

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

TSB-A-00(16)S
Sales Tax
March 29, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990927A

On September 27, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from J. D. Posillico, Inc., 1200 Veterans Memorial Highway, Suite 350, Hauppauge, New York 11788.

The issue raised by Petitioner, J. D. Posillico, Inc., is whether, under the terms of a joint-venture agreement, the transfer of certain tangible personal property is subject to sales and compensating use tax.

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

Petitioner and Peter Scalamandre & Sons, Inc. are New York corporations that have unrelated shareholders. The corporations are contemplating bidding on a contract as a joint venture. If they are successful bidders, they plan to enter into a written agreement confirming the establishment of a joint venture. The joint venture agreement will require each corporation to provide equipment and labor which will be assessed to the joint venture based upon prescribed rates. Profits will be shared equally by each corporation. The joint venture will dissolve upon completion of the contract.

The joint venture agreement will require each corporation to provide an operator/driver with the equipment. The equipment operator will be under the supervision of employees of the corporation which furnished the equipment to the joint venture. The equipment operator will be instructed by the respective corporation's personnel when and where to report to work, what hours to work, and which equipment is to be used and how it is to be used. Each corporation through its supervising personnel would have the right to hire and fire the equipment operators it furnishes at any time. In some cases, the equipment operator will remain on the corporation's payroll. In other cases, the equipment operator will be transferred to the joint venture's payroll and returned to the corporation's payroll upon completion of the joint-venture. In either case, the equipment operator will remain under the direct supervision of the respective corporation's employees.

Petitioner submitted a copy of the proposed joint venture agreement and attachments. The pertinent part of Petitioner's proposed contract follows:

WHEREAS, the Joint Venturers have agreed to prepare and submit a bid or proposal to the _____ (hereinafter the "G.C./Owner") for the construction of _____, in an amount and upon terms to be mutually agreed upon by the Joint Venturers prior to the submission thereof.

* * *

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereby agree to constitute themselves as Joint Venturers for the purposes of (1) preparing and submitting a bid and (2) performing and completing the Principal Contract, upon the following terms and subject to the following conditions:

1. SCOPE OF AGREEMENT. The parties hereto constitute themselves as Joint Venturers solely for the purpose of preparing and submitting a bid and performing and completing the Principal Contract, but for no other purpose, it being understood that as Joint Venturers the parties are not making any arrangement to perform any work jointly except that specifically encompassed within this Agreement and that each party may carry on its separate business for its sole benefit.

* * *

9. MANAGING PARTY. One of the parties shall be designated the Managing Party and, under the overall control and direction of the Joint Venturers, shall have general charge and supervision over the timely and satisfactory performance of the Principal Contract but shall be without liability to the other party for losses caused or sustained as a result of good faith errors of judgment or mistakes in its actions as Managing Party. The Managing Party shall have the power, which it may delegate in the name of the Joint Venture, to execute and deliver purchase orders, rental agreements, subcontracts and such other agreements as are necessary and appropriate to carry out the Principal Contract. The Managing Party, for this Joint Venture shall be:

J. D. POSILLICO, INC.

* * *

11. PROJECT MANAGER. The Managing Party with the agreement of the other Joint Venturers shall designate a Project Manager, who shall serve at its pleasure and be subject only to its control. The Project Manager shall manage and supervise the work called for by the Principal Contract and he shall have such specific powers as the Managing Party may, from time to time, delegate. Each party shall execute such documents as are required by the Managing Party to evidence the authority of the Managing Party and the Project Manager.

* * *

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19. DISPOSAL OF EQUIPMENT. When appropriate, the Project Manager shall determine what part of the plant, equipment, tools and salvageable materials belonging to the Joint Venture are no longer needed. This surplus shall be disposed of as the parties shall agree. In the event the parties are unable to agree, this surplus shall be disposed of as follows:

* * *

34. The following Attachments are attached hereto and made a part hereof:

A) Transactions between Joint Venture and Joint Venturers.

Attachment "A" to the joint venture agreement provides, in part:

TRANSACTIONS BETWEEN JOINT VENTURE AND JOINT VENTURERS

1. PARTY-FURNISHED EQUIPMENT, TRUCKS & SUPERVISORY PERSONNEL

A.) The Managing Party shall notify the parties of the Joint Venture's need for equipment (including trucks, hereinafter referred to only as equipment) and shall allow all parties an equal opportunity to furnish such equipment to the Joint Venture on a subcontract basis.

