under section 1105(a) of the Tax Law. Because the issue presented here arises within the context of an audit, the resolution of questions of fact must be made within such context.

DATED: July 1, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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