

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

TSB-A-99(2)S  
Sales Tax  
January 19, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980713A

On July 13, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Walter Helly, 91 Central Park West, New York, New York 10023.

The issue raised by Petitioner, Walter Helly, is whether the compensating use tax applies with respect to tangible personal property purchased by a New York State resident in a foreign country under the circumstances described below.

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

A New York State resident purchased goods in a foreign country. Petitioner states that the resident paid a "sales/purchase tax" imposed by the foreign country at the time of purchase. The New York State resident declared the goods to United States customs in an airport located in New York State. Once the goods were through customs the New York State resident arranged to have the goods shipped from New York to a resident of another state as a gift.

**Applicable Law**

Section 1101(b)(7) of the Tax Law defines the term "use", as follows:

Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1110 of the Tax Law provides, in part:

(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, ...

\* \* \*

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of four 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, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

Section 1118 of the Tax Law provides, in part:

Exemptions from use tax. The following uses of property 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.

Section 47 of the General Construction Law defines the term "state" as follows:

The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

### **Opinion**

Initially, it is noted that the nature of the tax paid in the foreign country is not clear. Many foreign countries impose value added taxes. Experience indicates that in many instances the tax may be readily refunded by the foreign country in these circumstances.

In this case the purchaser of tangible personal property, the New York State resident, declared the goods in United States customs located in New York State and arranged to have them shipped from New York to a resident of another state as a gift. These actions are indicative of the exercise of a right or a power over the tangible personal property by the purchaser. Therefore, a use of the tangible personal property occurred in New York State based on the definition of such term as provided in Section 1101(b)(7) of the Tax Law.

TSB-A-99(2)S  
Sales Tax  
January 19, 1999

As the tangible personal property was purchased at retail in the foreign country, its use in New York State is subject to use tax in accordance with Section 1110(a)(A) of the Tax Law. The basis used to compute the use tax is the consideration paid in the foreign country for the tangible personal property. See Section 1110(b) of the Tax Law. It is noted that, generally, a sales tax imposed directly upon the consumer would not be included in consideration for purposes of computing the use tax, while other taxes imposed on a manufacturer or wholesaler and passed through to the consumer would be included in consideration for purposes of computing the use tax.

Section 1118(7)(a) of the Tax Law provides an exemption from use tax with respect to the use of tangible personal property to the extent that sales or use tax was paid on such property, without any right to a refund or credit, to another state or jurisdiction within a state, where such other state or jurisdiction allows a corresponding exemption for sales or use tax paid to New York. Putting aside questions of whether the tax paid in the foreign country was a sales or use tax and whether there was a right to refund or credit, it is clear that the provisions of Section 1118(7)(a) would not apply since the term "state" as used in such section does not encompass foreign jurisdictions. In Boissevain v. Boissevain, 224 AD 576, modified on other grounds 252 NY 178, the court stated with respect to Section 47 of the General Construction Law, "There is no intimation that, even in the case of a broad use of the word 'State,' it should embrace territory alien and foreign." Therefore, a sales or use tax was not legally due or paid to any other state or jurisdiction within any other state, within the meaning and intent of the exemption provided in Section 1118(7)(a), where the tax was imposed by a foreign country. Accordingly, such exemption from the use tax does not apply in the situation described in the Petition.

DATED: January 19, 1999

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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