

Sales Tax Treatment of a Lease or Rental of Real Property for the Purpose of Parking, Garaging, or Storage of Motor Vehicles

Section 1105(c)(6) of the Tax Law imposes sales tax on the service of providing parking, garaging, or storage of motor vehicles by persons operating a garage (other than a garage that is part of premises occupied solely as a private one- or two-family dwelling), parking lot, or other place of business engaged in providing parking, garaging, or storage of motor vehicles. As explained below, when a person makes payments under a lease (or rental) agreement that includes parking, garaging, or storage of motor vehicles, and the agreement constitutes a lease of real property, the payments are not subject to sales tax under section 1105(c)(6) of the Tax Law.

Where any information in this memorandum is inconsistent with information in TSB-M-91(7)S, *State and Local Sales Tax Imposed on Parking Fees, June 1, 1990*, the information in this memorandum will apply.

Conditions used in determining if an agreement is a nontaxable lease of real property

A transaction, including a concession agreement or similar arrangement, will be treated as a nontaxable lease of real property if there is a written agreement between the parties (hereinafter, lessor and lessee) and all the conditions described below are satisfied.

Conditions within the written agreement

The lessee has the exclusive right to occupy either the entire premises of the lessor or a fixed and specific area or areas of the lessor's premises.

If the lessee is leasing only a specific area or areas of the lessor's premises, it is not necessary for the lessee's area or areas to be physically separate from the other area of the lessor's premises to meet this condition. For example, if the lessee's area is identified by signage or other indicators that the area is for the exclusive use of the lessee, this condition will be met.

The lessor relinquishes the right to enter the fixed and specific area or areas of the lessor's premises subject to the agreement, except for a limited reservation of rights to enter to perform activities normally associated with being a lessor of real property, such as to collect rent, to perform repairs, etc., at reasonable times and upon notice.

This condition will be met even if, for example, a provision in the agreement requires that for insurance purposes or safety reasons the lessor's employees perform certain services for the lessee. Examples of these services include driving the lessee's vehicles to specific areas within the premises, or operating elevators or other machinery that transports the vehicles within certain areas of the premises, provided these services are performed under

the direction and control of the lessee. In addition, this condition will be met even if, under a separate contract or agreement, the lessor's employees perform certain services, such as checking vehicles in, reading odometers, or maintaining or cleaning vehicles.

The lessee, its employees, or agents have an unlimited right to enter the property during normal business hours.

Condition of insurability

The lessee has an insurable interest in the premises.

This condition will be met if:

- the lessee has a relationship or connection with the leased premises that gives the lessee a monetary benefit or advantage from its preservation; or
- the lessee may incur a monetary loss or damage from the destruction or injury to the leased premises; or
- the lessee may be held liable, either personally or in its official capacity, for any injury that occurs to persons who may be present on the premises.

It is not necessary that the lessee actually have insurance on the premises to meet this condition. However, the fact that the lessee actually has insurance on the leased premises would be acceptable proof that this condition has been met. To demonstrate an insurable interest, it is not necessary that the business has a separate insurance policy on the premises where the vehicles are parked. An insurance policy that covers a number of business premises, along with the leased premises where vehicles are parked, is sufficient.

The following examples illustrate the rules contained in this memorandum:

Example 1: An automobile dealer does not have sufficient space at its business location to store all of the vehicles held in its inventory. Accordingly, the automobile dealer enters into an agreement to use an entire parking garage on an ongoing basis where it stores excess vehicles. The owner of the garage has relinquished its right to enter the parking garage (except for the right to enter the parking garage for reasons described above that are normally associated with being a lessor of real property), and only the dealer and its employees have access to this space. There are no limitations on the dealer and its employees entering the parking garage under the agreement, and they have an unrestricted right to enter the garage during normal business hours. In addition, the dealer carries liability insurance in connection with its use of the parking garage. This transaction is a nontaxable lease of real property.

Example 2: Same facts as Example 1, except that the agreement contains an additional provision that requires that the garage owner's employees, for safety reasons, must park the cars in the garage and remove cars from the garage. The garage owner's employees can only park cars or remove cars when directed to by the dealer or its employees, and cannot move cars within the garage unless directed to do so by the dealer or its employees. This transaction is a nontaxable lease of real property.

Example 3: A rental car company enters into a concession agreement with an airport authority. Under the concession agreement, the airport authority agrees to provide the rental car company with a fixed number of specific parking spaces and counter space at the airport from which it will operate its rental car business. As part of the agreement, the rental car company will pay the airport authority the greater of a fixed guaranteed minimum or a percentage of its gross receipts. Also, the agreement provides that the principals and employees of the airport authority will not have rights to access or enter the business area of the rental car company (except for reasons described above that are normally associated with being a lessor of real property). In addition, other than complying with airport security requirements there are no limitations on the rental car company and its employees entering its business area, including its allocated parking spaces, during normal business hours. Also, the rental car company carries liability insurance in connection with its use of the counter space and parking spaces at the airport. This agreement constitutes a nontaxable lease of real property.

