

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

TSB-A-86(4)S  
Sales Tax  
January 9, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841224A

On December 24, 1984 a Petition for Advisory Opinion was received from Browning-Ferris Industries, Inc., 14701 St. Mary's Street, Houston, Texas 77079.

The issue raised is whether the transfer of tangible personal property between related corporations constitutes a retail sale subject to sales tax where there is no exchange of consideration and all or a majority of the stock of the transferor and transferee corporations is owned, directly or indirectly, by a third corporation.

Petitioner, a publicly held Delaware corporation, owns all or a majority of the stock of several New York and foreign corporations, some of which own all or a majority of the stock of other New York and foreign corporations. Petitioner refers to the corporations of both tiers as "Subsidiaries."

Petitioner states that regional operations in New York State may require a Subsidiary to transfer possession and/or title to some or substantially all of its tangible personal property to another Subsidiary or other Subsidiaries. Several Subsidiaries may engage in such transfers at or about the same time.

Petitioner claims these transfers would all be without an exchange of consideration; in no case would the transferor Subsidiary receive, or the transferee Subsidiary pay or provide, anything of value in exchange for the transfer of possession and/or title to the tangible personal property. Transfers of possession would not be documented by a lease or any similar instrument. Title transfers would be documented by bills of sale or assignment or, in the case of vehicles, as provided under the Vehicle and Traffic Law.

Tax Law 1101(a) defines the term "person" to include a corporation. The term retail sale (which includes rentals) is defined, in relevant part, as follows:

(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) and (5) of subdivision (c) of section eleven hundred five. . .  
Tax Law 1101(b)(4)(i).

For the purpose of rendering this Advisory Opinion it is assumed that the transactions at issue do not involve property referred to in (A) and (B) of the foregoing paragraph, nor property the receipts from which are exempt from the sales tax under Section 1115 of the Tax Law.

The Tax Law provides for the exclusion of certain specific corporate and intercorporate transactions from the definition of "retail sale", as follows:

- (A) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the Law of New York or any other jurisdiction.
- (B) The distribution of property by a corporation to its stockholders as a liquidating dividend.
- (D) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock. (Tax Law 1101(b)(4)(iii)).

Since Petitioner makes no mention of a merger, consolidation, liquidating dividend or issuance of stock upon the organization of a corporation, it is assumed for purposes of this Advisory Opinion that the provisions of Tax Law section 1101(b)(4)(iii) are not here relevant.

The sales and use tax regulations further define the words sale, selling or purchase to mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration. (20 NYCRR 526.7(a)(1)). The regulations exclude from the term "retail sale" the transfer of property to a corporation, as a contribution to capital, at a time other than its organization, without the issuance of stock or other consideration. (20 NYCRR 526.6(d)(8)(ii)).

Accordingly, if entries on the books of the corporations involved document the transfer of tangible personal property, as described above, as a legitimate contribution to capital without issuance of stock or other consideration, such transfers are not subject to tax because they are transfers without issuance of stock or other consideration and, therefore, not retail sales within the meaning and intent of regulation sections 526.6 and 526.7. In this regard, it should be noted that the mere transfer of possession without the transfer of title will not be considered a contribution to capital.

The sale and use tax regulations impose special rules on certain other transactions between corporations, as follows:

"The sale of property by one related corporation to another related corporation is a retail sale, and taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred.

Example 11: On February 1, 1976, Corporation A transfers to its subsidiary, Corporation B, ten 1975 trucks, for a total of \$40,000. The fair market value of the trucks is \$100,000. Corporation A has made a taxable retail sale to Corporation B in the amount of \$100,000. (20 NYCRR 526.6(d)(8)(i))."

Pursuant to regulation section 526.7(b) the term consideration includes not only monetary consideration but also exchange, barter, the rendering of any service, or any agreement therefor. Petitioner states that several of its subsidiaries intend to make transfers of property at the same time without an exchange of consideration. Such transactions will constitute barter or exchanges where the property received is deemed consideration for the property given, and sales tax is due from each subsidiary based on the fair market value of the property received. See: Lake Steel, Inc., State Tax Commission Advisory Opinion, Nov. 2, 1983, TSB-A-83(47)S.

In the following rulings the Tax Commission found evidence of consideration, although conventional accounting records such as vouchers, invoices or cash disbursements were not prepared.

In the Matter of E.J. Delmonte Corp., Decision of the State Tax Commission, Nov. 9, 1984, TSB-H-85(34)S, the petitioner argued that the acquisition of certain assets from a related corporation represented a contribution to capital. However, it was held that the issuance of a large block of capital stock to said corporation on the same day was consideration for the property transferred. It was further concluded that the minimal amount paid for the shares did not reflect the true taxable value of the assets.

The establishing of an account receivable by a subsidiary from its parent was determined to constitute consideration for the transfer of assets in the Matter of Augsbury Corporation, State Tax Commission Advisory Opinion, Nov. 10, 1981, TSB-A-81(54)S.

In Manufacturers Hanover, N.A., Decision of the State Tax Commission, Sept. 28, 1983, TSB-H-83(208)S, disbursements claimed to be principal and interest payments against a loan were, absent a written agreement to that effect, held consideration paid for assets received from a related corporation.

Tax Law section 1101(b)(5) defines a "sale" to include any "rental", which, in turn, is defined by the sales tax regulations to mean "all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to property." (20 NYCRR 526.7(c)(1)). The transfer of possession may be "actual or constructive" and may consist of "the right to use, or control, or direct the use of" the transferred property. It is not essential for a transfer of possession to include the right to move the tangible personal property which is the subject of a rental, lease or license to use. (20 NYCRR 526.7(e)(4) and (5)). Monetary consideration for such transactions includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay. (20 NYCRR 526.7(b)).

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With regard to rentals between related corporations, the Tax Commission concluded in Lake Steel that an oral agreement by a parent corporation to provide all necessary maintenance and repair services to equipment rented free of charge from a subsidiary constituted consideration, and that therefore the transaction was a sale subject to tax.

In Coyne Industrial Laundry, Decision of the State Tax Commission, March 18, 1983, TSB-H-83(76)S, transactions between related corporations were accomplished solely by bookkeeping entries. It was ruled that charges described as management fees or end-of-year adjustments were in effect consideration for supplies or services received from a subsidiary. The Tax Commission (citing Matter of 107 Delaware Ave. Associates, Decision of the State Tax Commission, March 6, 1981, TSB-H-81(71)S, annulled 99 AD2d 29, revd 64 NY2d 935) reached a similar conclusion in Matter of Central Markets, Decision of the State Tax Commission, April 9, 1982, TSB-H-82(85)S.

Furthermore, Petitioner is referred to Section 1132 of the Tax Law and, specifically, to subdivision (c) which states, in part, that "it shall be presumed that all receipts for property or services of any type mentioned in subdivision (a), (b), (c) and (d) of section eleven hundred five, . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer".

Finally, it should be noted that if a substantial part of the business assets of one related corporation are transferred to another, other than in the ordinary course of business, the transferee must at least ten days before taking possession of the property, or paying therefor, file with the Tax Commission a "Notification of Sale, Transfer or Assignment in Bulk" and pay such taxes as may be determined due under the Tax Law. (See: Part 537 of the Regulations of the State Tax Commission).

DATED: January 9, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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