

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

TSB-A-97(83)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970528B

On May 28, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Leica Inc., 3362 Walden Avenue, Depew, New York 14043-2437.

The issue raised by Petitioner, Leica Inc., is whether certain maintenance charges made to Petitioner are subject to sales and use tax.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a manufacturer that leases a building in a commercial complex. There are common areas in the complex such as the main through road, and lawn and shrubbery adjacent to either the main road or having no relationship to specific buildings. The lessor charges Petitioner for maintenance as additional rent. Petitioner receives a billing for repairs and maintenance to the premises and lawn, waste removal, snow plowing, etc. The bill contains a dollar amount which includes both the common area maintenance and the maintenance of those areas directly related to the leased premises such as the lawn and shrubbery adjacent to the leased building and drive-ways and parking areas surrounding the buildings.

Petitioner is charged an amount that reflects the cost of the repair to the lessor plus a mark-up. On Petitioner's bills the lessor separately states sales tax only on the mark-up. Petitioner has been told by the lessor that the added tax represents only the tax on the mark-up.

The following paragraphs in the lease agreement are relevant to the issue presented in this Advisory Opinion:

ELEVENTH: MAINTENANCE. Subject to Paragraph "THIRTEENTH" responsibility of the respective parties for maintenance and repairs to the Leased Premises shall be determined as follows:

A) Landlord shall, repair and maintain the structural portion of the Leased Premises including: roof, exterior walls (excluding window glass), foundation, floor slab (excluding floor finishing such as tile, carpeting and the like).

B) Landlord shall maintain and repair the exterior portions of the Leased Premises and the Building, including but not limited to, parking area curbs, sidewalks, grass and shrubbery, and external lighting.

C) Landlord shall maintain the complex access roadways, lawns and green areas and all utilities and related infrastructure improvements serving the Walden Business Center. Such maintenance shall include upkeep, repair and replacement of such complex roadways, lawns and green areas, utilities and related services in order that Tenant shall have use and enjoyment and access to its Leased Premises.

Applicable Law and Regulations

Section 1105(c) of the Tax Law imposes sales tax upon:

The receipts from every sale, except for resale, of the following services:

* * *

(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...."

Opinion

While the sales tax is imposed upon the receipts from the sale of tangible personal property and certain services, it is not imposed on receipts from either the sale or rental of real property.

Certain services even though characterized as additional rent may be subject to sales tax. These services may include maintenance of the premises which is required to be performed by the lessee but for whatever reason is performed by the lessor and charged to its tenant as additional rent. These maintenance services are taxable under Section 1105(c)(5) of the Tax Law. Other services, however, may be considered incidental to the rent. Additional rent charges for these services are not subject to tax. (See Newsweek Inc., Adv Op Comm T&F, November 1, 1996, TSB-A-96(69)S.)

Services considered incidental to the rent may include services related to the leased premises of a tenant. The maintenance by Petitioner's lessor of areas related to the leased premises such as the lawn and shrubbery adjacent to the leased building, and drive-ways and parking areas surrounding the leased building, is incidental to Petitioner's rental of the premises. Petitioner's lease agreement supports this conclusion. Paragraph 11(B) of the agreement provides that the "[l]andlord shall maintain and repair the exterior portions of the Leased Premises and the building, including but not limited to, parking area curbs, sidewalks, grass and shrubbery, and external lighting." Accordingly, the lessor's "additional rent" charges to Petitioner for these services are not subject to tax.

Administrative and overhead charges made by a lessor to its 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 provisions in the lease agreement, are considered to be "additional rent" and as such are not subject to sales tax.

Administrative and overhead charges billed as a separate item on the monthly rental invoice by a lessor to its 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 (See TSB-M-84(9)S Charges by Shopping Mall Operators). Petitioner's lessor may not charge and collect sales tax only on the amount of the mark-up billed to Petitioner for a taxable sale of property or services. The lessor must charge and collect tax on the total amount billed to Petitioner for a taxable sale, including expenses attributable to the sale.

DATED: December 29, 1997

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

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