

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

TSB-H-80 (239) S
Sales Tax
December 5, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S800611A

On June 11, 1980, a Petition for Advisory Opinion was received from Enercon Systems, Inc., 170 Wilbur Place, Bohemia, New York 11716.

The issue raised in the Petition is whether sales tax is due on charges for the rental of a crane. It is intended that the crane will be used to hoist heating and air conditioning units to the roofs of newly constructed buildings. The lessor of the crane provides the services of an individual to operate the crane. The lessee has an employee at the job site to supervise and direct the crane operation.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. The Sales and Use Tax Regulations define the term "sale" to mean "...any transaction in which there is a transfer of title or possession or both of tangible personal property for consideration." 20 NYCRR 526.7(a)(1) Such transactions are stated to include "...rentals, leases or licenses to use or consume tangible personal property." 20 NYCRR 526.7(a)(2) In the case of a rental, lease or license to use the term transfer of possession "...means that one of the following attributes of property ownership has been transferred...(iii) the right to use, or control or direct the use of tangible personal property." 20 NYCRR 526.7(e)(3). The Regulations further provide that "...When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease provided they reflect prevailing wage rates.

Example II: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator. The taxable receipt excludes the operator's wages," 20 NYCRR 526.7(e)(5).

Accordingly, inasmuch as Petitioner rents a crane, as the services of an operator are included in the equipment lease, and as Petitioner has the right to direct and control the use of the equipment by such operator, the transaction in question constitutes a sale of tangible personal property the receipts of which are subject to tax under section 1105(a) of the Tax Law.

DATED: November 18, 1980

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau