

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether various charges that are paid to it by its customers are subject to New York State and local sales tax. We conclude that Petitioner’s charges for the use of its facilities, as well as its charges for boat docking, electricity and the use of parking facilities are not subject to sales tax, charges for cleaning, waste removal, and security are subject to sales tax, and the services of an operations manager may be subject to sales tax, depending on the nature of the services performed.

Facts

Petitioner is a business with access to various facilities in New York City. These facilities, which Petitioner leases from a third party, can be used for corporate parties, rehearsal space, etc. Petitioner does not host or put on events at these facilities, nor does it provide amenities, such as food service or entertainment, to its customers. Rather, Petitioner makes its facilities available for short-term use under “Short Term Revocable License Agreements” (“Agreements”) with its customers. These Agreements, among other things, describe what a facility or “premises” can be used for (i.e., its “Permitted Use”), and how long it can be used. These Agreements also contain various terms and conditions related to a facility’s use, including the following:

- Facility Condition: Petitioner’s Agreements provide that customers have inspected a facility and accept it “as is.” They also state that Petitioner “shall not be required to perform any work, repairs, modifications or changes to the Premises,” and that it “does not represent, guarantee or warrant as to the condition of the Premises or as to the use that may be made of the Premises.” Notwithstanding the forgoing, Petitioner’s Agreements promise that a facility “shall be in a good state of repair and in a condition suitable for the Permitted Use,” and will be “in compliance with all applicable laws and health, safety and other applicable codes and regulations except as necessitated by [the customer’s] unique use of the Premises.”
- Utilities: Petitioner’s Agreements provide that it is “expressly agreed and understood that [Petitioner] is in no way obligated to provide any elevator or

utility service, whatsoever.” The Agreements also state that Petitioner “in no way warrants the existence, condition or adequacy of any utility systems including without limitation electricity, heat, steam and/or water,” except as otherwise expressly provided.

- Security: Petitioner’s landlord requires that security be provided when a facility is used, and its Agreements advise customers of this. However, the Agreements expressly state that Petitioner “shall not in any manner be responsible for security of the Premises.”
- Surrender of Facility: Petitioner’s Agreements require customers, at the end of their occupancy, to “vacate and surrender the Premises broom clean, in good order, condition and repair except for ordinary wear and tear.” This includes the cleaning of a facility and its surrounding area, and the removal of any property that a customer or its invitees, employees, agents or representatives bring in.

In exchange for the use of a facility, Petitioner charges customers a “fixed term occupancy charge.” This is a set daily amount that Petitioner multiplies by the number of days a facility is used. Petitioner also bills customers for what it calls “additional occupancy charges,” which are separately stated and include the following:

- Boat Docking: Petitioner’s facilities are accessible by water. While Petitioner does not provide ferry service, such service may be purchased by customers from third parties. When this occurs, Petitioner’s landlord will impose a fee for temporary berth access that it will bill to Petitioner and Petitioner, in turn, will pass through to its customer “at cost.”
- Electricity: Petitioner requires that customers “pay monthly all utility charges including all energy usage and electric” that are incurred while using a facility. Petitioner explains that electricity is supplied to its facilities by its landlord, which has an account with the power company, and which sends Petitioner a bill for all electricity that is used. Petitioner bills its customers for electricity in an amount equal to what Petitioner is charged by its landlord.
- Security: As noted above, Petitioner’s landlord requires that security be provided while its facilities are in use. Customers, therefore, must arrange for the provision of security when an event is in progress. If a customer fails to do this, Petitioner’s landlord will arrange for the provision of this security and bill Petitioner. Petitioner will pass this charge through to its customer “at cost.”
- Waste Removal: Petitioner’s Agreements do not explicitly address waste removal at its facilities. Petitioner indicates that it maintains dumpsters on site that

customers can use free of charge. If the onsite dumpsters are not sufficient to meet a customer's needs and additional dumpsters are necessary, Petitioner will pay to have additional dumpsters brought on site. Petitioner will pass the amount it paid for these dumpsters through to its customer "at cost."

- Parking Lot: Petitioner's Agreements also do not address parking. There is, however, a parking lot near Petitioner's facilities, which its landlord charges a fee to use. When customers wish to use this lot, Petitioner's landlord will bill Petitioner for this use, and Petitioner will pass this charge through to its customers "at cost."
- Cleaning/Damage: As noted above, customers are required to vacate and surrender Petitioner's facilities "broom clean, in good order, condition and repair except for ordinary wear and tear." If this is not done, or if a facility is found to be materially altered from its original condition or is damaged, Petitioner will charge its customer a "post venue cleaning" fee.
- Operations Manager: Petitioner offers customers the services of an employee who will assist them in whatever capacity may be needed. Petitioner refers to this person as an "operations manager," and the type of work he or she does can range from providing logistical support, to assisting with building operations (i.e. controlling the heat and air conditioning, etc.), to setting up for events. The amount that Petitioner charges for an operations manager is based on a set dollar amount per hour.

