

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

TSB-A-90(17)S  
Sales Tax  
April 16, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900109A

On January 9, 1990 a Petition for Advisory Opinion was received from Northeast Timber Erectors, Inc., P.O. Box 340, Pruyin Street, Bainbridge, New York 13733.

The issue raised by Petitioner, Northeast Timber Erectors, Inc., is whether receipts received from crane rentals, with operator, are subject to New York State and Local Sales or Use Tax.

Petitioner is considering providing a crane rental service, with operator. Petitioner's crane service will perform such jobs as the placement of modular homes onto foundations or slabs, the hoisting and setting into place of laminated wood beams, structural steel, wooden roof trusses, etc. Petitioner will provide the services of an individual to operate the crane.

In a typical transaction Petitioner will contract with a mobile home sales company to set modular home sections in place on either a foundation or slab belonging to the customer of the company. In the performance of this contract, Petitioner will transport the crane to the job site. Subsequent to the crane being made operational by Petitioner's crane crew, the crane crew will fasten cables to one section of the modular home. The crane operator will cause the crane to lift and maneuver the modular home section to a point located immediately above the foundation or slab. A set-up crew (employed or sub-contracted by the mobile home sales company) will direct the crane operator as to the exact placement of the modular home section on the foundation or slab. The crane crew will then remove the cables. The other modular home sections will be set in place in like manner.

Pursuant to Section 1105(a) of the Tax Law, sales tax is imposed on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(5) of the Tax Law defines "sale, selling or purchase" as follows:

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, or any agreement therefore....

Section 526.7(c)(1) of the Sales and Use Tax Regulations provides in part that:

The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property....

Section 526.7(e)(4) of the Sales and Use Tax Regulations further provides that:

Transfer of possession with respect to a rental, lease or license to use, means 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.

Lastly, Section 526.7(e)(6) of the Sales and Use Tax Regulations provides in part as follows:

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 15: 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.

Where Petitioner is directed by the customer or a person acting on behalf of such customer, as in the transaction between Petitioner and the mobile home sales company, the rental of the crane by the customer is a taxable sale because the right to direct and control the use of the crane belongs to the customer.

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Maplecrest Sausage Co., Inc. v. Tully, 67 AD 2d 329; Ormsby Haulers, Inc. et al v Tully, 72 AD 2d 845). However, the operator's wages, if separately stated and if reflective of prevailing wage rates, are excludible from the receipts subject to tax.

Likewise, a transfer of possession will occur in all of Petitioner's crane rental transactions wherein the customer actually directs and controls or has the right to direct and control the use of the equipment by the operator. Such transactions will fall within the definition of sale as stated in Section 1101(b)(5) of the Tax Law and the receipts from such transactions will be subject to the tax imposed under Section 1105(a) of the Tax Law. The operator's wages, where separately stated and reflective of prevailing wage rates, will be excludible from the receipts subject to tax.

DATED: April 16, 1990

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions  
are limited to the facts set forth therein.