

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

TSB-A-91 (73) S
Sales Tax
December 2, 1991

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911023B

On October 23, 1991 a Petition for Advisory Opinion was received from Omori & Associates, 106 East 19th Street, 9th Floor, New York, New York 10003.

The issue raised by Petitioner, Omori & Associates, is whether it is required to pay sales tax on a termination fee charged on the cancellation of a lease for computer equipment.

Petitioner entered into a computer equipment lease agreement with IBM through IBM Credit Corporation which provided the financing. The lease term was for five years. A half year later, Petitioner received an offer from IBM to upgrade old equipment to new equipment. Petitioner signed a new lease in December 1990 and the old lease was terminated. Petitioner paid a termination fee to IBM Credit Corporation as directed in order to switch the old lease to a new one. The salesperson at IBM did not give Petitioner all the information about possible expenses for switching the lease. IBM reimbursed Petitioner approximately the same amount of the termination fee as a promotional offering credit. Later, Petitioner received a bill for the sales tax on the termination fee it had paid.

Section 1105(a) of the Tax Law imposes sales tax upon "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(5) of the Tax Law defines a sale as "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."

In interpreting the application of Sections 1105(a) and 1101(b)(5) of the Tax Law in connection with the lease of equipment by a contractor, Section 541.9(c)(1)(c) of the Sales and Use Tax Regulations provides that "If a contractor cancels a lease on equipment and the lessor charges a cancellation fee, such fee is included as a part of the total receipts upon which the tax is based."

It follows that the same rule would apply to a cancellation fee in connection with the termination of a lease of computer equipment.

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Therefore Petitioner was required in accordance with Sections 1105(a) and 1101(b)(5) of the Tax Law to pay sales tax on the termination fee charged by IBM Credit Corporation on the termination of its lease of computer equipment. The fact that IBM subsequently reimbursed the Petitioner for the amount of the termination fee as a promotional offering credit does not effect the taxability of the cancellation transaction.

DATED: December 2, 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.