

Charges By Shopping Mall Operators

Lease agreements between shopping mall operators and tenants generally provide for a fixed rental charge plus additional rental charges. The additional rental charges may include a tenant's pro rata share of expenses for maintenance, utilities, snow plowing, landscaping, security, insurance, administration and overhead costs incurred by the mall owner in relation to the operation of the "common area" of the shopping mall. The "common area" is the area within and outside of the mall (other than the fixed rental space) available to the tenants and their customers and necessary for access to the tenants' businesses.

To provide for an equitable rental charge, the lease agreement generally provides that common area expenses are to be billed to each tenant based on a share formula (i.e. leased square footage). The parties agree that the costs will be estimated at the beginning of each year, with the tenant paying his share in 12 monthly installments. At the end of the year the actual costs are determined and the tenant either pays an additional amount or receives a credit, if payments exceed actual costs.

Common area charges which are designated as "additional rent" or similarly provided for by specific provisions in the lease agreement are considered to be receipts from the rental of real property and are not subject to sales tax when billed to tenants. An "anchor" store which owns its own building within a mall complex is normally subject to common area charges which are determined by a method similar to the method used for tenants, and will receive the same treatment as mall tenants for sales tax purposes.

The mall operator is responsible for paying tax to his supplier on purchases of any taxable tangible personal property or services used or consumed by him in the operation of the common area. The mall operator is responsible for collecting sales tax on any taxable charge made to the tenant for expenses incurred relative to the premises actually leased to him (as differentiated from common area expenses). This is true even when the lease agreement specifies the charge as "additional rent" or by some similar designation.

When purchasing utilities, however, the mall operator may either:

- 1) pay tax to his supplier on his total utility charge and subsequently claim a refund or credit, on Form AU-11, of the portion applicable to use in the tenants' premises (for which he will charge tax to the tenant), or
- 2) issue a Resale Certificate, Form ST-120, or other appropriate exemption document to his supplier and subsequently collect sales tax from his tenants on the portion of utility use attributable to the tenants' premises and pay a use tax on the portion of the utility purchase applicable to use in the common areas of the mall.

Example 1: As part of "additional rent" a mall operator charges a tenant for a proportionate share of the cost of utilities used in the "common area." Such charge to the tenant is considered to be for the rental of real property and is not subject to sales tax. If the mall operator has not paid sales tax to his utility supplier, he must now pay a use tax on such utility purchase.

Example 2: As part of "additional rent" a mall operator charges a tenant for a proportionate share of the cost of utilities used in the tenant's premises. These charges are considered taxable sales by the mall operator and tax should be charged to the tenant.

Administration and overhead charges made by a mall operator to his tenants, where such charges are a percentage of the actual operating costs of the "common area" and are either designated as additional rent or similarly provided for by specific provision in the lease agreement, are considered to be "additional rent" and as such are not subject to sales tax. Similar charges to owners of anchor stores will receive the same treatment for sales tax purposes.

Administration and overhead charges billed as a separate item on the monthly rental invoice by a mall operator to his tenants, and representing a percentage of actual expenses relating to the tenants' premises are considered to be a pro rata part of the various charges included in the billing and taxed accordingly. If the billing reflects a charge for any taxable sale of tangible personal property or services, tax would be due on both such charge and a pro rata portion of the charge for administration and overhead.

Example 3: Pursuant to a lease agreement, the mall operator is required to provide all necessary plumbing repairs within tenant areas. Under the terms of the lease, an additional charge of 25% of the total amount due from each tenant will be included in the billing to cover the mall operator's administration and overhead costs. A periodic bill from the mall operator to a tenant provides as follows:

Rent	\$1,200.00
Common Area Allocation	600.00
Plumbing Repairs	<u>200.00</u>
	\$2,000.00
Administration and Overhead (25% x \$2,000.00)	<u>500.00</u>
Total	\$2,500.00

Because plumbing repairs are taxable, the \$200 charge for such repairs is subject to tax. In addition, the pro rata portion of the administration and overhead charges attributable to the plumbing repairs is includible in the amount subject to tax. The taxable charge is computed as follows:

Plumbing Repairs	\$200.00
Pro rata portion of administration & overhead attributable to plumbing repairs (\$200/\$2,000 x \$500 =)	<u>50.00</u>
Total Taxable Charge	\$250.00

Even though a mall operator may have his own maintenance crew perform repair and maintenance services on mall premises, rather than hire an outside company, any charge by the mall operator to a tenant for such repairs and maintenance of the tenant's leased space is subject to sales tax. In the event the mall operator hires an outside company to perform these services to the tenant's premises, he may issue a Resale Certificate (Form ST-120) to the outside contractor.

Example 4: A mall operator's maintenance crew performs janitorial functions and routine plumbing, heating, electrical and similar repairs in the common area of the mall and, as necessary, within tenant space. The mall operator is required to collect tax only on those charges he makes to a tenant for taxable services performed within the tenant's area, if such charges are separately stated. If not separately stated, the mall operator must collect tax on the total additional charge to the tenant.