

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(28)S
Sales Tax
June 24, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031121A

On November 21, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Gilbert Displays, Inc., 110 Spagnoli Road, Melville, NY 11747. Petitioner, Gilbert Displays, Inc., furnished additional information with respect to the Petition on February 11, 2004.

The issue raised by Petitioner is whether its charges for delivery, freight, drayage and dismantling of trade show displays are subject to sales tax.

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

Petitioner is a corporation that manufactures displays for sale or rental to customers to use in trade shows and convention centers throughout the world. In addition, Petitioner contracts with customers to deliver, assemble and disassemble the displays, and to provide any other necessary services for exhibiting the displays at trade shows and convention centers. Petitioner's staff provides some of the required services, while other services are provided by outside contractors and trucking companies retained by Petitioner. When needed, Petitioner may rent furniture and other exhibit components to customers. Petitioner also provides storage at its facilities for customers' displays when not in use at trade shows and convention centers. All of these functions are the sole responsibility, and under the direction of, Petitioner. Petitioner bills each service separately by line item, including trucking, freight handling, drayage, erecting the displays, and the other services noted above. Petitioner represents that its charges for drayage are the cost of moving booths and displays from the trucks to the trade show floor and back. Each exhibitor is billed based upon the subcontractors' and truckers' invoices to Petitioner plus an added administration fee.

Applicable law and regulations

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such

charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party. . . .

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration. . . .

Section 1105 of the Tax Law imposes sales tax, in part, upon:

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

* * *

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

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . and whether or not any tangible personal property is transferred in conjunction therewith, . . .

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. The word *receipt* means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

* * *

(g) Shipping or delivery. (1) Shipping or delivery charges by a vendor to its customer for the cost of transporting tangible personal property to the customer are part of the vendor's receipt subject to tax where the sale of the property is subject to tax or where taxable services were performed on the property. This is so regardless of whether the vendor separately states such charges in a written contract or on an invoice and regardless of whether the vendor ships or delivers the property itself or hires a third party to ship or deliver the property. Similarly, charges by a vendor to its customer for picking up the customer's property upon which the vendor is to perform taxable services are part of the vendor's receipt from the sale of the service subject to tax.

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

Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal

property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Section 527.5(a) of the Sales and Use Tax Regulations provides, in part:

Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

(2) Installing means setting up tangible personal property or putting it in place for use.

Opinion

Petitioner manufactures displays for sale or rental to customers to use in trade shows and convention centers throughout the world. In addition to manufacturing the displays, Petitioner contracts with customers for the shipment and delivery of the displays to a convention site, and for drayage, assembling and disassembling of displays at the convention site. The term *drayage* is defined in Black's Law Dictionary 532 (8th ed 2004) as, "A charge for transporting property." Petitioner represents that its drayage charge to customers is for the cost of moving booths and displays from the trucks to the trade show floor and back.

Petitioner also provides storage at its facilities for customers' displays when they are not in use at trade shows and convention centers. Petitioner's staff provide some of the required services, while other services are provided by outside contractors and trucking companies. Petitioner may also rent furniture and other exhibit components to customers. Petitioner charges its customers for each service separately, billed by line item based upon Petitioner's costs plus an added administration fee.

Petitioner's sales of displays are sales of tangible personal property under section 1105(a) of the Tax Law. Rentals are included within the definition of *sale, selling or purchase*, under section 1101(b)(5) of the Tax Law. Therefore the rental of displays, furniture, and other exhibit components are sales of tangible personal property pursuant to section 1101(b)(5). Petitioner's sales or rentals of this property to customers for use at trade shows and conventions are retail sales subject to sales tax. See section 1101(b)(4)(i) of the Tax Law. Petitioner's charges to customers for the initial delivery, drayage and assembly of the displays, furniture and other

exhibit components are considered to be part of the total charge to the customer for the sale or rental of the display, furniture or other exhibit components. Under the provisions of section 1101(b)(3) of the Tax Law and section 526.5 of the Sales and Use Tax Regulations, such charges are not deductible from the taxable receipt.

Accordingly, Petitioner is liable for collecting and remitting State and local sales taxes on the total receipts, including shipping, drayage and assembly charges, from its sales or rentals of displays, furniture or other exhibit components in any transaction where delivery of the tangible personal property occurs within New York State, regardless of whether the customer's business location is within or outside New York State. However, if delivery of the displays and related property occurs outside New York State, the receipts from the sales or rentals are not subject to State or local sales tax. See sections 525.2(a)(3) and 526.7(e) of the Sales and Use Tax Regulations.

The service of dismantling is not one of the services taxed under section 1105(c) of the Tax Law. Petitioner's charge for dismantling will not be subject to tax if the charge is reasonable in relation to the charges for other services provided, the dismantling service may be purchased from Petitioner separately from the other services provided, and the charge is shown separately on the invoice or receipt given to Petitioner's customer.

Petitioner's charges to customers for storage services provided at a location in New York State are subject to the sales tax imposed under section 1105(c)(4) of the Tax Law.

After the initial delivery and setup of a display which is manufactured for and purchased by customers, Petitioner may additionally provide its customers with delivery, freight handling, drayage, assembling and disassembling of displays at subsequent events. If Petitioner, other than in conjunction with the rental or initial sale of a display, separately offers these services, and the charges for these services are separately stated on its invoices or in its contracts, the taxability of each of the charges is determined separately. The assembly of displays is a service to tangible personal property taxable under section 1105(c)(3) of the Tax Law. Accordingly, Petitioner's charges for this service are subject to sales tax when performed in New York State. Delivery, freight handling, drayage and disassembling are not included among the enumerated services taxable under section 1105(c). See *Buehler Moving Ltd.*, Adv Op St Tx Comm, February 4, 1982, TSB-A-82(1)C; *I & D Inc.*, Adv Op St Tx Comm, May 29, 1985, TSB-A-85(16)S. Accordingly, the charges for each of these services, when sold by Petitioner other than in conjunction with the rental or initial sale of a display to a customer, are not subject to tax if the charge for such service is reasonable; the service may be separately purchased from Petitioner; and the charge is shown separately on the invoice or receipt given to the client. However, if assembly service, which is taxable, is sold with one or more of the other nontaxable services (delivery, freight handling, drayage, disassembling) and the services are provided for a single price, or cannot be purchased separately, the entire charge is taxable. See section 527.1(b) of the Sales and Use Tax Regulations. See also *PricewaterhouseCoopers LLP*, Adv Op St Tx Comm, March 25, 2003, TSB-A-03(11)S; *Salomon & Leitgeb CPA's, LLP*, Adv Op St Tx Comm,

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July 23, 1997, TSB-A-97(44)S. If these additional services for subsequent events are provided outside New York State, the charges are not subject to State or local sales tax. See sections 525.2(a)(3) and 526.7(e) of the Sales and Use Tax Regulations.

In the case of a rental of tangible personal property, each periodic rent payment is considered a separate sale for purposes of Article 28 of the Tax Law. See *Petrolane Northeast Gas Service, Inc. v State Tax Commission*, 79 AD2d 1043 (3d Dept 1981). Therefore, the charges for delivery, drayage and assembly of the rented displays are considered to be a constituent part of the taxable rental. Such charges whether or not separately stated and billed in conjunction with the rental are a part of the taxable receipt for such rental. However, as previously noted, reasonable and separately stated charges for the service of dismantling may not be subject to sales tax under section 1105(c) of the Tax Law.

Dated: June 24, 2005

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