

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

TSB-M-82 (5) Revised
Corporation Tax
Sales Tax
November 19, 1982

The memorandum supersedes memorandum TSB-M-82(5) dated January 25, 1982, which should be destroyed.

Department of Taxation and Finance Policy

Safe Harbor Lease Transactions

The previous TSB-M-82(5) dealing with the Economic Recovery Tax Act of 1981 has been revised by Chapter 55 of the Laws of 1982. The Economic Recovery Tax Act of 1981 provides "safe harbor" rules under which certain transactions applicable to property placed into service on or after January 1, 1981 will be treated as a lease for federal tax purposes, regardless of whether or not the transaction qualifies as a lease under applicable state law.

The seller/lessee corporation in a "safe harbor" lease transaction sells its equipment to a purchaser/lessor corporation. The purchaser/lessor corporation, in turn, leases the same equipment back to the seller/lessee corporation. As a result of this transaction, the purchaser/lessor corporation, as owner of the equipment may claim the federal cost recovery allowance (depreciation) and the federal investment tax credit on the equipment. The seller/lessee corporation receives cash plus the use of the equipment. Usually at the end of the lease, the seller/lessee can buy the equipment for nominal consideration. For more federal information concerning this area, please refer to Section 168(f)(8) of the Internal Revenue Code or the instructions for Federal Form 6793.

The New York State Department of Taxation and Finance has adopted the following policies concerning "safe harbor" lease transactions for corporation franchise tax:

1. A purchaser/lessor who qualifies in a "safe harbor lease" transaction under the provisions of Section 168(f)(8) of the Internal Revenue Code will be taxable under Article 9-A of the New York State Tax Law if the "safe harbor leased" property is located in New York State.
2. The purchaser/lessor may claim depreciation on the "safe harbor" leased assets in conformity with the federal rules for taxable years ending on or before December 31, 1981. For taxable years beginning after December 31, 1981, the seller/lessee may claim depreciation on the "safe harbor" leased assets for New York State purposes.
3. The seller/lessee will be allowed the investment tax credit for New York State Tax Purposes for taxable years beginning after December 31, 1981.
4. Under discretionary authority of Section 210.8, the State Tax Commission has determined that such lease transaction results in a distortion of the business allocation percentage of the purchaser/lessor and the seller/lessee in a "safe harbor" lease transaction. Therefore, in order to properly allocate the income and capital of the purchaser/lessor and the seller/lessee:

- a. The leased property is deemed property of the seller/lessee and not the purchaser/lessor in computing the property factor of the business allocation percentage.
- b. Rental income and interest income applicable to a "safe harbor" lease transaction are not included in computing the receipts factor of the business allocation percentage.

For New York State Sales and Use Tax Purposes, the following policy applies:

Where a concern "sells" excess federal tax benefits on new equipment to a nominal lessor, in accordance with the new Federal rules on leasing, actual ownership of the equipment does not change. Accordingly such transaction will be considered a financial arrangement and will not be subject to sales or use tax. This applies to both the sale and the leaseback of the assets.

However, in a transaction where either title or possession are actually transferred, it is no longer strictly a financial arrangement, and the sales tax will be due.

Please note that although the foregoing is a general guideline, each contract will be reviewed on its own merit.