

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

TSB-A-98(87)S  
Sales Tax  
December 30, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970926C

On September 26, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from T&K Communication Systems, Inc., 56 Gail Drive, Owego, NY 13827-1032.

The issue raised by Petitioner is whether receipts from the rental of radio communication tower space, for antennae owned by a lessee, are subject to sales and compensating use taxes.

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

Petitioner currently operates thirteen radio communication towers which have antennae attached. Some of the antennae are owned by Petitioner and other antennae will be owned by Petitioner's lessees. The rentals at issue in this Advisory Opinion are to persons who use the towers for in-house communications in their businesses ("end users").

Petitioner's customers lease tower space and building space to house communication equipment and placement of transmission lines. Antennae are installed on the towers for sending or reception of radio frequency signals. Petitioner does not charge a transmission usage fee.

Petitioner's standard site lease agreement for use of tower space provides, in part:

**Terms and Conditions**

1. Description of Floor and Tower Space Leased. Lessor hereby agrees to Lease in part to lessee the use and enjoyment of the real property, further described and limited by the following. The entirety of the real property shall be referred to herein as "the premises."

Floor space within a building owned or operated by Lessor at that location of approximately 24"W x 24"D x 72"H each in dimensions, one total. (emphasis added)

\* \* \*

Tower space on a tower owned or operated by Lessor at that location whereby Lessee's antennas shall be mounted at a heights [sic] above ground level as follows: (emphasis added)

\* \* \*

Lessee shall provide all mounting brackets, mounts, or any additional structural modifications Lessee's [sic] deems necessary to mount Lessee's antennas on the tower.

\* \* \*

3. Maintenance of Equipment by Lessee. Lessee shall, at its own expense, maintain its equipment on or attached to the Premises in a safe condition and in good repair, and in a manner suitable to Lessor so as not to conflict with the use of the Premises by Lessor, or by any other company using the Premises.

All repair and maintenance of Lessee's equipment shall be performed by qualified technicians, authorized to enter the Premises as Lessee's agents or employees.

Any and all machinery, equipment and trade fixtures except the electrical service, installed by Lessee, shall remain personalty notwithstanding the fact that it may be affixed or attached to the realty, or the Premises, and shall, during the term of this Lease or any extension or renewal thereof, and upon termination thereof, belong to and be removable by Lessee. Lessee agrees that the Premises and associated realty shall not be damaged by Lessee's occupancy, make any repairs necessitated by Lessee's occupancy or removal of equipment less ordinary wear and tear.

4. Access. Lessor agrees to give Lessee free and unrestricted ingress and egress to the Premises during the continuation of this Lease and any renewals thereof for the purpose of installing, maintaining, operating and removing Lessee's equipment.

**Applicable Law**

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

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(5) Sale, selling or purchase. 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 therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. — . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

**Opinion**

In this case, Petitioner's customer leases tower space, and a specific amount of floor space within a building owned by Petitioner, at a particular location. The lessee has free and unrestricted access to the premises during the term of the lease and any renewals thereof, and the lessee provides all mounting brackets, mounts, or any additional structural modifications lessee deems necessary to mount its antennae at the location. For Petitioner's customers which install their own antennae on Petitioner's towers, the physical location of the towers is the primary reason to lease space on them. Charges by Petitioner to a lessee for the rental of radio communication tower space at a specific location, for antennae and equipment owned by a lessee, are not charges for rental or a license to use tangible personal property, and are not subject to State and local sales and use taxes.

DATED: December 30, 1998

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

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