

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

TSB-A-87(22)S
Sales Tax
May 22, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S860106B

On January 6, 1986, a Petition for Advisory Opinion was received from Spectradyne, Inc., 1501 North Plano Road, Richardson, TX 75083-0775.

Petitioner inquires whether it may assume the liability of a hotel operator to pay over to the Tax Commission taxes collected on charges for showing movies on guest room television.

Petitioner is engaged in the business of telecasting, in closed circuit, movies and other programs to hotel guests on a pay-per-view basis by means of equipment it supplies, installs and maintains at the hotel premises. Guests may select a film by pushing a "pay" button on their television sets. Petitioner contends that it is the seller, through its agent (the hotel), of the Spectravision televiewing service (Spectravision) and should therefore be responsible for the remittance of sales taxes collected from the guests.

To set up a system, Petitioner and the hotel enter into a Spectravision Guest-Pay Agreement (Agreement) whereby each party contributes certain property, equipment and services to the operation. The following parts of the Agreement are relevant to the Petition:

- 1.(a) At least four movies shall be made available for viewing by guests each day.
- (c) The hotel shall have the option to decline certain telecasts.

- 2.(a) The hotel shall bill guests on a daily basis.

- (b) The "Gross Viewing Receipts" for any period shall mean the viewing charges collected by Hotel from the Hotel guests during such period less the amount of taxes, if any, charged to the Hotel guests for viewing Spectravision.

- (c) In addition to the viewing charge, Hotel agrees to collect from guests any applicable taxes levied on viewings.

- (d) In consideration of all of the rights granted to Spectradyne, Hotel shall be entitled to a monthly fee equal to ten percent (10%) of the Gross Viewing Receipts for that month.

- (e) On the first work day of each month, Hotel shall furnish Spectradyne with an accounting of the total Gross Viewing Receipts for the preceding calendar month. Spectradyne will then issue a statement to Hotel for the Gross Viewing Receipts and for sales tax collected on the Gross Viewing Receipts, less the ten-percent-of-Gross-Viewing-Receipts hotel fee. That statement is payable no later than the fifteenth of the month following the month reported.

4.(d) Spectradyne shall install at the Hotel Premises room units, transmission and monitoring equipment, and all other equipment necessary to provide Spectravision movies in guest rooms.

6.(a) Spectradyne shall maintain the Spectravision Equipment in satisfactory operational condition and make all necessary repairs and replacements.

8.(a) The equipment affixed to the hotel premises shall remain the property of Spectradyne.

(b) Hotel agrees that the movies provided over Spectravision and the tape cassettes provided under this agreement remain the property of Spectradyne.

Additionally, Petitioner asserts that: (1) the amounts collected by each hotel from hotel customers is collected by the hotel as agent for Petitioner; (2) the 10% fee retained by each hotel represents a charge for the right of Petitioner to install Spectravision in the hotel and for the hotel's services as agent of Petitioner; (3) at no time does Petitioner relinquish dominion and control of Spectravision equipment to the hotel; (4) at all times, Petitioner's Spectravision equipment is kept in a locked cabinet to prevent access by hotel employees; and (5) Petitioner bears the risk of loss resulting from the failure of hotel customers to pay amounts due for the viewing of Spectravision.

Section 1105(e) of the Tax Law imposes sales and use tax upon the "rent for every occupancy of a room or rooms in a hotel in this state...." Regulation section 527.9(i)(1)(ii) specifically provides that "charges for in-room use of movies are taxable charges for occupancy."

Accordingly, receipts from the sale of in-room movies such as Spectravision are taxable as charges for hotel occupancy. The total amount charged to each hotel customer is subject to tax. Since each hotel controls the manner in which its guests may use the rooms and the collection and payment of charges made by such guests, each hotel is responsible for the collection and payment of sales tax on any charges made by its guests.

Inasmuch as Petitioner is not a hotel within the definition contained in regulation section 527.9(b)(1), it is not responsible for collection of the tax on occupancy from hotel customers. That responsibility is the hotel's alone.

Furthermore, section 526.7(e)(4) of the sales tax regulations describes the conditions necessary for a rental of tangible personal property.

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

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- (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.

Although Petitioner's equipment is located on the hotel premises, Petitioner does not transfer possession of its equipment to the hotel. Thus, Petitioner is not making a taxable rental of equipment to the hotel.

Finally, it should be noted that Petitioner would be subject to tax on its equipment when used in this state to provide Spectravision service.

DATED: May 22, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.