

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-02(39)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020111B

On January 11, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Arthur C. E. Burkard, Esq., 13 Wilmont Avenue, White Plains, New York 10605.

The issue raised by Petitioner, Arthur C. E. Burkard, Esq., is whether, under the circumstances presented, booth space fees charged by show managers to dealers and vendors at antique forums and fairs are rentals or licenses to use real property which are excluded from tax under Articles 28 and 29 of the Tax Law.

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

Petitioner's client (Manager) is an antiques show manager/promoter based outside of New York State. For a two-week period each year, Manager enters into a rental or license agreement to utilize space at either a public or private building, or alternatively enters into a short-term lease for the use of land upon which a special purpose temporary structure will be installed in New York.

To prepare the location for the antiques show, Manager retains the services of construction contractors to build temporary booths in either the public or private building or the temporary structure. The booth space consists of temporary walls, ceilings and settings that are painted or similarly finished. Manager provides the booths with access to basic electricity and installs temporary lighting in the aisle ways between the booths. Dealers and vendors may contract directly with the contractors for electrical service in the booth or for additional decorating or modifications to the booth itself. Manager does not furnish the booths with equipment, furniture, displays or other tangible personal property. The booths are dismantled at the conclusion of the antiques show.

Manager charges antique dealers and vendors a fixed fee, based upon booth dimensions and location, for the use of the booths for the two-week period.

Applicable Law and Regulations

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise . . . without any deduction for expenses . . .

* * *

(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

Section 1105 of the Tax Law imposes sales tax, in part, upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . and whether or not any tangible personal property is transferred in conjunction therewith

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

TSB-A-02(39)S
Sales Tax
July 25, 2002

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Opinion

Petitioner's client, Manager, is an antiques show manager/promoter who enters into a rental or license agreement to utilize real property in New York State for a two-week period each year to conduct the antiques show. To prepare the location for the antiques show, Manager retains the services of construction contractors to build temporary booths and settings which consist of temporary walls, ceilings and settings, and installs temporary lighting in the aisle ways between the booths. Manager does not furnish the booths with equipment, furniture, displays or any other tangible personal property. Manager charges antique dealers and vendors a fixed fee, based upon booth dimensions and location, for the use of the booths for the two-week period.

The fee charged by Manager to use the space to display tangible personal property for sale is a fee for the use of real property which is not subject to State and local sales and use taxes. See Five Star Promotions, Adv Op Comm T&F, February 6, 1997, TSB-A-97(7)S. Manager is not reselling the booths and lighting but is consuming them in providing its license to use the real property. See New York Convention Center Operating Corp., Adv Op Comm T&F, May 21, 1997, TSB-A-97(38)S. As the consumer of the property and services supplied by the contractors, Manager is not permitted to issue Form ST-120, Resale Certificate, and must pay the applicable sales tax on these purchases. Therefore, since it appears from the facts submitted that the booths are not capital improvements, sales of tangible personal property to, and the service of installing such property for, Manager are subject to tax, as are the sales of electricity or electrical service. See Sections 1105(a), 1105(c)(3) and 1105(b) of the Tax Law. Contractor services provided directly to dealers or vendors are separate transactions from the booth rental by Manager and are subject to sales tax.

DATED: July 25, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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