

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

TSB-A-96 (69) S
Sales Tax
November 1, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S951121A

On November 21, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Newsweek Inc., 333 Route 46 Mountain Lakes, New Jersey 07046.

The issue raised by Petitioner, Newsweek Inc., is whether a landlord is required to charge a tenant sales tax on certain services provided when these charges are billed as additional rent.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner leases space in a building located in New York City. The landlord is charging for: 1) overtime freight elevator service (with and without an engineer), 2) overtime heating, 3) daily wet trash removal (from the cafeteria), 4) overtime a/c tower cleaning costs (extra charges to periodically clean the air conditioning tower servicing the entire building, which must be done on weekends), 5) miscellaneous painting, 6) maintenance and 7) repairs due to water leakage into lower floor spaces. The lease specifies that the base rent covers normal operating costs of which Petitioner is required to pay a fixed percentage. All other charges are billed as additional rent.

The following articles in the Agreement of Lease are relevant to the issue presented in this Advisory Opinion:

Maintenance and repairs 4. Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein. Tenant shall be responsible for all damage or injury to the demised premises or any other part of the building and the systems and equipment thereof, whether requiring structural or nonstructural repairs caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant ...

Services Provided by Owner 29. ... (d) cleaning service for the demised premises on business days at Owner's expense provided that the same are kept in good order by Tenant

47. MAINTENANCE OF DEMISED PREMISES. Except as otherwise expressly specified in Articles 4, 29 and 51 hereof, Owner shall not be responsible for the upkeep or maintenance of the demised premises or any installation or fixtures therein. In no event shall Owner be responsible for or insure any installation, fixtures, betterments or leasehold improvements made by or for the benefit of Tenant. Should Owner hereafter agree, in writing or otherwise, at the request of Tenant or otherwise, to do any work in or in respect of the demised premises, same shall be Paid for by Tenant as additional rent not later than twenty (20) days after being billed therefor. (Emphasis supplied)

51. CLEANING SERVICES; RECYCLING; EXTERMINATION. A. The cleaning service to be provided by Owner in accordance with the Provisions of Article 29(d) hereof shall include removal of Tenant's normal office refuse and the general cleaning services specified on Exhibit B. Tenant shall pay the Building's cleaning contractor (as additional rent) upon demand the cost of any other cleaning services and for removal of any of Tenant's refuse and rubbish (such as cartons, boxes, crates, packing cases, furniture and furnishings, filing cabinets, etc.) that is in excess of normal office refuse. Owner, at no cost to it and without the need to incur any obligation or liability, shall cooperate to resolve any disputes that may arise between Tenant and the Building's cleaning contractor.

52. OTHER SERVICES. Tenant shall pay Owner's customary charges (as additional rent) within (20) days after receipt of Owner's invoice therefor, for any and all maintenance and/or repair work done by Owner for Tenant, at Tenant's request, but nothing contained herein shall in any manner or to any degree obligate Owner to do any such maintenance or repair work.

53. ADDITIONAL RENT. A. In addition to the Base Rent, all other payments required to be made by Tenant hereunder shall be deemed to be additional rent, whether or not same shall be designated as such, and in the event of the non-payment thereof, Owner (in addition to and not in limitation of its other rights and remedies, whether herein reserved or as may be provided by law) shall have all of the rights and remedies in respect thereof as are herein or otherwise provided in the case of the non-payment of Base Rent. (Emphasis supplied)

Applicable Law

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

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105(b) of the Tax Law imposes a tax upon:

[T]he receipts from every sale, other than for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, and from every sale, other than for resale, of telephony and telegraphy and

telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and from every sale, other than sales for resale, of a telephone answering service.

Section 1105(c) of the Tax Law imposes sales tax upon: [T]he receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(5) Maintaining, servicing, or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

In Debevoise & Plimpton v New York State Dept. Of Taxation and Finance, 80 NY2d 657, 661, the Court of Appeals held that the tenants' payments for overtime heat, ventilation and air conditioning services were incidental to the rental of the commercial premises and not the sale of a refrigeration and steam service and, therefore, not subject to the sales tax pursuant to Section 1105(b) of the Tax Law.

In Empire State Building Company v New York State Dept. Of Taxation and Finance, 81 NY2d 1002, the Court of Appeals held that the tenants' payments of an Electricity Rent Inclusion Factor were for an electric service provided only as an incident to the rental of the commercial premises and not as a part of "separate transactions which have as their primary purpose the furnishing of utilities or utility services," and therefore, not subject to tax as a sale of utility services under Section 1105(b) of the Tax Law.

In Debevoise & Plimpton, supra and Empire State Building Company, supra, charges for overtime heat, electricity, etc., that the landlord was responsible for providing were considered an increase in the rent when the tenant required the services outside of certain established hours. Other than overtime elevator, overtime heat and overtime a/c tower cleaning, the transactions described

by Petitioner are fundamentally different. The additional services received by Petitioner are not an incident to the rental of the premises. Petitioner's lease agreement supports this conclusion. Petitioner's lease agreement requires the lessee to be responsible for keeping the building in a certain condition. In doing so, the lessee may hire its own contractor or one may be provided by the owner. Article 51 of Petitioner's lease agreement provides that the tenant will pay a third-party cleaning contractor directly for additional services and rubbish removal. The tenant's payments directly to the contractor for services rendered cannot be considered rent to Petitioner. Article 52 of Petitioner's lease agreement provides that "nothing contained herein shall in any manner obligate Owner to do any such maintenance or repair work." This language further indicates that these transactions should be treated differently from the additional rent paid in the Debevoise and Empire State Building cases. The characterization as "additional rent" of the various payments described in Articles 4, 47, 51 and 52, other than for elevator, porter and indicated utility services, does not change the nature of the transactions referred to or their taxability under the Sales and Use Tax Law.

The charges for overtime elevator freight service, overtime heating and overtime a/c tower cleaning costs are considered payments of real property rent because these services are incidental to the rental of the commercial premises. The charges for daily wet trash removal, and miscellaneous painting, maintenance charges and repairs due to water leakage into lower floors, however, cannot be considered payments for real property rent merely because the landlord chooses to characterize the charges for these services as additional rent. These services are taxable under Section 1105(c)(5) of the Tax Law. To the extent services to tangible personal property are involved, they would be taxable under section 1105(c)(3) rather than section 1105(c)(5). Consequently, charges to Petitioner for these services are subject to New York State and local sales taxes, including the sales tax imposed in New York City under Section 1107 of the Tax Law. See: Midtown Realty Company, Adv Op Comm T & F, May 2, 1996, TSB-A-96(26)S.

DATED: November 1, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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