New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-83(22)S
Sales Tax
May 5, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S820121A

On January 21, 1982 a Petition for Advisory Opinion was received from Jonathan Logan, Inc., 50 Terminal Road, Secaucus, New Jersey 07094.

Petitioner presents four issues arising within the context of an audit.

I.

One of Petitioner's divisions is engaged in the manufacture of leather goods. As part of its production processes naphtha, alcohol and wipers are used to clean the leather. Petitioner inquires as to whether sales tax is due on its purchases of these items.

Section 1115(a)(12) of the Tax Law provides for an exemption from the State sales tax with respect to purchases of "machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale . . . by manufacturing . . . . "The items at issue here constitute not "machinery or equipment" but "tools", in the case of the wipers, and "supplies," in the case of the alcohol and naphtha. Accordingly, the exemption provided for under Section 1115(a)(12) of the Tax Law is thus inapplicable to such items. However, the State sales tax applicable to such tools and supplies so used or consumed directly and predominantly in the production of tangible personal property for sale by manufacturing was reduced from 4% to 2% with respect to the period September 1, 1980 through February 28, 1981. As of March 1, 1981 such sales became exempt from the State sales tax. Tax Law, § l105-B. Such sales were at all times, and remain, subject to the New York City sales tax, but were and are exempt from locally imposed sales taxes and the ¼% Metropolitan Commuter Transportation District sales tax. Tax Law § 1109,§ 1210.

II.

Petitioner inquires as to "whether additions to and modifications of . . . [its] divisional headquarters are capital improvements and, therefore, exempt from sales and use tax." Petitioner's description of the purported improvements is as follows:

> The expenses include new floor to ceiling walls, substantial electrical wiring, plumbing, and built in lighting systems all of which cannot be removed without substantial damage to the premises and the items affixed thereto . . . .

> The applicant as tenant under lease agreements bears sole financial responsibility to improve, alter and expand the premises. All improvements become the property of the owner at the time of installation. The applicant also bears the financial responsibility of additional real estate taxes resulting from increases in assessed valuation. Such increases are a direct result of the improvements.

Section 1101(b)(9) of the Tax Law defines the term "capital improvement" as follows:

> An addition or alteration to real property which: (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) is intended to become a permanent installation.

The installations described by Petitioner appear to satisfy the above-quoted statutory criteria and accordingly would constitute capital improvements. Within the context of the audit each item, of course, must be separately found to in fact satisfy the stated criteria.

III.

Petitioner states that tax is being asserted to be due on two transactions for which invoices are submitted. The first of these states a total price as "including 8% N.Y.C. Sales Tax", while the second contains no notation whatever relating to tax. However, appended to the second is a written estimate showing an estimate for certain services of $5815.00 "Plus 8% City Sales Tax." At the bottom of the typewritten estimate are handwritten estimates for two additional components of the proposed service in amounts of $1500 and $2000, respectively. The invoice itself merely states a total price of $9,315.00.

Section 1132(a) of the Tax Law provides, in relevant part, that "if the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price . . . paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him." The Sales and Use Tax Regulations provide, further, that: "The words 'tax included' or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax, and the entire amount charged is deemed the sales price of the property sold or services rendered." 20 NYCRR 532.1(b)(3).

Accordingly, in both instances described above, tax is "deemed" to be due on the entire price stated. The presumption thus created may be rebutted by an evidentiary showing made either to the auditor conducting the subject audit or, upon the issuance of an assessment, at a hearing before the State Tax Commission. Matter of Earlecia, Inc., State Tax Commission, September 25, 1981, TSB-H-81(176)S. Cf., RAC Corp. v. Gallman, 39 A.D. 2d 57.

IV.

Petitioner next inquires as to whether tax is due on purchases of tangible personal property delivered in New York but thereupon used outside of New York. Sales tax is due on the receipts from the retail sale of tangible personal property where delivery takes place in New York. 20 NYCRR 525.2(a)(3). However, the Tax Law provides for a refund or credit of such tax based on proof of certain uses. Thus, section 1119(a) of the Tax Law provides, in relevant part, as follows:

> "Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . . (2) on the sale or use of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser or user within this state if that property is subsequently re-shipped by such purchaser or user to a point outside this state for use outside this state, ...

Accordingly, while Petitioner was required to pay tax at the time of purchase, it is entitled to a refund or credit with respect to property used in accordance with the above-quoted statutory provision.

DATED: April 13, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau