

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

TSB-A-98(83)S
Sales Tax
December 2, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980924A

On September 24, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Helicorp, Inc., 8473 State Route 69, Oriskany, New York 13424.

The issues raised by Petitioner, Helicorp, Inc., are:

- (1) Whether the helicopter services it provides are subject to sales and compensating use taxes imposed under Article 28 of the Tax Law.
- (2) If Petitioner were to offer aerial photographs for sale, would receipts from the charges for such photographs be subject to sales and compensating use tax?

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

Petitioner is a helicopter services company engaged in the business of providing the use of its helicopters, including its services as a pilot, for specified periods of time at predetermined prices. The amount of time varies from approximately six minutes for a short ride to approximately one hour for an aerial sightseeing tour. Although the destinations are predetermined and chosen by the customer, the route taken is determined by the pilot and is generally a straight line to the agreed upon destination (in the air).

Petitioner is solely responsible for the operation of its helicopters and to pay all registration fees and miscellaneous expenses such as fuel and insurance. Petitioner has the right to hire and fire its pilots and pays their wages.

Currently, many of Petitioner's customers bring photographic equipment on board the helicopter to take pictures during their tours. Petitioner is contemplating sending one of its employees on each tour to take aerial photographs and offer them for sale to its customers.

Applicable Authority

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:

* * *

(5) Sale, selling or purchase. 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.

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

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

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

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.

Section 526.8(a) of the Sales and Use Tax Regulations provides, in part:

Definition. The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

* * *

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings. . . .

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 operates a helicopter services business providing rides and aerial sightseeing tours to paying customers. Whether the chartering of a helicopter constitutes the furnishing of an exempt transportation service rather than a taxable rental of tangible personal property within the meaning and intent of Section 1101(b)(5) of the Tax Law turns upon the question of dominion and control (see 1000 Island Balloon Co., Adv Op Comm T&F, May 28, 1986, TSB-A-86(22)S; Henry F. Geerken, Adv Op Comm T&F, August 25, 1997, TSB-A-97(52)S; Klondike Cruises, Inc., Adv Op Comm T&F, July 29, 1998, TSB-A-98(46)S).

The criteria set forth in TSB-M-84(7)S, supra, are useful in determining whether Petitioner has relinquished dominion and control of its helicopter within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations. Petitioner provides helicopter rides/tours to predetermined destinations for fixed periods of time at predetermined prices. Petitioner retains possession of the helicopter, has the right to hire and fire any pilots, uses its discretion in operating the helicopter, pays all operating expenses including the pilot's wages and retains the responsibility for the operation of

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the helicopter 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 helicopter and is thus providing a transportation service which is not one of the services enumerated under Section 1105(c) of the Tax Law and, therefore, is not subject to the imposition of sales or use tax (Henry F. Geerken, supra; Klondike cruises, Inc., supra).

With regard to issue "2," receipts from Petitioner's charges to customers for photographing aerial views are not taxable if the customer does not purchase a photograph. However, such receipts will be subject to the tax imposed under Section 1105(a) of the Tax Law where the photographs are transferred to the customer, as such transaction will be considered a sale of tangible personal property (see Leslie H. Barker, Adv Op Comm T&F, June 23, 1994, TSB-A-94(26)S; The Association of Professional Art Advisors, Adv Op Comm T&F, July 5, 1991, TSB-A-91(47)S).

In those instances where Petitioner sells photographs together with its transportation service, Petitioner should collect sales tax only on the charge for the photographs, assuming that Petitioner's charges for the nontaxable transportation service are separately stated and reasonable.

DATED: December 2, 1998

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

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