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Letter Ruling 88-9: Leasing of Dock Space

May 16, 1988

You request a ruling on the application of the sales tax to leasing of dock space at the ("Marina") by ("Corporation"). The Marina is composed of two types of piers, fixed piers and floating piers. Specifically, you ask whether the leasing of dock space alongside the floating piers is a "retail sale" of tangible personal property under Chapter 64H of the General Laws and thus subject to sales tax. For the reasons stated below, we rule:

1. The floating piers under the facts described in this ruling are not "tangible personal property" under Chapter 64H, but realty.
2. The Company's leasing of dock space alongside the floating piers is not a "retail sale" of tangible personal property subject to sales tax under Chapter 64H of the General Laws.

Facts

The Corporation represents the relevant facts as follows. This ruling is conditioned on the continued existence and accuracy of all the facts which the Corporation represents.

The Corporation is a Massachusetts corporation that owns a 120 year lease on the portion of the Marina consisting of fixed and floating piers. The Corporation's lease of the Marina cannot be terminated by the Corporation or the owner of the Marina. There are approximately 120 dock spaces in the Marina, one-third of the dock space is alongside the floating piers. The Company intends to lease dock space alongside the fixed and floating piers for terms of 99 years. The leases for dock space alongside the fixed and floating piers are the same.

Each slip lease will give the lessee the right to use one designated slip during the season for ninety-nine consecutive years. A season runs from March 1 through November 30. The dock spaces are not used by the lessees from December through February. A lessee can use a dock space only for private pleasure vessels; commercial use or commercial vessels are prohibited.

The price paid for each slip lease is the total rent payable for the ninety-nine year term of the lease. The price must be paid in full at the time of the execution of the slip lease. The slip lease cannot be terminated for any reason, except under the "termination conditions" stated in the lease. Any one of the "termination conditions" must occur within 10 years after the execution of the slip lease. All dock spaces will have access to electricity and water. Electrical and water outlets are provided at various places along the pier system. Each lessee is entitled to hook up to such outlets at the location nearest to a lessee's dock space. In addition, a lessee, at its own expense, may install electricity and water outlets on the piers adjacent to its dock space.

The Marina's pier system of fixed and floating piers along with the location of each designated dock slip has been recorded with the local Registry of Deeds. The Corporation states that once the floating piers are in place it does not intend to remove or relocate them, except for repairs or maintenance or under circumstances where removal is necessary to protect the piers. The Corporation may relocate, alter, change, add to, or subtract from the present pier system as recorded in the Registry of Deeds only under the conditions provided for in the slip lease. Any changes will cause the "Dock Plans" to be revised, and the revisions recorded in the Registry of Deeds. If a

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change occurs, a lessee will be assigned a new dock space. The fixed and floating piers are subject to a mortgage from a Massachusetts bank.

The fixed piers are attached to the shore and are supported by wooden pilings driven to refusal into the ocean floor. The floating piers are attached to the fixed piers and/or wooden pilings by means of a movable wooden collar and/or chains. They are supported from underneath by buoyant floats. The floating piers are not bolted to any structure and are easily removable. The type of attachment described above allows the floating piers to shift with the tide and provides for continuous water level dock space.

Discussion

The question presented is whether the floating piers attached to the fixed piers by the Corporation are tangible personal property or realty. The facts and circumstances surrounding the attachment of the floating piers to the fixed piers warrant our conclusion that the Corporation intends to affix permanently the floating piers to the fixed piers. We rule that these floating piers and the fixed piers to which they are attached are realty for sales tax purposes.

Massachusetts imposes a tax on sales at retail of "tangible personal property," G.L. c. 64H, §2. A "sale" is any transfer of title or possession or both of tangible personal property. G.L. c. 64H, § 1 (12) (a). It includes the transfer of title or possession of tangible personal property by lease. *Id.* "Tangible personal property" is "personal property of any nature consisting of any produce, goods, wares, merchandise and commodities...." G.L. c. 64H, § 1 (15). Sales of realty are not subject to sales tax.

The Department ordinarily looks at all the facts when considering the application of the sales tax to the leasing of space alongside a floating dock versus the leasing of a floating mooring. In Letter Ruling 82-30, the Department ruled that the leasing of space alongside a floating pier attached to the ocean bottom adjacent to the taxpayer's land was not subject to sales tax. Here the floating piers were realty. The intent of the taxpayer was to attach a permanent structure to its land so as to provide access to the water. In Letter Ruling 80-32, the Department ruled that the leasing of floating moorings, assembled by the taxpayer and attached to the ocean bottom in a local harbor, was subject to sales tax. Here the floating moorings were tangible personal property. The intent of the taxpayer was to provide a temporary mooring for its customers.

In the present ruling, we must look to all the factors surrounding the attachment of the floating piers to the fixed piers to determine whether the floating piers are realty or tangible personal property. Structurally the floating piers and the fixed piers provide individuals with access to the waterways. The fact that the floating piers are attached to the fixed piers by movable attachments does not necessarily preclude our classification of the floating piers as realty. The type of attachment used by the Corporation provides its lessees with continuous water level access to their vessels, which is consistent with the Corporation's intent of providing its lessees with long term docking space.

Also, the length of the slip leases, the attachment of the floating piers to upland water and electricity, the recording of floating piers and their adjacent berths in the local Registry of Deeds, the Corporation's statement that the floating piers will not be removed or relocated except for repairs or under circumstances to protect the piers, and the fact that the floating piers are subject to a mortgage provide adequate proof of the Corporation's intent to affix permanently the floating piers. We rule that the floating piers are realty for purposes of the sales tax. The Corporation's leasing of dock space alongside the floating piers is not a "sale of tangible personal property" subject to sales tax.

Very truly yours,
Stephen W. Kidder,
Commissioner of Revenue
May 16, 1988
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