

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

TSB-A-13(19)S
Sales Tax
July 15, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121005A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks if its charges for providing certain sophisticated temporary structures are subject to sales tax, and if so, whether it may accept a properly completed resale certificate tendered in good faith by an event planner.

We conclude that Petitioner's charges for providing these temporary structures are sales of tangible personal property subject to State and local sales taxes. We further conclude that Petitioner may accept a properly completed resale certificate tendered in good faith by a customer under the conditions described in this Advisory Opinion.

Facts

Petitioner's offerings include sophisticated temporary structures to house various events, including marketing events and weddings. Petitioner is often engaged by an event planner who contracts with Petitioner and other subcontractors, on behalf of or as agent for the sponsor or host of the event. The temporary structures frequently involve sophisticated lighting, heating, or air conditioning equipment. Petitioner's staff sets up and removes the structures and related equipment and is present at the event to properly and safely operate certain aspects of the equipment. The presence of Petitioner's staff is necessary to provide services to the structure during the event. For example, a structure may use glass sidewalls that range in height from 13 to 28 feet above ground, or large awnings, both of which must be opened or closed by Petitioner's staff. Petitioner's trained technicians would also be required to install and operate large commercial HVAC systems, which have no user-operable controls.

A sample "General Services Agreement" between Petitioner and a customer provides, in part that the location of the equipment is subject to the customer's "reasonable approval" and that the customer "assumes all risk of loss or damage to the equipment while it is in [customer's] possession."

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, unless specifically exempt under another provision of law. Section 1101(b)(5) of the Tax Law defines "sale" as any transfer of title or possession or both, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration. The terms "rental", "lease" and "license to use" refer to all transactions in

which there is a transfer for a consideration of possession of tangible personal property without transfer of title to the property. *See* 20 NYCRR § 526.7(c)(1). “Transfer of possession” with respect to a rental, lease or license to use is defined in the sales tax regulations as meaning that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use or control or direct the use of tangible personal property.

20 NYCRR § 526.7(e)(4).

Here, Petitioner transfers possession of the temporary structure to its customer, because the customer has the right to use, control, or direct the use of the structure. The host of a wedding or other event has control over the event (e.g., deciding who may attend the event, the order of ceremonies, etc.), and the host and guests have the ability to use the structure to participate in the activities offered at the event. The host has the ability, within reasonable limits, to direct the location of the structure. While only Petitioner’s staff may operate certain aspects of the equipment, such as side walls, louvers and HVAC equipment, the host and his or her guests use the structure to participate in the event without assistance from Petitioner’s staff. The agreement between Petitioner and the customer also provides that the customer bears the risk of loss or damage to the equipment while in the customer’s possession. The customer’s right to select the persons who will use the structure, to decide when and where the structure will be used, and the customer’s liability for damage to the structure while it is in his or her possession are compelling indications that the customer has possession of the temporary structures. *See* TSB-A-12(12)S. The presence of Petitioner’s employees to operate certain aspects of the structure and address problems if they occur does not negate the customer’s control over the property. Accordingly, charges by Petitioner for the rental of these temporary structures are subject to sales tax.

Under Tax Law § 1101(b)(4)(i)(A), sales for resale and sales for use in performing certain taxable services are not retail sales and are not subject to tax. The Sales and Use Tax Regulations provide that a vendor who in good faith accepts from a purchaser a properly completed exemption certificate within 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. An exemption certificate is “accepted in good faith” when a vendor has “no knowledge that it is false or is fraudulently presented.” 20 NYCRR § 523.2; *see also, Saf-Tee Plumbing v. State Tax Commission*, 77 AD2d 1 (3rd Dep’t 1980).

Rental by Petitioner of a temporary structure to an event planner who re-rents the structure to an event host may be excluded from sales tax as a sale for resale. If Petitioner, in good faith, timely accepts properly completed Form ST-120, *Resale Certificate*, from a customer, it is not required to collect sales tax. However, purchases of tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale and are subject to sales tax. *See* 20 NYCRR § 527.8(f)(2)(i). If a caterer

rents a temporary structure from Petitioner, it may not tender Form ST-120 for that rental. Petitioner may not knowingly accept a resale certificate under these circumstances and must collect sales tax from the caterer for the rental. The petition also states that, in some cases, the event planner acts “as agent for the sponsor or host of an event. . . .” If the event planner is the agent of the host, it is not renting the structure for resale because the agent’s acts are considered to be the acts of his or her principal (i.e., the host). In that situation, the agent would not be reselling the equipment to the principal; the sale to the agent would be considered a sale directly to the host. Accordingly, an event planner acting “as agent” for the host may not tender Form ST-120 for the rental of a temporary structure from Petitioner. Petitioner may not knowingly accept a resale certificate from an agent under these circumstances and must collect sales tax from the agent for the rental. However, Petitioner is not under a duty to investigate or police its customers. *See Saf-Tee Plumbing, supra.* Petitioner may timely accept a properly completed resale certificate from its customer as long as Petitioner does not have knowledge that such certificate is falsely or fraudulently offered.

DATED: July 15, 2013

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.