

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

TSB-A-96 (70) S
Sales Tax
November 25, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960205A

On February 5, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Steven Buskin, CPA, 197 Route 18, Suite 3000, East Brunswick, New Jersey 08816. Petitioner, Steven Buskin, provided additional information pertaining to the Petition on May 24, 1996.

Petitioner questions the applicability of New York State sales and compensating use taxes to a number of transactions entered into between his client (the Company) which is located in New Jersey and its customers located in New York.

Petitioner submits the following facts as the basis for this Advisory Opinion.

The Company, a New Jersey corporation, is located in the State of New Jersey and has no place of business in New York State. The Company is in the business of storing and servicing stored materials (e.g., papers, documents and files) owned by its customers. The materials are generally placed in various sized containers. These containers are placed on shelves within the Company's storage facility. At no time does title to the containers or the materials that are in the containers pass to the Company.

The Company's "Storage and Service Agreement" clearly indicates that the storage will take place in New Jersey. Charges for storing customers' containers are based on the size of each container. Charges are billed periodically, generally on a monthly basis. New Jersey sales tax is collected on the monthly storage charge.

In addition to the storage of customers' containers, the Company also performs the following services for its customers. (To the extent that the services are performed in New Jersey and are subject to New Jersey sales tax, New Jersey sales tax is collected by the Company regardless of whether the customer is located in New Jersey or New York.)

Retrieval - This is the charge for taking a container off a shelf and placing it on the Company's loading dock for delivery to or pick up by a customer.

Filing and Refiling - This is the charge for placing a container on a shelf when it is first placed in the Company's storage facility or when it is returned to storage. (There is no filing charge to a new customer for filing the initial containers that a customer places in storage. The filing charge is only for subsequent additional containers to be filed for storage.)

Disposal - This is the charge for disposing of a customer's container from the Company's storage facility through the use of an independent disposal company.

Processing and Data Entry Charge - This is a labor charge for creating a customer's data base, relating to materials in storage, on the Company's computer system.

Interfile - This is a charge for filing individual papers within a customer's file container that is already in storage.

Fax Services - This is a charge for the use of a fax machine. A customer may either use the fax machine in New Jersey or request the Company to fax papers or other documents. Conceivably, faxes could be sent to destinations in New York State.

Photocopies - This is a charge for the use of a photocopy machine. A customer may either use the machine in New Jersey or request the Company to photocopy papers or other documents. Conceivably, copies could be sent to destinations in New York State.

Computer Entry. Changes or Removals - This represents a data entry labor charge for updating a customer's file.

Permanent Removal - This is the labor charge made when a container is permanently removed from storage. The charge occurs when a container is to be destroyed at a customer's request or when a customer wants to remove a container from storage at the termination of the contract. This charge is for preparing containers for shipment by placing them on pallets, shrink wrapping the loaded pallets and otherwise ensuring that the containers do not get lost in transit.

Labor Per Hour - This is a charge for furnishing labor on behalf of a customer for any activity not specifically listed in the customer's contract, for example, looking for papers or other documents. All of these activities are performed in New Jersey.

Material - This is the selling price of a storage container sold to a customer. The container may be delivered to a customer's business location in New Jersey or New York. The container may also be used to replace a container damaged when the container is received for storage at the Company's facility.

Deliveries and Pick ups - This charge represents the transportation charge made for delivering a container to a customer and/or for picking up a container from a customer's place of business. Deliveries are made from New Jersey to a customer's office in either New Jersey or New York. The delivery charge generally arises when a customer asks to have a container retrieved from storage and delivered to his or her business location. Pick up charges generally occur either when a customer wants to return a container to storage that was previously delivered or when a customer wants to place a new container in storage. There is generally no charge for picking up containers

when a customer initially signs a contract. Different rates apply to different levels of response time to a customer's request for delivery or pick up as well as the distance to a customer's place of business.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale

* * *

(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1101(b)(8)(i) of the Tax Law defines "vendor" to include:

(D) A person who makes sales of tangible personal property or services, the use of which is taxed by this article, and who regularly or systematically delivers such property or services in this state by means other than the United States mail or common carrier

Section 1101(b)(8)(iii) also provides:

For purposes of clause (D) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically delivering property or services

in this state if the cumulative total number of occasions such person or his agent came into the state to deliver property or services exceeded twelve during the preceding four quarterly periods ending on the last day of February, May, August and November, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to come into the state for such purposes on more than twelve occasions during the next succeeding four quarterly periods ending on the last day of February, May, August and November.

Section 1105 of the Tax Law imposes sales tax on:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) The receipts ... from every sale, other than sales for resale, of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service

(c) The receipts from every sale, except for resale, of the following services:

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

Section 1110(a) of the Tax Law imposes the compensating use tax, in part, as follows:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state ... except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail ... (C) of any of the services described in paragraphs (1), (7) and (8) of subdivision (c) of section eleven hundred five, (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five have been performed

Section 1118 of the Tax Law provides in part:

The following uses of property shall not be subject to the compensating use tax imposed under this article:

* * *

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction

Section 1131(1) of the Tax Law defines "persons required to collect tax," in part, to include "every vendor of tangible personal property " Section 1131(3) defines "tax," in part, to include "any tax imposed by sections eleven hundred five, or eleven hundred ten "

Section 526.10(a)(5) of the Sales and Use Tax Regulations codifies the definition of "vendor" as previously described. Subdivision (c) of this Section provides, in part:

Interstate vendors. (1) A person outside this State making sales to persons within the State ... who makes deliveries in New York as described in paragraph (5) of subdivision (a) of this section, is required to collect the tax on any taxable property or services delivered in New York.

Opinion

The Company's storage of materials at its facility in New Jersey are not subject to the sales tax imposed by Section 1105(c)(4) of the Tax Law since the storage does not occur in this State. There is no compensating use tax imposed on the storing of tangible personal property. The various services provided by Petitioner in this case relating to the stored materials in New Jersey, including delivering and/or picking up stored materials to or from a customer's office in New York, are also not subject to sales or use tax.

The Company's retail sales of photocopies and of containers to its New York customers are sales of tangible personal property, the use of which is subject to compensating use tax imposed by Section 1110(a)(A) of the Tax Law. If the Company regularly or systematically delivers the photocopies or containers to its customers in this State (or otherwise qualifies as a vendor under

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Section 1101(b)(8)), the Company is a vendor. As a vendor and a person required to collect tax, the Company would be required to comply with the requirements of Articles 28 and 29 of the Tax Law, including the collection and remittance of State and local sales and compensating use taxes, for example, on its sales of photocopies and containers that are delivered to customers in this State. The receipt or consideration for such photocopies and containers would include any charge by the Company to deliver them to its customers. However, in accordance with Section 1118(7) of the Tax Law, if New Jersey sales or use tax was legally due and paid on these sales without any right to a refund or credit, and if the State of New Jersey allows a corresponding exemption for New York sales and compensating use taxes, any New York State and local compensating use taxes would apply only to the extent that the New York aggregate rate of tax exceeded the New Jersey rate.

It is also noted that the Company's fax service to its New York customers is considered to be an interstate telephone and telegraph service, since the fax originates in New Jersey and terminates in New York, and as such is excluded from tax under Section 1105(b) of the Tax Law.

DATED: November 25, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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