

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

TSB-H-80 (128) S
Sales Tax
July 15, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S800327A

On March 27, 1980, a Petition for Advisory Opinion was received from the Manufacturers and Traders Trust Company, One M & T Plaza, Buffalo, New York 14203.

The issue raised is whether the petitioner, pursuant to article 28 of the Tax Law, is a vendor making sales of tangible personal property and as such responsible for collecting and remitting sales taxes or receiving exemption certificates.

The transaction presented involves four parties, referred to as the Lessor, the Lessee, the Supplier, and Manufacturers and Traders Trust Company (Petitioner). The Lessor is in the business of setting up financed leases for customers such as the Lessee. The Lessee contacts the Lessor concerning equipment. The Lessee selects both the equipment and the supplier from whom the equipment is purchased. The Lessor remits the full sale price plus applicable sales taxes (or applicable exemption certificates) to the Supplier. Petitioner will advance to the Lessor funds to finance the equipment. In consideration of such advance, the Lessor will assign its interest in the transaction to Petitioner.

Petitioner will never take physical possession of the equipment. The Lessee will have exclusive control and possession of the equipment during the term established for payment.

Petitioner will handle the transaction as a commercial loan for all purposes. Petitioner does not take depreciation deductions on the equipment, and never takes possession of the leased equipment at the end of the leased term.

UCC financing statements are filed for the equipment and the agreement therefor.

Section 1101(b) (8) of the Tax Law defines a vendor as "... (A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article; (B) A person maintaining a place of business in the state and making sales ... (C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services"

Section 1101(b) (5) of the Tax Law defines a sale as "Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor"

Section 1131(1) of the Tax Law states, " 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services"

Section 526.7(a) (1) of the Sales and Use Tax Regulations defines a sale as "The words 'sale,' 'selling' or 'purchase' mean any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration."

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
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Section 526.7(c) states, "(1)...Whether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement.... (3) A lease which has been entered into merely as a security agreement, but which does not in fact represent a transaction in which there has been a transfer of possession from the lessor to the lessee, is not a 'sale' within the meaning of the Tax Law."

The Sales Tax Law requires a vendor of tangible personal property or services who is required to collect tax and every person purchasing tangible personal property for resale, to register as a vendor with the Tax Commission. To be considered a vendor, a person would have to meet the criteria enumerated in the Tax Law.

Before a transaction is considered a sale, there must be a transfer of title or possession or both of tangible personal property by a vendor to the purchaser.

In the instant transaction, Petitioner neither receives title to nor possession of tangible personal property. Petitioner's interest in the transaction is financial in nature.

Accordingly, Petitioner is not a vendor of tangible personal property and is not under a duty to collect or remit New York State and local sales taxes.

Dated: June 30, 1980

s/ LOUIS ETLINGER
Deputy Director
Technical Services Bureau