

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

TSB-A-91 (46)S
Sales Tax
June 21, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910321A

On March 21, 1991 a Petition for Advisory Opinion was received from Bay Fireworks Co., P.O. Box 912, Syosset, New York 11791.

The issue raised by Petitioner, Bay Fireworks Co., is whether it may purchase for resale tangible personal property consisting of pyrotechnic materials used in providing a fireworks exhibition for customers.

Petitioner is in the business of selling pyrotechnic explosive devices, commonly called firecrackers, and supplying fixtures and manpower to explode these devices. Petitioner makes a presentation to its customer of what will be provided within the budget for an event. The offer will consist of a listing of the explosive devices which will be used in the event. The fireworks will usually have a monetary value of approximately 25% to 30% of the total budget for the event. If the bid or presentation is accepted, a written contract is entered into between Petitioner and its customer.

Paragraphs "1" and "3" of Petitioner's standard contract with its customer provides that:

"1. Fireworks Exhibition: COMPANY shall furnish CUSTOMER an exhibition of fireworks in accordance with the program incorporated into this agreement.

* * *

3. Equipment and personnel: COMPANY shall furnish all personnel necessary to execute the fireworks exhibition. COMPANY shall furnish all pyrotechnic materials. CUSTOMER will supply sand and lumber needed to execute the display."

Section 1105(a) of the Tax Law imposes a tax upon "[T]he receipts from every retail sale of tangible personal property. . ." In addition, the sales tax is imposed on certain enumerated services.

Section 1101(b)(5) of the Tax Law defines sale as:

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor. (Emphasis supplied)

TSB-A-91 (46)S
Sales Tax
June 21, 1991

Pursuant to Petitioner's contract with its customer it is selling a "Fireworks Exhibition" by providing "all pyrotechnic materials", "all personnel necessary to execute the fireworks exhibition" and "public liability insurance naming customer as additional insured." Petitioner's customer does not take title or possession of the fireworks and thus does not purchase tangible personal property as defined by Section 1101(b)(5) of the Tax Law. What the customer is purchasing is a fireworks exhibition which is not one of the services subject to tax under Section 1105(c) of the Tax Law. The fact that the customer is designated as the "distributee (buyer)" on the Department of Treasury - Bureau of Alcohol, Tobacco and Firearms "Explosive Transaction Record" does not reflect the actual nature of the transaction between the parties which is the sale of a fireworks exhibition and not the sale of the pyrotechnic materials.

Since the Petitioner is providing a service and not selling tangible personal property, therefore the materials purchased by Petitioner for use in providing the fireworks exhibition are not purchased for resale.

If Petitioner did not pay sales tax on its pyrotechnic materials at the time of purchase, it is required to pay the compensating use tax on such purchases as provided by Section 1110 of the Tax Law.

It is noted that if the Petitioner sells the pyrotechnic materials to a customer without providing any other services in connection with the sale then it would be purchasing said materials for resale.

DATED: June 21, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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