

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

TSB-A-97(39)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960513A

On May 13, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Smithtown Hotel Inc., 110 Vanderbilt Motor Parkway, Smithtown, New York 11788.

The issue raised by Petitioner, Smithtown Hotel Inc., is whether tangible personal property which is included with the lease of real property is subject to sales and use tax under the circumstances presented.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is incorporated as a wholly owned subsidiary of the Mutual Life Insurance Company of New York ("MONY"). MONY foreclosed on a mortgage that was secured by property located in Smithtown, New York, which was being operated as a hotel. MONY, as lessor, then entered into a lease agreement with Petitioner, as lessee, to lease the building, building improvements and all personal property located in the building. After entering into the lease agreement, MONY purchased new furniture for the guest rooms (new beds, dressers, etc.) and new tables and chairs for the lobby, lounge and restaurant. Petitioner indicates that, at the time MONY purchased these additions, MONY paid sales tax on the purchases. MONY did not collect sales tax on the lease of this property to Petitioner and Petitioner did not pay sales or use tax on the purchases when it filed its sales and use tax returns.

Petitioner contends that its operation is similar to that described in Howard Swartz Recording, Inc. (Adv Opn Comm T&F, TSB-A-82(26)S). In that opinion, it was held that since equipment that was leased by a recording studio was subsequently rented to its customers, the operator of the recording studio was not liable for sales tax on its acquisition of the recording equipment.

Petitioner also contends that the leasing of the personal property cannot be separated from the lease of the real property, which is not a taxable transaction for sales tax purposes.

Section 1105(a) imposes sales tax on " [t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4) defines the term "retail sale", in relevant part, as: "A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . . ."

Section 1101(b)(5) defines the terms "sale, selling or purchase", in relevant part, 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.

Opinion

Where a transaction involves the lease of both tangible personal property and real property, the lease payments are required to be allocated between the tangible personal property and the real property (see, Northway Properties, State Tax Comm, July 31, 1984, TSB-H-84(107)S and Matter of WEBR v. State Tax Comm, 58 AD2d 471). The portion of the lease payments attributable to tangible personal property is subject to sales and use tax under section 1105(a) of the Tax Law, unless the purchase of the tangible personal property is a purchase for resale as such. The portion of the lease payments attributable to real property is not subject to sales and use tax.

In Matter of Helmsley Enterprises v Tax Appeals Tribunal of the State of N.Y. (187 AD2d 64 [Levine, J.] lv to app den 81 NY2d 710), the Court held that the acquisition of guest room furniture, furnishings and guest consumables was not a purchase for resale as such and that these items were therefore subject to sales tax when purchased by a hotel. Here, the tangible personal property included in the lease (beds, dressers, tables, chairs, etc.) is purchased by Petitioner at retail from MONY. This property is not resold as such to Petitioner's patrons but rather is furnished to its patrons as part of its services. Howard Swartz Recording, Inc., cited by Petitioner, does not address purchases by a hotel and is not determinative of the issues presented by this petition. Consequently, Petitioner's lease of tangible personal property is not a purchase of property for resale but is subject to sales and use tax. Tax should have been collected from Petitioner on the portion of the lease payments reasonably allocable to the tangible personal property, including the additional furniture purchased after the lease was executed. We note that, although MONY is not a petitioner and the issue is not presented, the facts suggest the possibility that MONY's purchases might qualify as purchases for resale.

DATED: July 7, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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