

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

TSB-A-97(52)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970513A

On May 13, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Henry F. Geerken, RD#1 Box 70, Worcester, NY 12197-9706. Petitioner, Henry F. Geerken, provided additional information pertaining to the petition on May 20, 1997.

The issue raised by Petitioner is whether his charges for day charter sailing excursions are subject to sales tax.

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

Petitioner operates a passenger charter sailing excursion business with his thirty-six-foot clipper cutter ketch on the waters of Lake Champlain. This is a family-owned business run by Petitioner, his wife and their daughter; they have no other employees or crew. The business is a day charter business only. The cruises begin at 9:00 a.m. and end at 3:00 p.m. Petitioner charges \$150 for three people, which includes sailing for six hours and a box lunch consisting of sandwiches, soda and chips. Petitioner makes advance ticket sales, requiring a deposit of \$75 and payment of the balance due upon boarding the boat. The ketch can carry up to six passengers, for which Petitioner charges the \$150 plus \$50 for each person more than three.

Passengers are given a choice of sailing the broad reaches of Lake Champlain, visiting Cole Island which is in New York State waters, or of traveling up Otter Creek to Vergennes, Vermont. All cruises include sailing in both New York State and Vermont waters.

The sailing season is from May 29 to September 7. Petitioner and his family live aboard the boat during the season only, and their legal residence is in New York State. When Petitioner began business last year, he was unable to procure dock space in New York and therefore the principal berth and home port for the boat is in Point Bay Marina, Charlotte, Vermont. From this port, Petitioner picks up and discharges his passengers for the day cruises. Petitioner conducts his business operations from within New York State. The \$75 deposits are mailed to his New York address.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on the receipts from sales (including rentals) of tangible personal property.

Section 1101(b)(5) of the Tax Law defines the terms "sale, selling or purchase," in part, to mean:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration, or any agreement therefore, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(d)(i) of the Tax Law imposes sales tax on the receipts from "every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state . . . in all instances where the sale is for consumption on the premises where sold . . ."

Section 526.7(e) of the Sales and Use Tax Regulations provides, in part:

- (4) *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.

Technical Services Bureau Memorandum TSB-M-84(7)S, dated April 10, 1984, entitled Bus Company Transactions -- Transportation Service vs. Equipment Rental, provides, in part:

1. Where a bus company conducts a tour for which it determines the time and destination and sells tickets at a predetermined price, the company is providing a transportation service which is exempt.
2. Where a bus company charters a bus to a group, and the bus company retains dominion and control\* over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. A chartering party's rights are limited to boarding the bus and riding to the agreed destination. . . .

\*Dominion and control remains with the owner of a vehicle when pursuant to an agreement or contract:

1. there is no transfer of possession, control and/or use of the vehicle during the terms of the agreement or contract; and
2. the owner maintains the right to hire and fire the drivers; and
3. the owner uses his own discretion in performing the service . . . and generally selects his own routes; and

4. the owner retains the responsibility for the operation of the vehicle; and
5. the owner directs the operation, pays all operating expenses, including drivers' wages, insurance, tolls and fuels.

Opinion

Petitioner is engaged in the business of providing the use of his boat, including his service as a navigator, for day cruises both in and outside New York State waters to predetermined destinations for a fixed period of time. The chartering of a boat constitutes a rental of tangible personal property that is subject to tax if the charterer has direction and control over the boat's operation. While the provisions of TSB-M-84(7)S, supra, do not specifically apply to the chartering of a boat, the criteria set forth therein are useful in determining whether Petitioner has relinquished dominion and control of his boat within the meaning of Sales Tax Regulation Section 526.7(e) (see Limousine Operators of Western New York, Inc., Adv Op Comm T&F, October 27, 1988, TSB-A-88(55)S).

In Petitioner's case, the chartering party's rights are limited to boarding the boat at the home port, sailing to the agreed upon destination and returning to the home port for disembarkation. Although the destinations are predetermined, they are tailored to the wishes of the passengers. Petitioner determines the route taken between destinations. Petitioner retains possession of the boat, has the right to hire and fire any "drivers" should he choose to do so, uses his own discretion in operating the boat, pays all operating expenses and retains the responsibility for the operation of the boat at all times. In fulfilling all of the requirements listed in TSB-M-84 (7)S, supra, Petitioner is deemed to retain dominion and control over the boat and is thus providing a nontaxable transportation service to his passengers (see Limousine Operators of Western New York, Inc., supra; 1000 Island Balloon Co., Adv Op Comm T&F, May 28, 1986, TSB-A-86(22)S).

DATED: August 25, 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.