

The Wait Is Over: New York Sales Tax Rulings Are Back

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In this installment of Noonan's Notes, Noonan and Peppas provide an overview of 40 New York advisory opinions on topics ranging from complicated capital improvement issues to the ever-important question regarding the taxability of chocolate-covered marshmallows.

Tax rulings and advisory opinions are often important parts of state tax practice, especially in the sales tax area in which complexities and new fact patterns abound. Taxpayers starting a new business may have questions about how sales tax applies to their sales, or tax practitioners battling an audit may want a higher power to help resolve a dispute without the need for litigation. And for decades, taxpayers and practitioners have used New York's "advisory opinion" process for guidance. But recently, that well has dried up. While New York law ostensibly requires the tax department to issue advisory opinions within 90 days of a taxpayer request,¹ that rule is obeyed

¹N.Y. Tax Law section 171(24).

about as often as bedtimes are in the Noonan household. Indeed, between November 2020 and June 2024, the tax department did not issue one advisory opinion, despite a massive backlog of rulings.

But in June 2024, the floodgates opened, and over the next few months, the tax department issued 40 separate advisory opinions on topics ranging from complicated capital improvement issues to the ever-important question of the taxability of chocolate-covered marshmallows. So, in honor of this momentous development, we decided to cover them all. And since we're in the holiday spirit, we'll separate them into handy categories. Here we go!

Capital Improvements

TSB-A-24(2)S, June 24, 2024: A firm that produced and constructed glass and steel structures and curtain walls that are incorporated into building construction asked if the sale of curtain walls to contractors for installation constituted a capital improvement. A capital improvement is defined as an addition to real property that: (1) substantially adds to the value of the real property; (2) becomes part of the real property or is permanently affixed to the real property; and (3) is intended to become a permanent installation (N.Y. Tax Law section 1101(b)(9)).² The installation of the curtain walls satisfied the three-prong capital improvement test. However, that also meant that the sale of the curtain walls to the contractor were subject to sales tax, since contractors are typically required to pay sales tax on the purchase of building materials in a capital improvement project.

²Timothy P. Noonan, Lance E. Rothenberg, and Joshua K. Lawrence, "The Nuts and Bolts of New York's Sales Tax Rules for Contractors," *State Tax Notes*, June 29, 2015, p. 993.

TSB-A-24(16)S, August 1, 2024: Custom window inserts were not capital improvements because they didn't satisfy the second prong of the capital improvement test. The inserts were not "permanently affixed in such a way that removal would cause material damage to the inserts themselves or to the real property."

TSB-A-24(39)S, August 20, 2024: Contrast that with this one: The installation of a gutter protection system was a capital improvement because of how the system was installed; its removal would damage the underlying real property or the system itself.

TSB-A-24(28)S, August 14, 2024: Floating cement docks did not constitute a capital improvement because the vendor did not install the docks. The taxpayer at issue simply purchased the floating dock from a supplier and installed it. The supplier did not install the dock, so it did not result in the taxpayer purchasing a capital improvement. Therefore, the taxpayer had to pay sales tax.

TSB-A-24(37)S, August 20, 2024: A taxpayer provided repair and installation of HVAC units. It questioned whether a hot water hydronic coil replacement and alterations to duct work in an HVAC system were considered capital improvements and therefore not subject to sales tax. This service satisfied the three-prong test of a capital improvement.

Food Products and Such

TSB-A-24(3)S, June 26, 2024: The department determined that a taxpayer's food removal service was subject to sales tax. The taxpayer disposed of food waste from grocery stores and restaurants. The service was deemed taxable as a property maintenance service. Because the waste has no value, the service could not qualify as a tax-exempt transportation service. I guess the tax department doesn't consider expired boxes of Fruit Loops to have value.

TSB-A-24(1)M,(1)S, June 11, 2024: The department received an inquiry from a taxpayer about whether its product was considered a tobacco product and therefore subject to the excise tax on tobacco products. The taxpayer's product was similar to an electronic cigarette. The department determined that when the product was sold as separate pieces — battery, vapor

cartridge, or tobacco leaf capsule — the tobacco capsule was subject to excise tax, and the vapor cartridges were subject to supplemental vapor tax. But when sold as one item altogether, the product was subject to both taxes.

