

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

TSB-A-84(14)S
Sales Tax
May 17, 1984

This advisory opinion supersedes
TSB-A-84(14)S dated April 10, 1984
which should be destroyed.

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840315B

On March 15, 1984 a Petition for Advisory Opinion was filed by Key Capital Corporation, 57 River Street, Wellesley Hills, Massachusetts 02181.

The issue presented is whether any sales tax liability would arise from a proposed sale and lease-back transaction.

The factual basis for the present Advisory Opinion, as submitted by Petitioner, is as follows:

"Petitioner Key Capital is a corporation which is engaged in the business of leasing automobiles to customers. Each of the automobiles which are the subject of the proposed sale-leaseback transaction described below is now owned by Key Capital and is now leased pursuant to a true lease transaction by Key Capital as lessor and such customer as lessee.

Key Capital purchased each automobile for the purpose of leasing such automobile to a customer, and at the time of purchase Key Capital supplied a Resale Certificate (Form ST-120) to the seller. When each customer pays lease rentals to Key Capital pursuant to the applicable lease agreement, Key Capital collects New York State sales tax imposed on the lease payments and remits such tax to New York State.

Subsequent to the initial acquisition of the automobiles, Key Capital determined to enter into a sale-leaseback of the automobiles with L in a true lease transaction. Under the proposed sale-leaseback,

- (1) Key Capital will sell each automobile to L, subject to an existing lease between Key Capital as lessor and a customer as lessee, as described above, and
- (2) simultaneously L will lease back such automobile to Key Capital. Pursuant to the documents evidencing the leaseback, Key Capital will be both a lessee of L, obligated to pay rent to L, and a sublessor of the customer, entitled to the rents payable by such customer.

Key Capital intends to use the automobiles acquired pursuant to the leaseback solely in its leasing business, pursuant to which at all times it will hold the automobiles subject to the pre-existing leasing to customers, and in the event such customer lease expires or otherwise terminates prior to the term of the leaseback for any reason it will either re-lease such automobiles or terminate

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the leaseback in respect of such automobile; in no event does it intend itself to be an end user of the automobiles. The foregoing proposed sale-leaseback transaction with L will not affect the rights or obligations of the customers under the pre-existing leases, and the customers will not be parties to such transaction. In all circumstances, Key Capital's obligation to pay rent to L will be a full recourse obligation and will not be subject to Key Capital's receiving rent payable by the customers. Key Capital may or may not have termination options pursuant to which, if the applicable customer defaults under its lease arrangement, Key Capital would be entitled to terminate the portion of the lease between it and L related to the affected automobiles, upon payment by it as liquidated damages of additional rent in accordance with certain formulary clauses contained in the lease.

The proposed sale by Key Capital to L of the automobiles, in which Key Capital will transfer title to each automobile to L, will constitute a sale for purposes of local law and of Federal income tax law. The proposed lease by L to Key Capital of the automobiles, in which L will transfer the right to possession of each automobile to Key Capital (subject to the pre-existing leases with the customers), will constitute a lease for purposes of local law and of Federal income tax law.

L will furnish a Resale Certificate to Key Capital in respect of the proposed sale. In addition, Key Capital will furnish a Resale Certificate to L in respect of the proposed leaseback.

After consummation of the proposed sale-leaseback between Key Capital and L, Key Capital, as sublessor, will continue to collect and remit New York State sales tax imposed on the lease rentals paid by the customers to Key Capital."

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property in New York. The term "sale" is defined as "any transfer of title, or possession or both . . . , rental, lease . . . for a consideration" Tax Law, § 1101(b)(5) The term "retail sale" is defined, in relevant part, as "a sale of tangible personal property to any person for any purpose, other than (A) for resale as such"

The transfer by Key Capital of title to the automobiles to L, and the leasing of such vehicles back to Key Capital, both constitute sales within the meaning of Section 1101(b)(5) of the Tax Law. Such sales will be made for the sole purpose of resale as such. Thus, the receipts from such sales are not subject to the tax imposed under section 1105(a) of the Tax Law, nor to any locally imposed sales taxes imposed pursuant to the authority of Article 29 of the Tax Law. A Resale Certificate should be provided in each instance, as set forth above.

DATED: March 22, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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