

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

TSB-A-05(46)S  
Sales Tax  
December 28, 2005

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040913A

On September 13, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from B&L Wholesale Supply, Inc., 70 Hartford Street, Rochester, New York, 14605. Petitioner, B&L Wholesale Supply, Inc., provided additional information pertaining to the Petition on November 5, 2004.

The issue raised by Petitioner is whether it is required to collect sales tax on its restocking charge.

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

Petitioner is a vendor of building materials and supplies. When Petitioner makes a taxable sale, it collects the purchase price of the property and the correct amount of State and local sales tax on the purchase price. Petitioner's customers are made aware at the time of sale that returned materials may be subject to a restocking charge.

Petitioner's customers will, for various reasons, wish to return all or part of the building materials or supplies they have purchased. If a customer returns all the material purchased, it receives a refund of the full purchase price and the full amount of sales tax collected. If the customer returns only a portion of the materials, it receives the portion of the purchase price attributable to the materials actually returned and the portion of sales tax collected attributable to the refunded amount of the purchase price. Petitioner may deduct from the amount refunded to the customer the restocking charge. Petitioner shows any restocking charge as a deduction from the amount of the purchase price refunded on the credit slip issued to the customer. The returned merchandise is returned to Petitioner's inventory and treated on Petitioner's books as a cancelled sale.

The restocking charge is not necessarily charged to every customer making a return of materials or supplies. It is meant to cover Petitioner's cost of restoring the material to a saleable condition (i.e., cleaning, repackaging, etc.) where the customer has returned the merchandise in undamaged but less than saleable condition and, to a lesser extent, Petitioner's cost of returning the merchandise to its proper location in Petitioner's inventory.

**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, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . .

Section 525.2 of the Sales and Use Tax Regulations provides, in part:

Nature of tax. (a) Sales tax. (1) (i) Except as specifically exempted or excluded, sales tax is imposed on the receipts from:

(a) every retail sale of tangible personal property, as provided in section 1105(a) of the Tax Law;

(b) every sale, other than a sale for resale, of specifically enumerated services, as provided in sections 1105(b) and (c); . . .

\* \* \*

(2) Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service . . . .

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

(a) Definition. (1) 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.

(2) Among the transactions included in the words *sale*, *selling* or *purchase* are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

\* \* \*

(c) Rentals, leases, licenses to use. (1) The terms *rental*, *lease* and *license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. 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. . . .

Section 534.6(a) of the Sales and Use Tax Regulations provides, in part:

Cancelled sales and returned merchandise. (1) Exclusion from return. Where a contract of sale has been cancelled or the property returned within the reporting period in which the sale was made, a vendor of tangible personal property or services . . . may exclude such receipts, charges, or rents from his sales and use tax return.

(2) Credit where tax previously remitted. Where a contract of sale has been cancelled or the property returned and the tax collected thereon refunded to the customer, and such tax had been paid and reported on a return by the vendor of tangible personal property or services, . . . an application for refund or credit for the tax paid upon such receipt, charge, or rent shall be filed with the Department of Taxation and Finance within three years from the date when the tax was payable by such person to the Department of Taxation and Finance. The applicant may, as part of the application for credit, take the credit on the return which is due coincident with or immediately subsequent to the time such application is filed. The application for refund or credit shall be subject to the provisions of subdivisions (a), (b) and (c) of section 1139 of the Tax Law and section 534.2 of this Part.

## **Opinion**

Petitioner may charge certain customers a restocking charge to cover its costs of restoring returned merchandise to its inventory. Petitioner refunds its customer's purchase price attributable to the returned merchandise along with the applicable sales tax. Such returns are shown on Petitioner's books as cancelled sales. Cancelled sales are, for sales tax purposes, treated as sales which were never consummated. See section 534.6(a) of the Sales and Use Tax Regulations. Petitioner provides its customer with a credit receipt showing the amount of refund including the attributable sales tax, and a subsequent, separate charge for "restocking." The restocking charge represents a transaction separate from the cancelled sale and is not a part of the original receipt. See section 1101(b)(3) of the Tax Law.

Petitioner states that this restocking charge is imposed to cover its costs of making certain that the returned merchandise is in a saleable condition and restoring the merchandise to its inventory. The customer does not receive any property or service taxable under section 1105 of

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the Tax Law in exchange for this consideration. In *Matter of the Petition of William Hengerer Co. Division of Associated Dry Goods Corp.*, Dec State Tax Comm, September 3, 1982, TSB-H-82(93)S, it was determined that a \$1.00 charge imposed upon cancelled layaway sales was not a receipt from the sale of taxable property or services. In *STS Systems, Ltd.*, Adv Op Comm T&F, November 5, 1998, TSB-A-98(73)S, it was held that a restocking charge to customers upon the return of property upon a cancelled sale was likewise not a receipt from the sale of taxable property or services. Accordingly, a reasonable charge by Petitioner imposed solely for restocking returned merchandise as described in this Advisory Opinion is not a receipt subject to the sales tax. See section 1101(b)(3), (4) of the Tax Law and section 525.2 of the Sales and Use Tax Regulations.

It should be noted that if Petitioner's customer is charged for making some use of the returned merchandise, the sales tax will only be refunded on the portion of the original receipt actually refunded to the customer. For example, assume Petitioner's customer purchases a tool which is later returned to Petitioner. Petitioner notes that the tool has been used and cannot return the tool to its inventory to be sold as "new." In determining the amount of the refund to the customer, Petitioner keeps a prorated amount of the purchase price based on its customer's use of the tool. In addition, Petitioner charges its customer a restocking charge at the customary amount. The portion of the receipt Petitioner keeps for the use of the tool is subject to sales tax. See section 526.7 of the Sales and Use Tax Regulations. The restocking charge is considered a separate transaction not subject to sales tax, provided such charge is separately stated and at the customary amount.

DATED: December 28, 2005

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