

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

TSB-A-97(38)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961118A

On November 18, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from the New York Convention Center Operating Corp., 655 West 34th Street, New York, New York 10001-1188.

The issue raised by Petitioner, New York Convention Center Operating Corp., is whether certain utility services provided by Petitioner are subject to sales tax.

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

Petitioner is a public benefit corporation under Title 27 of the Public Authorities Law charged with operating and maintaining the Jacob K. Javits Convention Center ("the Center"). The Center hosts trade and public shows, conventions, meetings and other special events. These events are typically organized by show managers with whom Petitioner enters into license agreements. The show managers in turn frequently sublicense space to trade show exhibitors.

Petitioner submitted samples of a trade show license agreement, a special events license agreement, and order forms for electrical, telephone and plumbing services. Basic utility services such as general lighting, heat, etc., are included in the trade show license agreement while other such services ("additional utility services") including special electrical requirements, telephone service and plumbing must be ordered and paid for separately. The Center's public show license agreement is identical in this respect. The license fee for special events includes not only the basic utility services as provided in the trade show license agreement, but also certain additional utility services enumerated in the agreement. As with the trade and public show license arrangements, however, other additional utility services are frequently ordered and paid for separately.

Additional utility services are ordered from the Center both by the show manager and by the individual exhibitors, and are billed to the party that placed the order. The installation and dismantling of facilities for these services are provided by Petitioner's employees. The electrical services are generally sold as a package; that is, labor, electric power and, in the case of Javits-owned flood lights, the equipment itself, are all included in the price. Under certain circumstances, however, such as where more than six exhibitor-owned fixtures are installed, separate labor charges are imposed. Telephone services and plumbing services, with the exception of overhead venting, are sold as a package; the Center does not bill for the actual labor utilized.

In setting its prices for electric and telephone services, the Center does not separately meter the use of those services nor does it make any other attempt to pass through directly to its customers their portion of the costs of these services. The order form for electrical services submitted by Petitioner contains a rate schedule for these services. In Petitioner's sample form, the rates charged for providing electric service connections increase based on the number and type of connections made available. Similarly, in setting its prices for additional telephone services, the Center does not charge on a per call or usage basis or otherwise pass through directly to customers their portion of the telephone service costs. The rates charged by the Center for additional telephone services vary, depending on whether the Center provides single lines/sets, multi-lines/sets or modem lines/sets. The Center's current practice is to charge sales tax on all additional utility services. Such services include electric, telephone and plumbing (including compressed air) services.

Relevant sections of Petitioner's sample agreements read as follows:

Trade show license agreement

8: UTILITIES. Licensor will furnish without charge during the operating hours of the Event Period general lighting, normal electricity, ventilation and heating or air conditioning on written order submitted with the Plan of Operation, provided the amounts so specified shall not exceed the capacity of available equipment with a proportionate reserve for other portions of the Center.

9: SERVICES. A. Licensor reserves the exclusive right to provide telephone, telecommunication, water, waste water, plumbing, electrical services and compressed air. Such services shall be provided on written order submitted with the Plan of Operation at the established rates of Licensor for such services.

Special event license agreement

FOURTH: FEES.

A. License Fee: The License Fee will be **\$19,805.06**, which includes:

- 1 - Room rental and set up will be theater style (semi circle) of 2,400 chairs.
- 2 - Sixteen (16)-16" risers, and one (1)-60" Riser.
- 3 - Twenty (20) 8X30 draped tables and chairs.
- 4 - Carpentry labor.
- 5 - Electric Estimate:

a) - **Equipment to include:**

- one (1) microphone complimentary.
- six (6) microphones- 1st day.

one (1) microphone- 2nd day.
one (1) large sound system-1st and 2nd day.
one (1) medium sound system-1st and 2nd day.

b) - Power to include:

Two (2)-500w outlets.

c) - Labor to include:

Friday, September 20, 1996: two (2) men from 7:30 A.M. to 3:00 P.M. to set audio system.

Sunday, September 22, 1996: one (1) man from 7:30 A.M. to 3:00 P.M. to adjust and test audio system, and one (1) man from 3:00 P.M. to 9:30 P.M. to operate audio system.

Monday, September 23, 1996: one (1) man from 7:30 A.M. to 8:00 P.M. to operate audio system.

Tuesday, September 24, 1996: two (2) men for two (2) hours to remove all equipment.

B. Other Charges: All other additional services such as: electrical power/labor, carpentry labor, audio/visual, paramedics, equipment, water, food and beverage, ticket takers, security, decorations, coat check, and any other requirements necessary to the success of your Event are not included.

NINTH: SERVICES.

A. Licensor reserves the exclusive right to provide telephone, telecommunication, water, waste water, plumbing, electrical services and compressed air. Such services shall be provided on written order submitted with the Plan of Operation at the established rates of Licensor for such services.

APPLICABLE LAW

Section 1105(b) of the Tax Law imposes a tax on "[t]he receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and 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 and from every sale, other than sales for resale, of a telephone answering service."

Section 1105(c) of the Tax Law imposes a tax on the receipts from sales, other than sales for resale, of certain enumerated services.

In Debevoise & Plimpton v New York State Dept. of Taxation and Finance, 80 NY2d 657, 661, the Court of Appeals held that the tenants' payments for overtime heat, ventilation and air conditioning services were incidental to the rental of commercial premises and not the sale of a refrigeration and steam service and, therefore, not subject to the sales tax pursuant to section 1105(b) of the Tax Law.

In Empire State Building Co. v New York State Dept. of Taxation and Finance, 81 NY2d 1002, the Court of Appeals held that the tenants' payments of an Electricity Rent Inclusion Factor were for an electric service provided only as an incident to the rental of the commercial premises and not as a part of "separate transactions which have as their primary purpose the furnishing of utilities or utility services," and, therefore, not subject to tax as a sale of utility services under section 1105(b) of the Tax Law.

OPINION

In Debevoise & Plimpton, supra and Empire State Building Co., supra, charges for overtime heating, ventilation and air conditioning, and electricity, that the landlord was responsible for providing were considered an increase in the rent when the tenant required them outside of certain established hours. In the present case the charge for basic utilities is included within the trade show (or public show) license agreement for the Center. Payments for the license to use real property are not subject to sales and use taxes (see Section 526.8(c)(1) of the Sales and Use Tax Regulations). Petitioner supplies unmetered additional utilities (electric, telephone and plumbing services), under a rate schedule based on the number and type of connections made available, to meet special requirements of a licensee during the normal established hours of the Center. The additional utility charges are similar to the overtime charges at issue in Debevoise & Plimpton and thus are not subject to sales tax.

Even though Petitioner may separately state certain charges for services, it is not reselling these services but is consuming them in providing its license to use its property. See Debevoise & Plimpton, supra; Matter of Penfold v. State Tax Commission, 114 AD2d 696. Consequently, the charges made by Petitioner over and above the charges in its basic license agreement are considered to be an integral part of such agreement and are not subject to tax.

DATED: May 21, 1997

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

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