

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

TSB-A-91 (55)S
Sales Tax
August 12, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910604A

On June 4, 1991, a Petition for Advisory Opinion was received from Auburn Fireworks, Inc., 691 A-1 Cayuga Road, RD 1, Cayuga, New York 13034.

The issues raised by Petitioner, Auburn Fireworks, Inc., are:

1. Whether the sale of fireworks to exempt organizations, where the exempt organization itself will display the fireworks, is subject to sales or use tax.
2. Whether a contractual arrangement with an exempt organization whereby Petitioner displays the fireworks is subject to sales or use tax.

Petitioner is a New York State corporation duly licensed and authorized to conduct firework displays. It has two general methods of doing business. Under the first method, it sells outright to prospective purchasers firework material which Petitioner has purchased from out of State. Under the second, it enters into arrangements with persons or entities desirous of having firework displays and under the terms of a typical arrangement Petitioner for a consideration sells the explosives to the contracting party, with Petitioner exploding the fireworks at a stated time and place.

In the situation where the purchaser is to put on the display Petitioner requires, prior to delivery of the fireworks, that the purchaser provide Petitioner with the license number which authorizes the purchaser to have possession of the fireworks. Having received that information, Petitioner then delivers and the purchaser takes possession of the fireworks.

Under the second method after the contract has been entered into and the other contracting party had obtained the necessary licenses, Petitioner on the evening of the display goes to the designated area where the display is to be conducted with the explosive materials necessary for the display. By prior arrangement, the other party has an authorized representative at the site at the time when Petitioner or its employees arrive. When Petitioner and its employees come to the display site, the representative of the entity for whom Petitioner is putting on the display meets with the employees of Petitioner and has the opportunity (although it is rarely taken advantage of) to examine the explosives which are part of the contractual arrangement. In addition, Petitioner normally, in the presence of the representative, satisfies itself that the conditions of security, safety and other relevant considerations which the parties have agreed to has been complied with. In the normal course of events the representative of the other contracting party does not stay on the field when the fireworks are being exploded.

Petitioner's standard contract with its customer provides, in part, that:

"This contract, dated _____, day of _____, 19__ by and between Auburn Fireworks, Incorporated, hereinafter AFI, and _____ is an agreement for a guaranteed display of fireworks on the evening of _____, 19__ at a site selected by the display sponsor and approved by AFI. . .

* * *

GUARANTEE If display sponsor is not satisfied with the display presentation, there will be NO CHARGES for the display. The display will be FREE.

PAYMENT No down payment is requested or required. Display Sponsor agrees to pay AFI or their representative at the conclusion of the display, the amount of: _____ dollars."

Section 1116(a) of the Tax Law provides as follows:

Sec. 1116. Exempt organizations.--(a) Except as otherwise provided in this section, and sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United State of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(3) The United Nations or any international organization of which the United States of America is a member where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of

any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended) and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(5) A post or organization of past or present members of the armed forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization:

(A) organized in this state,

(B) at least seventy-five percent of the members of which are past or present members of the armed forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows or widowers of past or present members of the armed forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(6) The following Indian nations or tribes residing in New York state: Cayuga, Oneida, Onondaga, Poospatuck, Saint Regis Mohawk, Seneca, Shinnecock, Tonawanda and Tuscarora, where it is the purchaser, user or consumer.

(7) A not-for-profit corporation operating as a health maintenance organization subject to the provisions of article forty-four of the public health law.

(8) Cooperative and foreign corporations doing business in this state pursuant to the rural electric cooperative law.

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)

In addition, Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. The conducting of a firework display is not a service enumerated under Section 1105(c) of the Tax Law and, therefore, the fee paid for such service is not subject to sales or use tax.

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Pursuant to Petitioner's contract with its customer it is selling a "display of fireworks" by providing all pyrotechnic materials, all personnel necessary to execute the fireworks exhibition and public liability insurance. 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. Bay Fireworks Co., Adv Op Comm T & F, June 21, 1991, TSB-A-91(46)S.

Since Petitioner is providing a service and not selling tangible personal property, therefore the materials purchased by Petitioner for use in providing the firework displays 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 and would not be required to pay sales or use tax on said purchases, but would be required to collect applicable State and local sales tax on the sale. Bay Fireworks Co., supra

If Petitioner's sale of the pyrotechnic materials in such circumstances is to an exempt organization enumerated in Section 1116(a) of the Tax Law, such sale is not subject to the imposition of sales tax. However, Petitioner is required to obtain a properly completed Exempt Organization Certificate or government purchase order from its customer.

DATED: August 12, 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.