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

TSB-A-10(17)S
Sales Tax
April 26, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S100125B

[redacted] asks whether the charges it pays for the rental of a self-storage unit are subject to the sales tax imposed on storage under the provisions of section 1105(c)(4)of the Tax Law.

We conclude that Petitioner's rental of a self storage unit constitutes a rental of real property, the consideration for which is not subject to sales tax.

Facts

Petitioner rented a specific self storage unit located in a self storage facility in the city of New York on a month to month basis. The charges for the rental of the unit are based on the size of the unit, which the facility operator leases in various advertised standard sizes (e.g., closet-64 cubic ft, double closet-160 cubic ft, tall closet-112 cubic ft, etc.). Petitioner was responsible for keeping the storage space locked with a heavy duty padlock, and the facility operator could enter the storage space only in an emergency or in the event of default of the agreement. Upon termination of its agreement, Petitioner is responsible for removal of any of its property and to broom clean the premises. Petitioner's agreement with the facility owner provides that the owner will supply lighting on the floor on which the storage space is located and elevator service, but that it will not supply security, water, toilets, electricity, cleaning, rubbish removal, assistance in moving the occupant's personal property or any other service or utilities. Petitioner, upon presentation of proper identification, is allowed access to the storage unit during the posted hours of the facility's operation excluding access on certain legal holidays. At the present time, the posted hours of operation for the particular facility are 24 hours a day, 365 days a year.

Analysis

Section 1105(c)(4) imposes sales tax on the receipts from the service of storing tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

Regulations section 527.6(b)(2) provides:

> While the tax is imposed on the service of providing storage space, it is not imposed on the lease of real property for storage. A lease can be distinguished from the provision of storage space, in that under a lease, the tenant contracts for a certain amount of footage in a specific location, the tenant has unlimited control of access to the space, and may supply his own racks, cabinets and other physical facilities.

TSB-M-86(3)S – *Taxable Status of the Rental of Self-Service Mini Storage Units* provides, in part:

> Thus, the rental of a self-service storage room is exempt from sales tax if it constitutes the rental of real property for storage but taxable if it is the service of providing storage space.

The regulations set forth three tests to identify a lease of real property for storage. First, the tenant must contract for a certain amount of footage in a specific location.

Secondly, the regulations provide that to qualify as a lease of real property the tenant must have unlimited control of access to the space. This test is merely a restatement of the long established rule of law that it is the transfer of absolute control and possession of property at an agreed rental which differentiates a lease from other arrangements dealing with property rights. *Feder v. Caliguira,* 8 NY2d 400 (1960). Accordingly, it necessarily follows that a lease involves a possession exclusive even of that of the landlord. *Layton v. Namm & Sons*, 275 AD 246(1949). Thus, to be exempt, it is essential that the lessor relinquish all control of the space rented. The lessee's possession and control of the space must be to the complete exclusion of the lessor.

The lessee's exclusive possession of the space may be established by means of a lock (either lessor's or lessee's) on the door of the enclosed space if the key for the lock is solely under the control of the lessee and is not available to the lessor. As an alternative, if the lessor possesses either a duplicate or master key and thereby has access to the space, exclusive possession may nevertheless be found if a written lease agreement specifically provides that the lessor has no right of access to the space during the term of the rental except for purposes of collecting rent, making necessary repairs and in emergency situations.

Additionally, while "unlimited control" has traditionally been contemplated in terms of around the clock access to the property by the lessee, we recognize that this must be viewed in light of prevailing commercial practices. Today, many types of commercial rentals are not open around the clock. For example, commercial offices rented in large office buildings are often not open to their tenants during all hours. Accordingly, "unlimited control" of the tenant may still be found if the space is accessible to the tenant during hours when other similar commercial rentals are generally accessible to their tenants.

Furthermore, it has long been recognized that limited access by a landlord in order to collect rent, to make necessary repairs or in emergency situations will not be construed as negating the tenant's exclusive possession of the space. *Layton v. Namm & Sons*, *supra.* Any such provision in a lease agreement will not disqualify an otherwise qualifying agreement.

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To the extent that a lessor provides services to a lessee, either himself or through an agent, such as unloading vehicles or handling or transporting the goods to be stored, whether or not for an additional fee, the owner of the goods will not be considered to have relinquished possession and control of the stored goods as long as the owner of the goods or his agent is present during the rendering of such services and directs the actions of the individuals performing such services.

Petitioner has leased a designated storage unit in a mini-storage facility. Petitioner has exclusive possession of its rented space, 24 hour access, and is responsible for the maintenance of its leased property. Petitioner does not relinquish possession and control of the property to be stored to the facility operator. Rather, it is Petitioner who places property in and removes property from its storage unit at will. The facility operator does not have possession or control of the stored property, nor does it have any responsibility to Petitioner for the safekeeping and return of the stored property. As provided in the Tax Department’s TSB-M-86(3)S with respect to rentals of space in mini-storage facilities, the receipts

paid by Petitioner to the facility operator constitute nontaxable receipts from the rental of real property and are not receipts subject to sales tax imposed on sales of the service of storing tangible personal property under section 1105(c)(4) of the Tax Law.

DATED: April 26, 2010

/S/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.