TSB-A-24(10)S, July 30, 2024: A question was asked whether sales of energy enhancing gels and chews were subject to sales and use tax. Such gels and chews were sold for consumption before, during, or after intense physical activity and exercise. The department concluded that if the gels were packaged, labeled, and sold as dietary foods or health supplements, they were exempt from sales and use tax under the N.Y. Tax Law section 1115(a)(1) exemption.

TSB-A-24(15)S, July 30, 2024: The marshmallow saga continues. Chocolate-covered marshmallow twists were taxable as candy or confectionery. We have it on good authority that this one was requested by a retired accountant who obviously had too much time on his hands.

TSB-A-24(19)S, August 2, 2024: A container can cause otherwise nontaxable baked goods to become taxable. Here, the department was asked whether a taxpayer who sells prepackaged baked goods to New York residents was subject to sales tax. Since the baked goods were sold individually wrapped, labeled, and in a nonheated state, they were not subject to sales tax generally. But when the customers had the choice to purchase brownies in a keepsake tin for an additional cost, the purchase as a whole was taxable.

TSB-A-24(29)S, August 14, 2024: A taxpayer asked if its coffee-based beverage mix was subject to sales tax. The beverage mix was to be sold unheated and mixed with water before consumption as an alternative to normal coffee. Food and beverage items are usually exempt from sales tax, unless they fall under a specific exception, so this beverage mix was determined to be exempt from sales tax. But if the beverage mix was sold by a restaurant or through a vending machine, instead of for off-premises consumption, it would be subject to tax.

Software/IT Questions

TSB-A-24(4)S, June 26, 2024: A taxpayer asked the department whether the secure hosted exchange service it subscribed to for its business email was subject to sales tax. The email service

included unlimited mailbox storage, email security protection, antivirus protection, and live support. Though email service qualifies as “telephony” or “telegraphy service” and would normally be taxable, the Internet Tax Freedom Act prohibits states from imposing taxes on internet access. Therefore, the department determined electronic mail services were included in the ITFA’s definition of internet access and thus not subject to sales tax.

TSB-A-24(6)S, July 15, 2024: Mobile and web analytics services such as gathering and storing customer data and preparing customized reports were taxable information services. A taxpayer who provided data gathering and storage services to create reports for customers sold services that met the definition of taxable information services, the department concluded.

TSB-A-24(8)S, July 16, 2024: The department analyzed whether charges for use of a company’s web portal were subject to sales tax. The taxpayer’s customers were property owners or building management companies who used the portal to help with the application process for the purchase, lease, or refinancing of residential property. The department viewed the use of the online portal as a software service, so the taxpayer’s charges for use of the portal were taxable.

TSB-A-24(9)S, July 30, 2024: The department questioned the taxability of sales related to a web-based, electronic trading system used to trade currencies on the foreign exchange market. The conclusion was that tax should be imposed on receipts from such sales, including annual license fees and transaction charges. But charges for user/transaction support and any other charges for integrating components into the software were not taxable if they were reasonable and separately stated.

TSB-A-24(12)S, July 30, 2024: A taxpayer’s IT monitoring services were deemed taxable protective services, since they were cybersecurity services used to detect and respond to cyberattacks. The taxpayer’s other service that helps to create, oversee, and implement cybersecurity policies for its customers was also deemed a taxable protective service.

Procedural/Computational Questions

TSB-A-24(1)C,(11)S, July 30, 2024: A taxpayer asked if sales tax should be imposed on its receipts from the sales and installations of commercial lighting fixtures in a number of different scenarios. Most of the questions related to different pickup or delivery methods for fixtures originating in a foreign country. TL;DR: If the seller or purchaser arranges for shipping via common carrier, delivery is deemed to be in New York. If the purchaser picks up the product or arranges for a private carrier to pick it up, the sale occurs at the pickup point. We’ve grappled with a number of these questions in recent years, especially on sales of artwork and other high-value items. Care must be taken to follow the rules.