Example 4: An auto dealer has an agreement with a shopping mall operator to use up to ten parking spaces that exist in the mall parking lot to store excess inventory. Under the agreement, the dealer is not entitled to use any fixed and specific spaces and is not entitled to post signage or other indicators that specify that any particular spaces are solely for the dealer's use. Rather, the dealer is entitled to park ten vehicles in any available spaces. The shopping mall operator continues to use the entire parking lot for customer parking. Since the agreement does not allow the dealer to use a specific area of the shopping mall operator's parking lot and the shopping mall operator has not relinquished control over a specific area of the parking lot, the payments made under the agreement are payments for parking services subject to sales tax.

Example 5: A rental car company has an agreement with a parking garage operator to use a fixed number of specific parking spaces in the garage to store its rental cars. The company also maintains an office in the garage where customers can pick up and drop off rental cars in the garage. The office and rental car area are clearly marked by signs and are separate from the public parking area. The principals and employees of the company have an unrestricted right to be in the office and rental car area during its normal business hours, and the garage operator has relinquished its right to enter the rental car area of the garage (except for the right to enter the parking lot for reasons described above that are normally associated with being a lessor of real property). However, there is a separate agreement under which the rental car company pays a

separate charge to the parking garage operator for which employees of the parking garage operator check-in and park cars of the rental car company, read odometers and record mileage. Also, because the rental car company has an office on the premises, the rental car company may incur a monetary loss if any damages occur to the premises. This transaction is a nontaxable lease of real property.

Example 6: An auto repair shop enters into an agreement with a parking lot operator to use a fixed and specific half of a parking lot, next to its repair shop, to store vehicles that it has repaired or will repair as part of its normal business. The parking lot operator has relinquished its right to enter the portion of the lot that is used by the auto repair shop (except for the right to enter the parking lot for reasons described above that are normally associated with being a lessor of real property). The auto repair shop owner and his employees are the only persons who have access to their half of the lot and have an unrestricted right to enter the lot during the normal business hours of the lot. In addition, the auto repair shop maintains liability insurance. This transaction is a nontaxable lease of real property.

Example 7: A utility company enters into an agreement with a parking lot operator to use a vacant field adjacent to the operator's parking lot. The utility company will use the field to store its equipment and service vehicles. The parking lot operator has relinquished its right to enter the field (except for the right to enter the field for reasons described above that are normally associated with being a lessor of real property). The terms and conditions of the agreement allow the utility company the exclusive and unlimited right to use the entire field. Also, the utility company may be held liable for any injury that may occur to persons on the premises. This transaction is a nontaxable lease of real property.

Example 8: A promoter of an international food festival enters into an agreement to use a parking lot operator's entire parking lot to provide free parking for those persons attending the festival. Other than requiring a fixed payment for the use of the lot, the agreement places no further obligations on the promoter. The terms of the agreement provide that the parking lot operator will continue to operate the lot for the two days during which the festival is held. The agreement also states that the promoter and its employees have no control over parking operations during those two days. The agreement does not give the promoter the exclusive right to occupy the premises. In addition, the parking lot operator has not relinquished the right to enter the premises. Therefore, the agreement does not meet the conditions to qualify as a nontaxable lease of real property. The payments made under the agreement are payments for parking services that are subject to sales tax.

Related topics

The following sections provide additional guidance regarding lease-related transactions involving parking, garaging, or storage of motor vehicles.

Lessee uses part of leased premises to provide parking

If a person who enters into an agreement to obtain parking, garaging, or storage of motor vehicles that qualifies as a lease of real property not subject to sales tax, as previously described in this memorandum, subsequently uses any part of the parking, garaging, or storage facility to provide parking, garaging, or storage services to other persons, the receipts from the sales of those services are subject to sales tax. The following example illustrates this situation:

Example 9: A vendor in the business of renting cars does not have sufficient space at its business location to store all of the vehicles held for rental. The business enters into an agreement to use an entire parking lot on an ongoing basis. The agreement meets all the conditions to qualify as a lease as previously described. Accordingly, the agreement is a nontaxable lease of real property. However, if the car rental business does not need all the spaces in the lot for storage of its' own vehicles and uses the excess parking spaces to sell parking services to others, the receipts from the car rental business' sale of parking services are subject to sales tax.

Provision of parking incidental to a lease of real property

When parking services are provided that are incidental to a lease of real property, such as where a lease of real property includes the right of the lessee to park vehicles on the premises of the lessor for no additional charge the provision of the right to park by the lessor is not subject to sales tax because there is no charge to the lessee for parking.

Example 10: A vehicle rental company leases counter space in a shopping mall or hotel. As part of the lease agreement, the vehicle rental company is permitted to park a certain number of cars in the mall's or hotel's parking lot, but the spaces are not marked or otherwise designated to the vehicle rental company. The vehicle rental company pays market rent per square foot for the rented counter space, with no additional charge to the vehicle rental company for the right to park cars. In this situation, the provision of parking is incidental to the lease of real property and is not subject to sales tax.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.