Analysis

Sales tax applies to the receipts from every retail sale of tangible personal property, as well as every sale, other than sales for resale, of electricity. *See* Tax Law § 1105(a), (b). Sales tax also applies to the receipts from every sale (excluding sales for resale) of certain enumerated services. *See* Tax Law § 1105(c).

Petitioner provides customers with access to facilities. The facilities, which customers use on a short-term basis to host or conduct events, is provided pursuant to Agreements that set forth terms and conditions, including the payment of a "fixed term occupancy charge," for which a Permitted Use of a facility may be made. This charge is for the use of real property, and is not subject to sales tax. *See* TSB-A-09(56)S; TSB-A-02(39)S.

Petitioner also bills customers separately stated "additional occupancy charges." One such charge is a boat docking fee. While docking fees have been found to be taxable pursuant to Tax Law § 1105(f)(2) when charged by social or athletic clubs (*see, e.g., Matter of Youngstown Yacht Club, Inc.*, Tax Appeals Tribunal, December 11, 1997), Petitioner does not operate such a

club. Moreover, this charge is not for a service enumerated in Tax Law § 1105(c). This fee, therefore, is not subject to New York State and local sales tax when separately stated on a bill.

Petitioner also bills customers for any electricity they use while using a facility. Receipts from every sale, other than sales for resale, of electricity are subject to New York State and local sales tax. *See* Tax Law § 1105(b)(1)(A). Here, however, Petitioner's Agreements make clear that it "is in no way obligated to provide any ... utility service, whatsoever," and, in fact, it is Petitioner's landlord that supplies electricity to Petitioner's facilities. Further, while the use of a facility's electrical system is presumably within the scope of a customer's Permitted Use of that facility, Petitioner's Agreements expressly state that Petitioner does not warrant the existence, condition or adequacy of any utility system, including electricity. Under these circumstances, we find that Petitioner, which is billed for all electricity used at a facility by its landlord, is not selling electricity when it bills customers for such, but is rather recouping an expense incurred because of a facility's Permitted Use. This charge, therefore, is a component of Petitioner's occupancy charge, and is not a separate sale of electricity subject to sales tax. *See* Tax Law § 1101(b)(3); 20 NYCRR 526.5(e); TSB-A-16(32)S; TSB-A-97(11)S.

Petitioner also bills customers for additional dumpsters that may be required (waste removal). Like electricity, this service is subject to New York State and local sales tax when sold in New York State. *See* Tax Law § 1105(c)(5) & (6); 20 NYCRR 527.7(b)(2). However, Petitioner's Agreements are silent with respect to waste removal, and thus the provision of this service, and any charge for this service cannot be considered a component of a customer's occupancy. Rather, when waste removal service is furnished to customers, it is provided in addition to such occupancy, and Petitioner's receipts for this service are subject to New York State and local sales tax.

Likewise, Petitioner bills customers for premises cleaning/repair and security, the sales of both of which are subject to New York State and local sales tax. *See* Tax Law § 1105(c)(5) & (8); 20 NYCRR 527.7. Here again, Petitioner's Agreement does not require the provision of these services to customers. In fact, Petitioner's Agreement expressly disclaims any responsibility for the provision of security. Further, Petitioner incurs and passes on these charges to the customer for these services only when a customer fails to do something they are expressly required to do (*i.e.*, hire security and/or leave the premises clean and in good order). Under these circumstances, Petitioner is considered to be selling these services, and its receipts from such are subject to sales tax. *See, e.g.*, TSB-A-97(83)S (maintenance of premises that is required to be performed by lessee but for whatever reason is performed by lessor is taxable); TSB-A-96(69)S (charges by lessor to lessee for maintenance that lessee is responsible for are taxable).

Petitioner makes available the use of a parking lot near the facilities, which its landlord charges Petitioner a fee to use. When customers opt to use this lot, Petitioner passes the fee through to its customers “at cost.” Petitioner’s charges to customers for the optional use of a parking lot are not charges for parking, garaging or storing of motor vehicles but rather are more in the nature of charges for the rental of real property, and, therefore, are not subject to sales tax. *See* TSB-M-08(14)S.

Finally, Petitioner offers the option of having an operations manager assist customers in whatever capacity may be necessary. The type of work this person does varies, but can include providing logistical support, assisting customers with building operations (i.e. controlling the heat and air conditioning, etc.), and assisting with setting up for events. Generally, the taxability of Petitioner’s charge for an operations manager will depend on the type of work that individual does. Where a taxable service to tangible personal property (“TPP”) or real property is performed, sales tax should be collected on this charge. *See, e.g.*, TSB-A-17(10)S (event site services involving taxable services to TPP or real property are subject to tax). This includes the service of setting up (installing) TPP (*see* Tax Law § 1105[c][3]; TSB-A-15[13])S; TSB-A-07[17]S; TSB-A-05[28]S, as well as the performance of any service that constitutes the maintenance, servicing or repair of real property (*see* Tax Law § 1105[c][5]). If both taxable and non-taxable services are provided by an operations manager, sales tax should be collected on the entire amount charged. *See, e.g.*, TSB-A-15(34)S; TSB-A-15(13)S.

DATED: November 10, 2020

/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.