

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

TSB-A-12(12)S
Sales Tax
June 12, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100805A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its receipts for the use of amusement devices and equipment are subject to sales and use tax.

We conclude that the transactions constitute the lease of tangible personal property for purposes of sales and use tax; therefore, receipts from the leases are subject to sales and use tax under Tax Law section 1105(a). This conclusion applies even if Petitioner provides supervisory personnel who assist customers in the use of the devices and equipment.

Facts

Petitioner provides inflatable devices and non-inflatable amusement equipment for use by its customers at parties and similar social events. The inflatable devices include a bungee run, four way bungee, wrecking ball, giant slide, sticky wall, and an obstacle course. Non-inflatable amusement equipment includes property used to joust, box, and sumo wrestle. The jousting equipment includes helmets, pummel sticks and a mat. The boxing equipment consists of helmets, oversize gloves, and mat. The sumo wrestling equipment consists of inflatable suits, helmets and mat. Petitioner also offers the use of Segway racers.

Petitioner delivers the devices and equipment to the customer's location and sets up the property. Each inflatable device is supervised by at least one employee of the Petitioner. Some devices require two or three employees to assist the persons in using the device. For example, the inflatable climbing wall requires two employees to handle the ropes that assist the user in climbing the wall and in preventing the user from falling. In some cases, the employee will be responsible for assisting the user in putting on equipment such as a harness that is necessary to use the device.

The employee or employees assigned to a device are responsible for ensuring the safe use of the device and equipment. For example, an employee will enforce height and weight requirements for use of devices that are set by manufacturer specifications and government regulation. Another example would be ensuring that a user is properly secured to a harness. Employees also monitor the participants' use of devices to ensure safety. For example, an employee may admonish a participant who uses a device in an unsafe manner and may order the participant to cease using the device if he or she persists in the unsafe use.

All of Petitioner's employees who work with devices receive written and oral instruction from Petitioner as to the safety rules for the devices. For example, the Petitioner will instruct an

employee with respect to the height, weight, or age restrictions that may pertain to the use of a device.

Safety training of employees is required by Petitioner's liability insurance carrier, as well as by government regulation. Some of petitioner's employees are licensed by government entities in the set up and operation of the devices and equipment in question. The licensees must attend classroom instruction organized by the licensing agency and pass a final exam. These licenses must be renewed periodically. Some states require that a licensed person supervise the installation of an inflatable device and be present while the device is used.

Petitioner will always designate one employee to supervise all other employees at a customer location. This person is responsible for ensuring that all inflatable devices and other equipment is properly installed and is responsible for monitoring the performance of other employees. This employee usually will be also responsible for a specific inflatable device or piece of equipment at the customer location. This employee will usually be licensed. None of Petitioner's employees will act as a master of ceremonies or in a similar capacity at the customer location.

Petitioner sets fees for the use of each device. The fee varies based on the length of time the device will be used at the customer's location. The standard time period is four hours. Customers have to pay an additional fee if the device is used beyond the allotted time. Petitioner does not bill separate charges for installation of a device or for providing personnel on-site who perform the safety and related functions described above; i.e. these expenses are part of the base fee.

Customers select the devices they want to use and the location where the devices are to be installed for an event. Subject to the safety restrictions imposed by Petitioner, the customer has the right to decide who may use the devices or equipment and when the devices or equipment are used. If the devices cannot be used because of rain or other inclement weather, Petitioner's customer is still liable for the full fee.

Analysis

Section 1101(b)(5) of the Tax Law defines "sale" as any transfer of title or possession or both, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration. 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 transfer of title to the property. 20 NYCRR§ 526.7(c)(1) "Transfer of possession" with respect to a rental, lease or license to use is defined in the sales tax regulations as meaning that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use or control or direct the use of tangible personal property.

20 NYCRR § 526.7(e)(4). Subsection (e)(6) of this sales tax regulation provides that when a lease of equipment includes the services of an operator, possession is deemed to be transferred if the lessee has the right to direct and control the use of the equipment.

Petitioner transfers possession of its inflatable devices and non-inflatable equipment listed above to its customers. One indication of the transfer of position is that the customers select the specific devices they want to use. Another indication of possession being transferred is that the customer selects the location where the devices and equipment are to be furnished. While this direction as to the situs of the tangible personal property is not by itself conclusive of a transfer of possession, it is consistent with the customer having exclusive control over the tangible personal property. Finally, the customer's right to select the persons who will use property and decide when the property are used are compelling indications that the customer has possession of the devices.

Petitioner's employees do not have possession or control of the devices and equipment while the property is at the customer's location. The employees merely enforce safety rules and assist the customer and guests in the use of the property. A customer's obligation to comply with safety rules pertaining to the use of leased tangible personal property does not negate the customer's control over the property. *Cf.* TSB-A-11(30)S; TSB-A-07(02)S.

DATED: June 12, 2012

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

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