

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

TSB-A-13(20)S
Sales Tax
July 15, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121217B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether language in its agreement with customers makes the agreement an installment or conditional sale rather than a lease of computer hardware and software and office furniture, and whether it must collect sales tax on the gross receipts at the time the sale is recorded or collect and remit tax with each monthly payment due under the agreement.

We conclude that Petitioner's agreement is a conditional sale, not a lease. Thus, Petitioner must collect sales tax on the entire amount due under the agreement at the time the Petitioner and its customer execute the agreement and the property is delivered to the customer.

Facts

Petitioner is registered for New York sales tax purposes, is a lessor of business tangible personal property (computer hardware, computer software, office furniture), and has entered into a 36 month lease agreement with one of its customers (the end user). The agreement includes the following provision:

"Notwithstanding any provision contained in the Master Lease Agreement or the Lease Schedule to the contrary, upon expiration of the lease term set forth in the Lease Schedule (the "Initial Lease Term") and upon payment by Lessee of all rentals and other amounts due, Lessee agrees to purchase all of the Lessor's right, title and interest in and to all, but not less than all of the equipment described and covered by the Lease Schedule (the "Equipment") for the purchase price of \$1.00."

Petitioner indicates this provision is a purchase agreement, not a purchase option.

Analysis

For purposes of New York sales tax, Tax Law section 1101(b)(5) defines "sale" as "any transfer of title or possession or both, ... rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor..." Thus, a conditional sale, an installment sale, and a lease are all sales. If a transaction is a conditional sale, tax on the entire amount of the purchase price is due at the time of sale, and the time or method of payment is generally immaterial, because the tax becomes due at the time of

transfer of title to or possession of (or both) the property. *See* Tax Law, §1132(a); 20 NYCRR § 525.2(a)(2). On the other hand, if a transaction is a lease, then tax is due as each monthly payment is made. With limited exceptions not at issue here, the tax is on use and possession of the lease property for each rental period as it individually accrues. *See Matter of Ormsby Haulers v Tully*, 72 AD2d 845 (3rd Dept, 1979); *Matter of Concrete Delivery Co. v State Tax Comm.*, 71 AD2d 330 (3rd Dept, 1979).

Petitioner refers to itself as a lessor and to its agreement as a lease. Nevertheless, though an agreement is cast in the form, style, and language of a lease, we must look at the rights the agreement confers and the obligations it imposes to determine whether it has the essential attributes of a contract of conditional sale or installment sale. *See Central Union Gas Co. v. Browning*, 210 NY 10 (1913). If the purchaser has possession of the property, is obligated to pay for it and, having paid, becomes or has an option to become the owner of it, and if the vendor has retained the right to retake the goods if the conditional purchaser defaults in its obligation to pay for them, there is a conditional sale. *See Matter of New York World Telegram v. McGoldrick*, 298 NY 11 (1948); *Central Union Gas Co. v. Browning, supra*.

Petitioner indicates that its customer takes possession of the property at the inception of the agreement, must make payments for it over 36 months, and, then must purchase the property for \$1.00 and take title to it once that period is up. Thus, because the customer, having satisfied its payment obligations, is required to take title to the property, we conclude that the agreement constitutes a conditional sale, not a lease. Petitioner states that the agreement covers computer hardware, computer software, and other furniture. Assuming the computer software transferred to the customer under the agreement is pre-written software, all of the property subject to the Petitioner's agreement is tangible personal property. Petitioner must collect sales tax on the entire amount due under the agreement at the inception of the agreement and pay over the tax collected with its sales tax return due for the period during which the agreement was entered into and the property transferred to its customer.

DATED: July 15, 2013

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.