

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

TSB-A-09(34)S
Sales Tax
August 19, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S081124A

On November 24, 2008 the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its rental fees and related charges for renting reusable food containers to farmers are exempt from sales tax under Tax Law, §1115(a)(19) if the farmers use the containers to ship produce to the farmers' customers. Petitioner's receipts from the rental of the containers to farmers, and related charges, are not exempt under Tax Law, §1115(a)(19) because the containers are not actually transferred to the farmers' customers.

Facts

Petitioner rents reusable containers to farmers. Farmers use the containers to ship produce to customers that operate retail food stores. The containers may be left at retail stores for use as display cases or just for storage of the produce. After the container is emptied, it is returned to Petitioner for re-rental. The containers are shipped to farmers on pallets. The rental agreement with farmers provides that the farmer will be billed a base lease fee, a pallet charge (a charge for each pallet used to ship containers to the farmer), and a fuel surcharge (a delivery charge). Petitioner also bills a refundable deposit fee of \$4.85 per container. The base rental fee is refunded in full if an unused container is returned to Petitioner within 30 days of its receipt by the farmer. A credit of 50% of the rental fee is granted if an unused container is returned to Petitioner within 31 to 60 days of its receipt. Petitioner keeps the deposit fee if a container is not returned.

Analysis

Petitioner is in the business of leasing containers. A container is exempt from State and local sales and use tax under Tax Law §1115(a)(19) if used by a vendor to package tangible personal property for sale and the container is actually transferred by the vendor to the purchaser. *Actually transferred* means that the packaging material is physically transferred to the purchaser for whatever disposition the purchaser wants. 20 NYCRR 528.20(b)(4). Because Petitioner's customers (the farmers) are obligated to return the containers in question to Petitioner, the containers are not actually transferred to the customers. 20 NYCRR 528.20(c)(1). Thus, the rented containers do not qualify for the §1115(a)(19) sales and use tax exemption. See *Matter of Upstate Farms Coops.*, Tax Appeals Tribunal, May 2, 2002.

Petitioner's rentals of the containers to farmers located in New York State constitute retail sales of tangible personal property for purposes of State and local sales tax. Therefore, sales tax is due on the receipts for rentals under Tax Law §1105(a) unless otherwise exempt. Expenses incurred by a vendor in making a sale, regardless of their status and regardless of whether they are billed to a customer, are not deductible from receipts. 20 NYCRR 526.5(e). Shipping and delivery charges by a vendor to a customer for the cost of transporting tangible personal property to the customer are part of the vendor's receipts subject to sales tax when the sale of the property is subject to sales tax. Tax Law §1101(b)(3). Accordingly, Petitioner's pallet and delivery charges are subject to sales tax because they are components of the rental receipts. If Petitioner delivers containers to a farmer at a point outside New York and the farmer is a resident of this State and brings the container into this State for use here, then the farmer's use of the containers in New York would be subject to state and local use tax, unless otherwise exempt. The consideration subject to

use tax includes any charge by Petitioner to deliver the containers to the farmer. Tax Law §1110(a)(A) and (b). Thus, Petitioner's pallet and delivery charges are also subject to State and local use tax.

A charge made by a vendor to a customer that constitutes a deposit on tangible personal property rented or leased is not deemed to be a taxable receipt. 20 NYCRR 526.5(j). However, any deposit not refunded by the vendor constitutes a taxable receipt. Therefore, Petitioner will have to collect sales tax on all deposit fees that it keeps.

The purchase of tangible personal property that is to be resold as such qualifies for the resale exclusion and is not subject to sales or use tax. Tax Law §1101(b)(4). A lease constitutes a sale for purposes of sales tax. *See* Tax Law §1101(b)(5) and 20 NYCRR 526.7(a)(2). Since Petitioner leases containers to its customers, its purchases of containers will qualify for the resale exclusion and will not be subject to sales and use tax, provided the containers are purchased exclusively for resale or re-rental.

DATED: August 19, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.