

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

TSB-A-88 (14) S
Sales Tax
February 8, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870804B

On August 4, 1987, a Petition for Advisory Opinion was received from C.K. Industries Corp., 67 Meadow Road, P.O. Box 128, Montrose, New York 10548.

Petitioner is a trucking firm which transports materials for building contractors, building supply yards etc.

The issue raised is whether, under the following facts or examples, Petitioner is required to collect sales tax.

- 1) Petitioner contracts to haul material for a contractor to a job site or from a job site. The contract price is based on an hourly rate. Petitioner maintains an employee who, at the job site, determines the access to the job sites and insures that the trucks are not overloaded or abused when loading and dumping.
- 2) Same facts as #1, except that the material is purchased by Petitioner. There is no profit added to the cost of material, specifically separate from the hourly rate. The material is delivered to a building supply yard or to a job site for a building contractor.
- 3) Petitioner contracts to move material from a job site to a plant site. The contract price is based on a price per yard or ton. The material is owned by Petitioner's customer.
- 4) Petitioner contracts to haul material and sell it to his customer. The contract provides for a combined price based on the yard or ton. Petitioner is buying material and selling it to his customer who in turn is reselling the material.
- 5) Petitioner contracts to haul material to a building contractor who is acting as a general contractor for an exempt organization or a governmental entity. The pricing for this type of contract is by the yard or ton and the material is owned by the general contractor.
- 6) Petitioner contracts to truck for an exempt organization. The contract price is based upon the yard or ton.
- 7) The same as #6, but the material is owned by a contractor who has a direct payment permit.
- 8) Petitioner contracts to truck material for an exempt organization. The contract price is based upon an hourly rate.

- 9) The same as #8, but for a contractor who has a direct payment permit.

The following sections of the sales tax regulations apply:

§541.2(p) Rental, lease and license to use. (1) The terms rental, lease and license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. (Emphasis supplied) Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

- (i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;
- (ii) maintains the right to hire and fire the drivers and operators;
- (iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;
- (iv) retains responsibility for the operation of the equipment or vehicle; and
- (v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

§526.5(g) Transportation. (1) The cost of transportation of tangible personal property, sold at retail, which is separately stated in written contract, if any, and on the bill rendered to the purchaser is excluded from the receipts subject to the tax.

§527.1(a) Imposition. The sales tax is imposed on the receipts from every retail sale of tangible personal property

§526.6(c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

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Pursuant to section 541.2(p) of the Sales Tax Regulations, the situations as described in paragraphs 1, 3, 5, 6, 7, 8 and 9 are exempt transportation services if Petitioner supplies the driver or operator and retains dominion and control over the vehicle or equipment. Transportation charges do not have to be evidenced by any exemption certificates, however, Petitioner must be able to substantiate that it falls within the exclusion described by section 526.5(g).

Of course, if Petitioner fails to supply the driver or operator or fails to retain dominion and control over the vehicle or equipment, then the transaction is a taxable rental, lease or license to use.

In situations 2 and 4, Petitioner is purchasing material for resale. In such instances, Petitioner may give its supplier a Resale Certificate and obtain a Resale Certificate from its customer (situation 4) or collect the tax on its subsequent sale (situation 2).

DATED: February 8, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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