

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(27)S
Sales Tax
June 26, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090310A

Petitioner [REDACTED] asks whether the provision of individual free-standing garages to residential tenants of an apartment complex constitutes the sale of taxable parking, garaging, or storing services under Tax Law § 1105(c)(6), when: (1) the cost of the garage is included in the tenant's rent; or (2) the tenant pays a separate rental charge for use of the garage. We conclude that, under the lease agreements described below, the provision of the garages does not constitute a taxable garaging or parking service.

Facts

Petitioner operates a residential apartment complex and acts as lessor of the units in the complex. Located on the premises are a number of individual, free-standing, garages. Petitioner's tenants have the option of renting one of these garages in conjunction with, and for the full-term of, their apartment lease. In some lease arrangements, the tenant pays a separately-stated charge for use of a garage. This charge is designated as "rent" for the garage. In other leases, the cost of a garage is included in the tenant's base rent for the apartment. In all cases, the leases designate the specific garage that is the subject of the lease.

The garages are designed primarily to house motor vehicles. Tenants may use the garages for storage of personal property or other purposes, either in addition to or instead of placing their motor vehicle there. With regard to the garages at issue, the lease will say the following:

If Tenant has opted to include a Garage or Storage Unit in conjunction with this Lease, Tenant shall have the sole and exclusive right to use and occupy the specific Garage/Unit designated in the Lease for the Lease Term or the Term designated on the Garage/Storage Addendum, if any. Landlord relinquishes the right to enter Tenant's designated Garage/Unit during the Term, except [to prevent the storage of flammable or hazardous materials or excessive use of electricity] and, at reasonable times and upon notice, to perform routine maintenance, repairs or other work the Landlord may deem necessary. The Landlord will not be held liable for any damage, theft, or other liability of any kind or nature to either vehicles stored in the Garage/Unit or any other personal property contained in the Garage/Unit. All provisions of Paragraph 10 of this Lease concerning liability shall apply to Tenant's use of the Garage/Unit.

Paragraph 10, in turn, states the following, in pertinent part:

Tenant must pay for damage suffered and money spent by Landlord relating to any claim arising from any act or neglect of Tenant, his guest or invitees. If an action is brought against the Landlord arising from the Tenant's act or neglect Tenant shall defend Landlord at Tenant's expense with an attorney of Landlord's choice. . . . Tenant is responsible for all acts of Tenant's family, employees, guests, or invitees. Tenant represents and warrants to-Landlord that Tenant will carry and maintain sufficient property and liability insurance.

A separate "Garage/Storage Lease Addendum" is signed by tenants who did not opt for a garage upon leasing their apartment but chose to add one during their lease term. In pertinent part, this addendum states:

Tenant will not store flammable or dangerous chemicals or items in the garage/storage unit. Tenant will not use the electrical supply to the garage for the heaters, freezers, power tools, additional lighting, etc. Garage doors must be kept closed at all times. Landlord shall be permitted to make periodic inspections of the Garage/Unit, at reasonable hours, to verify compliance. The Landlord will not be held liable for any damage, theft, or other liability of any kind or nature to either vehicles stored in the garage/storage unit or any personal property contained in garage/storage unit. Risk of loss by fire, vandalism, damage, theft or any hazard whatsoever is assumed by the Tenant. Tenant will be held responsible for any such loss. Tenant shall indemnify and save harmless the Landlord from and against any liability or any injury to persons or property resulting from acts or omissions on the part of the Tenant, his family, employees, agents, servants, visitors or licensees during the term of the Agreement.

Neither form of lease restricts when the tenant may enter the premises. According to petitioner, although the apartment complex rules govern tenants' use of "common areas" including "parking areas," these rules do not apply to individually rented, numbered garages.

Analysis

Sales tax is imposed upon the charges for "[p]roviding parking, garaging or storing for motor vehicles by persons operating a garage . . . , parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles" (Tax Law section 1105[c][6]). Payments made pursuant to an agreement to lease real property for the purpose of parking, garaging, or storing motor vehicles are not subject to sales tax under section 1105(c)(6) of the Tax Law (TSB-M-08[14]S, *Sales Tax Treatment of a Lease or Rental of Real Property for the Purpose of Parking, Garaging, or Storage of Motor Vehicles*, December 17, 2008). Under that TSB-M, the following conditions must be met for the written agreement under which the payments are made to qualify as a lease of real property:

1. 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.
2. 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.
3. The lessee, its employees, or agents have an unlimited right to enter the property during normal business hours.
4. The lessee has an insurable interest in the premises.

Here, the lease agreement gives a tenant the exclusive right to occupy a specified garage. The lease agreement gives the landlord the right to enter only for repairs or inspections, while the tenant's right to enter the garage is untrammelled. The tenants also have an insurable interest in the lease because they bear the risk of loss in the event their personal property is damaged while stored in the garages and they are liable for personal injuries to third parties using the garages. Accordingly, the rent charged under

the lease agreement for the garages is in the nature of a payment for leased premises and not for garage or storage services. Those payments are therefore not subject to sales and use tax.

DATED: June 26, 2009

/S/

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