TSB-A-24(5)S, June 27, 2024: The department concluded that a payment reduction granted by an auction house to a purchaser who placed a successful irrevocable bid on an item was *not* excluded from the item’s sales price for sales tax purposes. The issue here was whether the reduction was a discount or just an expense of the seller. The department held it was the latter.

TSB-A-24(14)S, July 30, 2024: The department was asked to clarify the statute of limitations on refund claims of sales tax filers who participate in the PromptTax program. It was determined any refund cannot exceed the portion of the tax paid within the three-year period immediately preceding. So, any payments made more than three years before the filing of a refund claim are barred by the statute of limitations.

TSB-A-24(21)S, August 2, 2024: The department considered whether a taxpayer’s purchase of motor parts was exempt from state and local sales tax. The taxpayer was a business in the United Kingdom that purchases motor parts from suppliers in the United States and then resells them in the United Kingdom. Because the purchases were for resale, they were not subject to sales tax, but the taxpayer must furnish the suppliers with a completed resale certificate.

TSB-A-24(27)S, August 6, 2024: A parking garage operator in New York City petitioned for an advisory opinion on whether its furnishing of electronic receipts to customers of its parking services and maintenance of digital records satisfied the requirements imposed by N.Y. Tax

Law section 1142-A(b)'s special recordkeeping provisions for parking garage operators in Manhattan. The operator was implementing a new phone app that would allow customers to reserve and pay for parking on their phones and then provide digital receipts. Because of the "factual nature of the inquiry," the department couldn't reach a conclusion about the operator's app and practice.

Information Services

TSB-A-24(23)S, August 2, 2024: Inquiring minds needed to know: Personalized astrological birth chart reading services were deemed not to be taxable information services. And because the services would not be taxable as entertainment services if provided in print format, they were also not subject to tax in the digital format in which they were sold.

TSB-A-24(31)S, August 14, 2024: The department was asked to determine whether receipts from providing an online directory, which lists persons who represent claimants seeking disability benefits, were subject to tax. The directory itself was free to claimants, but representatives who wanted to be listed in the directory must pay the taxpayer a fee. This service was held to be nontaxable since advertising services are exempt from the tax on information services under N.Y. Tax Law section 1105(c)(1).³

TSB-A-24(33)S, August 16, 2024: For information services, the invoice address is not controlling for purposes of locating the sale if the seller has information that the customer is using the service in New York. Sales tax must be collected on receipts from taxable services delivered in the state, regardless of the address on the invoice.

Vehicles

TSB-A-24(17)S, August 1, 2024: The taxpayer bought a vehicle in Maine while there on a temporary basis for work and then brought it back to New York a year or so later. Obviously, sales tax was due when the taxpayer registered it in New York. And worse, because Maine doesn't offer a credit for New York sales taxes on vehicles

brought to Maine, New York wouldn't allow a credit for the tax paid by the taxpayer to Maine. (Pro tip: If the taxpayer gifted the vehicle to a spouse or family member before bringing it to New York, there would've been no sales tax due upon registration by the new owner because the "purchase price" of the vehicle would've been zero.)

TSB-A-24(25)S, August 2, 2024: A taxpayer asked if sales or use tax was due on the transfer of a lease of a car, when the monthly installment payment assumed included a portion of the sales tax calculated at the start of the lease. Sales tax was due upon assumption of the lease for the remainder of the balance due of the lease term.

TSB-A-24(34)S, August 20, 2024: The department determined whether a particular model of motor coach qualified as an exempt omnibus for sales tax purposes. This one was easy. A qualifying omnibus measures at least 40 feet long; the taxpayer's motor coach was only 35 feet long and therefore did not qualify.

Medical Issues

TSB-A-24(18)S, August 1, 2024: A taxpayer asked for an advisory opinion on whether receipts from the sale of its multimode simulator were subject to sales tax. The simulator was an electrotherapy device used to treat and alleviate chronic and acute pain. As the product was considered medical equipment or supplies, it was exempt from sales tax because it was not purchased at retail for use in performing medical services for compensation — it was simply sold to patients and not physicians.

