

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

TSB-A-96 (11)S
Sales Tax
February 29, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950804A

On August 4, 1995, a Petition for Advisory Opinion was received from New York Convention Center Operating Corporation, 655 West 34th Street, New York, New York 10001.

The issues raised by Petitioner, New York Convention Center Operating Corporation, are:

(1) Whether the sale of temporary labor is the sale of a service under section 1105 of the Tax Law and whether the answer depends on the nature of the service being rendered by the temporary labor.

(2) In the event the answer to question (1) is either in whole or in part in the affirmative, whether the fact that the contractors to whom the labor is sold utilize that labor to perform, for a fee, services to a third party renders the transaction a "sale for resale," excluded from taxation under section 1105 of the Tax Law.

Petitioner makes the following submission of facts.

Petitioner is a public benefit corporation created by statute for the purpose of operating and maintaining the convention center known as the Jacob K. Javits Convention Center of New York (the "Javits Center"). Petitioner enters into license agreements with various entities ("show managers") entitling them to utilize space at the Javits Center for exhibits, trade shows and other events. In the course of preparing for these events, the show managers and exhibitors typically retain the services of contractors to erect and dismantle displays, exhibits, booths, and background and to lay rugs (collectively "display labor"); and to deliver and unload freight and equipment, both by hand and utilizing Hi-Lo machinery and to perform certain rigging (collectively "freight handling labor"). In the past the contractors have supplied their own labor to perform the display labor and the freight handling labor.

Effective July 3, 1995, however, Petitioner became the sole employer of the persons required to perform the display labor and the freight handling labor undertaken formerly by contractors at the Javits Center. Under the new arrangement, contractors must order all the labor from Petitioner at prescribed rates ("labor transaction"). Petitioner is solely responsible for paying all wages and benefits to and for obtaining worker's compensation and state disability insurance for these employees, but the employees will perform their functions under

the general direction of the contractor who has requested their services. The contractors supply the equipment and materials used by the Petitioner's employees. The employees are instructed by Petitioner to abide by the work and safety rules of both the contractor and the Javits Center.

Every contractor who purchases labor from Petitioner utilizes that labor to perform services for show managers and exhibitors at the Javits Center. Those services are sold to the exhibitor or show manager in a variety of ways, depending on the type of service performed. Thus, for example, display labor is separately billed according to per person/per hour rates. Rigging services are charged by the hour pursuant to a rate schedule which includes the cost of labor, equipment and fuel. Freight handling or "drayage" is charged by the hundredweight according to a schedule which includes the cost of labor, equipment and fuel. Pending issuance of the requested advisory opinion, Petitioner requires every contractor purchasing labor from it to provide it with a Resale Certificate.

Section 1105(c) of the Tax Law imposes a sales tax upon, in part, the following:

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except: (emphasis added)

* * *

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (9) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision.

Section 1116(a)(1) of the Tax Law provides in part, as follows:

(a) Except as otherwise provided in this section, any 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;

Section 527.5(a) of the Sales and Use Tax Regulations provides, in pertinent part, as follows:

Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

(2) Installing means setting up tangible personal property or putting it in place for use. (Emphasis added)

Taxability of Services Provided by Temporary Service Contractors. TSB-M-87(13)S, provides the distinction between an employment agency and a temporary service contractor. TSB-M-87(13)S provides as follows:

Temporary service contractors can be distinguished from employment agencies in that the temporary service contractor, unlike the employment agency, is the employer of its own staff and is directly responsible for the salaries, withholding of taxes, and the hiring and firing of the individuals who are rendering services to its clients. In addition, the temporary service contractor controls to which of its clients the individual will be assigned.

An employment agency, on the other hand, provides individuals who become the employees of the agency's client and who maintain no further relationship with the agency. The individual does not report, directly or indirectly, to the agency after being hired by the client, nor may the agency terminate the services of the individual or otherwise affect the relationship between the individual and the client. Since an employment agency merely refers personnel, its charges to its clients are not subject to sales or use tax.

Temporary service contractors generally maintain a staff of employees who possess varied expertise, such as engineers, draftsmen, technicians, secretaries, typists, nurses, salesmen, data entry operators, etc., and will determine the charge to their clients based upon those skills. For a fee (usually an hourly charge), the temporary service contractor will provide its client with trained and/or specialized individuals who have the specific job skills requested by the client. These individuals may be assigned on a long or short-term basis depending upon the needs and desire of the client. Since the temporary service contractor is the employer of the individual performing the service and is responsible for paying such individual's wages, the amounts paid to the temporary service contractor by the client are not salaries or wages within the meaning and intent of the exclusion from tax for employee services contained in Section 1105(c) of the Tax Law.

Section 1105(c) of the Tax Law imposes a tax on certain services When a temporary service contractor provides personnel to perform such taxable services for its client, the fee paid by the client for these services constitutes a receipt subject to tax. Accordingly, the temporary service contractor is required to collect sales tax on the fee charged to the client for such taxable services, regardless of how the charge is arrived at or how much the contractor is required to pay its personnel. The Tax Commission decision in the hearing concerning Wheatfield Properties sustained the tax due in respect to charges for temporary personnel services

If the services performed by the temporary service contractor's employee are not subject to tax under Section 1105(c) of the Tax Law, then no tax is to be collected on the charge for these services

Where the taxable service performed by the individual supplied by the temporary service contractor to the client is purchased by the client for resale, or results in a capital improvement to real property, such service is not subject to tax under section 1105(c) of the Tax Law. The temporary service contractor will not be required to collect a sales tax on the fee charged the client if a properly completed exemption certificate is provided by the client within 90 days of the date the services were performed. It should be noted that when services of both a taxable and nontaxable nature are performed, tax is required to be charged on the total amount of the bill unless the charges for taxable and nontaxable services are separately stated.

In the present case, Petitioner acts as a temporary service contractor. As a public benefit corporation, Petitioner constitutes an entity described in section 1116(a)(1) of the Tax Law. The services which Petitioner sells, however, are services of a kind ordinarily sold by private persons. Petitioner is therefore required to collect sales tax from the contractor on the total charge for taxable services performed by Petitioner's employees. Petitioner will not have to collect tax if it receives from the contractor a properly completed resale or capital improvement certificate, as the case may be, within 90 days from the date of the transaction. Unless the exemption certificate is presented by the contractor, Petitioner will be responsible for any sales or compensating use taxes due on services performed by Petitioner's employees.

Once a properly completed resale or capital improvement certificate has been issued to Petitioner, it is the responsibility of the contractor to determine from the exhibitor's contract which services are taxable. If the services being performed by the contractor for the exhibitor are both taxable and exempt, the contractor must separately bill the taxable and nontaxable portions of the transaction, or else collect tax on the total charge. When contractors using the labor performed by Petitioner's employees, provide the services of erecting exhibits and setting them in place at trade shows or conventions, they are providing services taxable under section 1105(c)(3) of the Tax Law. Freight handling services, per se, are not subject to tax.

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Additionally, the service of dismantling displays is not subject to sales tax since it is not one of the services taxed under section 1105(c) of the Tax Law. Thus, the contractor is not required to collect sales tax on its charges for dismantling services, provided those services are separately stated on its bill to the exhibitor. If installing and dismantling services are charged on the same bill, but they are not separately billed, the entire charge is subject to tax. See I & D Inc., Adv Op Comm T&F, May 14, 1985, TSB-A-85(16)S.

DATED: February 29, 1996

/s/
s/DORIS S. BAUMAN
Director
Technical Services Bureau

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