

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

TSB-A-05(26)S
Sales Tax
June 22, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S041228A

On December 28, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Karen Fredrickson, 1000 Woodbury Road, Suite 206, Woodbury, New York, 11797. Petitioner, Karen Fredrickson, provided additional information pertaining to the Petition on March 15, 2005.

The issue raised by Petitioner is how Petitioner's client determines the basis on which use tax is to be computed on the client's use of a vessel as described below.

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

Petitioner's client, a New York limited partnership (Partnership), is having a vessel custom built for it and outfitted at a location in New Jersey. Partnership will contract various aspects of the vessel's construction and outfitting to a number of persons. Partnership will take delivery of the vessel in New Jersey. The vessel will be registered and used by Partnership in New York State in the business of entertaining and catering for special events.

Partnership anticipates remitting the applicable New York State sales or use tax at the time the vessel is registered in New York State. Petitioner asserts that, at the time of registration, the fair market value of the vessel will be approximately \$1,500,000.

Applicable law and regulations

Section 1101 of the Tax Law provides, in part:

Definitions (a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) 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:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts 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 or transportation . . . is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. . . .

(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. . . .

Section 1105 of the Tax Law provides in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . 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:

* * *

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property. . . .

* * *

(7) Interior decorating and designing services, (whether or not in conjunction with the sale of tangible personal property), by whomsoever performed, including interior decorators and designers, architects or engineers; notwithstanding the foregoing, such services shall not include services which consist of the practice of architecture, as defined in section seventy-three hundred one of the education law, or the practice of engineering, as defined in section seventy-two hundred one of the education law, if the services are performed by an architect or engineer having a license or permit under the education law.

Section 1110 of the Tax Law provides, in part:

Imposition of compensating use tax (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . . (C) of any of the services described in paragraphs (1), (7), and (8) of subdivision (c) of section eleven hundred five of this part, (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five of this part have been performed. . . .

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of . . . percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one, . . .

* * *

(f) For purposes of clauses (C), (D), and (E) of subdivision (a) of this section, the tax shall be at the rate of . . . percent of the consideration given or contracted to be given for the service, including the consideration for any tangible personal property transferred in conjunction with the performance of the service and also including any charges for shipping and delivery of the property so transferred and of the tangible personal property upon which the service was performed as such charges are described in paragraph three of subdivision (b) of section eleven hundred one.

Section 1111 of the Tax Law provides, in part:

Special rules for computing receipts and consideration

* * *

(b) Tangible personal property, which has been purchased by a resident of New York state outside of this state for use outside of this state and subsequently becomes subject to the compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided, however:

(1) That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this state, such property shall be taxed on the basis of current market value of the property at the time of its first use within this state. The value of such property, for compensating use tax purposes, may not exceed its cost.

Section 1118 of the Tax Law provides, in part:

Exemptions from use tax The following uses of property and services shall not be subject to the compensating use tax imposed under this article:

* * *

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

Opinion

Partnership is a person for sales tax purposes. See section 1101(a) of the Tax Law. Partnership appears to be a resident of New York State for sales tax purposes who is having a vessel built and outfitted in New Jersey by third party contractors. Once built, the vessel will be brought to New York State for use by Partnership in a business or trade in the State. Partnership is, in effect, purchasing tangible personal property and services in connection with the construction and outfitting of a vessel which will be used in the State.

If a resident of New York State purchases tangible personal property outside of the State, such resident will owe a compensating use tax upon bringing the tangible personal property into the State for use. Accordingly, upon bringing the vessel into New York State, Partnership is liable for compensating use tax. The basis on which the use tax will be computed is the total cost of the vessel and tangible personal property used to outfit the vessel. Such cost consists of

Partnership's purchase price of the vessel and of all tangible personal property which becomes part of or is used to outfit such vessel, as well as the purchase price of any services taxable under section 1105(c)(2), (3) and (7) of the Tax Law performed on the vessel or related tangible personal property. See section 1110(a)(A), (C) and (D) of the Tax Law. Such amounts shall include any transportation costs or expenses included on invoices for tangible personal property or those services enumerated in section 1105(c)(2), (3) and (7) of the Tax Law. See sections 1101(b)(3) and 1110(b), (f) of the Tax Law.

It is noted that if the property was used outside New York State for more than 6 months prior to its use within this State, the use tax is based on the current market value of the property at the time of its first use within this State. The value of such property, for compensating use tax purposes, may not exceed its cost. See section 1111(b)(1) of the Tax Law.

Partnership may apply for a credit for the amount of any New Jersey sales tax paid (without any right to a refund or credit) on tangible personal property or the above enumerated services against the amount of New York State use tax owed or paid on the use of such property or services. Under no circumstances can the credit exceed the amount of tax due and result in a refund. See section 1118(7) of the Tax Law and Publication 39, entitled *A Guide to New York State Reciprocal Credits for Sales Taxes Paid to Other States* (8/04) for information on the calculation of this reciprocal credit.

DATED: June 22, 2005

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