New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(43)S
Sales Tax
September 22, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S090707D

On July 7, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted].

The issue raised by [redacted] ("Petitioner") is whether it must pay sales tax on its purchases of dehumidifiers and air movers, which it provides to customers, or whether such purchases are exempt from tax as purchases for resale. Petitioner operates a cleaning and restoration business and provides the dehumidifiers and air movers to its clients as an optional value-added service, separate from the cleaning and restoration.

We conclude that Petitioner's purchases do not qualify for the resale exclusion from sales and use tax unless it can show that: (1) the equipment is purchased with the intent to rent it as such and not to use it as a component of any services provided; (2) a specific charge is made for the rental on the invoice, separate from any charges for services performed; (3) clients have a true option to purchase the services without renting the equipment, or to rent the equipment without purchasing the services; and (4) Petitioner never uses the equipment for itself or as a component of services provided and thus the purchases are made exclusively for resale.

Facts

Petitioner operates a cleaning and restoration business. Petitioner's service is the complete cleaning of buildings that have suffered damage from smoke, fire, or flood. Petitioner does not tear down or rebuild any parts of the structure. After the cleaning is complete, Petitioner offers to provide various items to its clients such as dehumidifiers and air movers to remove air moisture. The items are offered as a second transaction, separate and distinct from the cleaning and restoration service. The items are optional. Clients are free to use their own fans, rent or buy equipment elsewhere, or simply let the area air dry. If the client chooses to obtain the equipment from Petitioner, the equipment is a separate line item on the invoice, at a daily fee. Petitioner collects sales tax from its clients on the charges for the equipment.

Analysis

Generally, section 1105(a) of the Tax Law imposes a sales tax on receipts from every retail sale of tangible personal property unless otherwise excluded or exempted. Section 1101(b)(4)(i) defines "retail sale" as "a sale of tangible personal property to any person for any purpose, other than (A) *for resale as such*…". The effect of this provision is to remove property purchased for resale from the application of the sales tax imposed under Section 1105(a) of the Tax Law.

Section 1101(b)(5) of the Tax Law defines "sale" 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...." Therefore, the term "sale" includes a rental for purposes of the Tax Law. The terms "selling" and "purchase" also include rentals. *See* Section 526.7 of the Sales and Use Tax Regulations.

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer. 20 NYCRR § 526.6(c).

To qualify as a purchase for resale, the tangible personal property must be purchased with the intent to resell it as such and not to use it as a component of any services performed. It is well settled that tangible personal property purchased by a vendor and supplied to customers as a component part of the services the vendor sells to its customers, is not property purchased for resale within the meaning of section 1101(b)(4) of the Tax Law, unless the tangible personal property is actually (i.e., permanently) transferred to the customer in conjunction with a taxable service. *See Accurate Disposal, Inc.*, Adv Op Comm T&F, November 30, 2006, TSB-A-06(28)S; *Jackson Welding Co.*, Adv Op St Tx Comm T&F, December 1, 1986, TSB-A-86(46)S. Thus, it has been held that gas cylinders were not "purchased for resale" where the seller of the gas did not impose a separate charge for use of its cylinders, but rather treated the cost as a cost of selling the gas itself. *Albany Calcium Light, Inc. v. State Tax Comm'n*, 44 NY2d 987 (1978); *see also U-Need-A-Rolloff Corp. v. State Tax Comm'n*, January 20, 1984, TSB-H-84(16)S; *aff'd* 67 NY2d 690 (1986). In the present case, Petitioner does not permanently transfer the equipment (dehumidifiers and air movers) to its customers. Accordingly, a resale will be deemed to occur only where a specific, separately stated charge is made for the rental of the tangible personal property in question. *See Niagara Lubricant Company, Inc. v. State Tax Comm'n*, 120 AD2d 885 (1986). Here, Petitioner lists the rental of the equipment as its own line item on the invoice at a daily rental fee, separate and distinct from any charges for cleaning and restoration services performed.

However, the mere separate statement on the invoice of charges for the rental equipment will not by itself qualify Petitioner's purchases of the equipment for the resale exclusion. In addition, the rental items must be offered for resale independent of any other items or services offered for sale. For example, in *Morton L. Coren, P.C.*, Adv Op Comm T&F, June 29, 1990, TSB-A-90(33)S, it was concluded that even though the components of a particular sale could be separately stated, calculated or estimated, if such components could not be separately purchased, the combination of items must be considered as one and, thus, subject to sales tax as a single purchase. *See also Penfold v. State Tax Comm'n*, 114 AD 2d 696 (1985). Thus, to qualify as a resale, the substance of the transaction must be such that the customer has a true option to rent the tangible personal property without also purchasing the services, or to purchase the services without also renting the tangible personal property. *Jackson Welding Co.*, *supra*. Petitioner states that its rentals of dehumidifiers and air movers to clients are optional and that Petitioner's clients are free to use their own fans, rent or buy equipment elsewhere or simply let the area air dry.

Further, to qualify as a purchase for resale, a purchase must be *exclusively* for resale. The use of rental equipment by its owner defeats the qualification of such equipment as equipment purchased exclusively for resale. *See Micheli Contracting Corp. v. New York State Tax Comm'n*, 109 AD2d 957 (1985). Petitioner must be able to show that it has never used the dehumidifiers or air movers on its own behalf or as a component of any services performed for its clients and that accordingly, the purchases are made for the exclusive purpose of "reselling," i.e. renting, the equipment to others, and with no intent to use it either for Petitioner's own use or as a component of the cleaning and restoration services it provides.

In sum, Petitioner's purchases do not qualify for the resale exclusion from sales and use tax unless it can show that: (1) the equipment is purchased with the intent to rent it as such and not to use it as a

component of any services provided; (2) a specific charge is made for the rental on the invoice, separate from any charges for services performed; (3) clients have a true option to purchase the services from Petitioner without renting the equipment, or to rent the equipment from Petitioner without purchasing the services; and (4) Petitioner never uses the equipment for itself or as a component of services provided and thus the purchases are made exclusively for resale. Only if all of these requirements are met will Petitioner's purchases of dehumidifiers and air movers qualify as purchases for resale. In that case, the purchases may be made without paying sales and use tax. This is accomplished by presenting a properly completed Form ST-120, *Resale Certificate*, to the supplier when purchasing the dehumidifiers and air movers. It should also be noted that the rental of the equipment from Petitioner to its clients is a "sale" within the meaning of the Tax Law, which is subject to sales tax.

DATED: September 22, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.