TSB-A-24(22)S, August 2, 2024: A taxpayer asked whether purchases of blood products by a veterinarian for use in surgical procedures were subject to sales tax. It was concluded that they were exempt from tax except when used by a licensed veterinarian to perform veterinary services on livestock or poultry used in the production for sale of tangible personal property by farming.

TSB-A-24(35)S, August 20, 2024: A taxpayer asked if the sale of prescription medication originally intended for use by humans but dispensed by a pharmacy instead for use on an animal was taxable. Drugs and medicine intended for use by humans is exempt from sales tax, and

³ See TSB-M-10(7)S (July 19, 2010).

similarly, medication is exempt from sales tax when it is purchased by a licensed veterinarian or farmer in the production for sale of tangible personal property by farming *only*.

Miscellaneous Sales/Services

TSB-A-24(1)I,(7)S, July 16, 2024: A taxpayer inquired whether her travel planning and concierge services were subject to sales tax and personal income tax. The services include group travel packages for solo female travelers, and the taxpayer serves as a group leader and concierge to the travelers. Since N.Y. Tax Law section 1105(c) imposes sales tax on a select list of services that does not include such travel services, sales tax should not be imposed on these travel planning services. However, the taxpayer's fees for her services were reportable as gross income for federal tax purposes, so they must be included in New York adjusted gross income and are subject to state personal income tax.

TSB-A-24(13)S, July 30, 2024: The department considered whether a service that provides transportation to railroad employees was subject to sales tax. Transportation services provided in New York state are taxable generally, but only if the service begins and ends in New York.

TSB-A-24(20)S, August 2, 2024: Moving a customer's furniture to their premises to facilitate the customer's preparation for a corporate event or conference is not a taxable service. But don't "install" any property and don't design the layout. If you do, you must charge sales tax.

TSB-A-24(24)S, August 2, 2024: Tree consulting services (yes, apparently this is a thing) involve taking an inventory of a property, documenting the tree and shrub species and conditions, and valuing the plants inventoried. The services do not include the maintenance and installation of trees or shrubs. The tree consulting services at issue were determined to be taxable under the taxability of the "maintenance, servicing or repair of real property" of N.Y. Tax Law section 1105(c)(5), unless performed solely as part of a capital improvement.

TSB-A-24(26)S, August 5, 2024: The sale of energy used for residential purposes in an apartment building was deemed eligible for the reduced state sales tax rate if the taxpayer furnished his energy suppliers with a certification

of residential use of energy purchases for each electric or gas meter.

TSB-A-24(30)S, August 14, 2024: This was a complicated one. The questions were whether propane delivered to tanks for heating a taxpayer's detached garage was exempt from sales tax, whether use of a detached garage was considered residential use, and whether propane delivered into a tank for running a backup generator used to power the taxpayer's home was exempt from sales tax. The propane delivered in either situation was deemed exempt from state — but not local — sales tax, the taxpayer's property was his primary residence, and no trade was conducted on the property, so it was obviously residential use.

TSB-A-24(32)S, August 14, 2024: A taxpayer petitioned for an advisory opinion on whether its sales of repairs to jewelry and watches were taxable. Sales tax is imposed on activities that relate to "maintaining, servicing or repairing" tangible personal property under N.Y. Tax Law section 1105(c)(3). The repair of jewelry and watches falls under that statute.

TSB-A-24(36)S, August 20, 2024: The department considered whether charges for admission to "mystery" or "escape" rooms were subject to sales tax. The admissions were found to be taxable since they fell within the definition of amusement.

TSB-A-24(38)S, August 20, 2024: A taxpayer is an arts and crafts store that sells memberships to customers. The department considered whether the sale of memberships that allow purchasers to make discounted purchases was taxable if the memberships were sold to tax exempt organizations. Sales to tax exempt organizations are not subject to sales tax.

TSB-A-24(40)S, August 21, 2024: Office furniture disassembly, removal, and disposal is taxable real property maintenance. "Maintaining, servicing and repairing" relates to keeping real property in good condition and includes trash removal and disposal of refuse. ■