Without, in any way, altering or diminishing the subcontractor relationship between the party-subcontractor and the Joint Venture, such equipment may be furnished to the Joint Venture either:

- a) with an operator/driver paid by the party-subcontractor, or
- b) with an operator/driver who will be transferred to the Joint Venture payroll for accounting and administrative ease, while in control of the party-subcontractor furnished equipment.

The party-subcontractor shall supervise its own equipment, insure its own equipment at no cost to the Joint Venture, and maintain its own equipment in good operating condition.

The party-subcontractor shall have the explicit right to deploy from the Joint Venture Project, as it sees fit, any of its own equipment at any time it deems

necessary, and in this particular context, the party-subcontractor's primary obligation to the Joint Venture is to perform the subcontracted work necessary for the successful completion of the Joint Venture project.

In order to quantify the value of the subcontracted equipment, a Schedule of Equipment Use Rates will be established whereby like equipment will be credited at the same rate for each party-subcontractor. Such Schedule of Equipment Use Rates shall be attached hereto and become a part hereof. Rates for equipment not listed thereon shall be agreed upon, as necessary. Regardless of how the rate is denominated, (i.e. rate per hour, per day, per week, etc.), it shall be considered a basis for determining each party-subcontractor's total value of equipment subcontracted to the Joint Venture.

B.) For purposes of complying with existing New York State Sales and Use Tax regulations as respects equipment and truck use transactions between the Joint Venturing parties and the Joint Venture, the parties hereby agree as follows:

Notwithstanding any authority granted to the Managing Party or Project Manager by any other provision of this Joint Venture Agreement, neither the Managing Party, nor the Project Manager will be deemed to have assumed "Dominion and Control" of any equipment owned by a Joint Venturing party while in use on the Joint Venture project in the prosecution of that party's portion of the assigned work. At no time, shall "Dominion and Control" (as defined by current New York State Sales and Use Tax regulation) be deemed to have passed from the party-subcontractor to the Joint Venture.

All payments received by the party-subcontractors from the Joint Venture in consideration for equipment used on the Joint Venture Project, shall be considered "subcontract" payments.

C.) Each party may similarly be called upon by the Managing Party to assign supervisory personnel to the Joint Venture on a subcontract basis.

Applicable Law & Regulations

Section 1101(b) of the Tax Law provides, in part:

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:

* * *

(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 541.2(p) of the Sales and Use Tax Regulations provides, in part:

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. 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.

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the

facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Section 541.5(d)(1) of the Sales and Use Tax Regulations provides, in part:

(i) Charges for repair, service, maintenance, and installation of tangible personal property which retains its identity as tangible personal property are taxable to the customer based on the full invoice price.

* * *

(iii) A subcontractor must collect tax on all his charges to a prime contractor for repair, service, maintenance, and installation of tangible personal property unless the prime contractor issues a properly completed exemption certificate or a capital improvement certificate to the subcontractor.

Section 541.9 (c)(1) of the Sales and Use Tax Regulations provides, in part:

(ii) When dominion and control of equipment supplied with an operator or driver remains with the lessor, there is no rental or lease of equipment to the contractor, but the service performed may be subject to the tax pursuant to section 1105(c)(3) and (5) of the Tax Law. The method of payment (for example, a rate per hour, day, week, month, or job or trip) is not relevant in determining whether the transaction is a service or a taxable rental or lease of equipment.

(a) If the service performed constitutes a capital improvement to real property, for example, a foundation excavation, the charge for such service is not taxable.

(b) If the service performed constitutes a repair, maintenance or service to tangible personal property or to real property, the service is subject to the tax.

(c) However, the owner-operator of the equipment must pay tax on the equipment used to perform the forgoing services.

(iii) When dominion and control of equipment supplied with an operator or driver transfers to the contractor, there is a rental or lease of tangible personal property and the charge is subject to the tax. If the operator's or driver's wages are separately stated and reasonable in relation to prevailing wage rates, such wages may be excluded from the receipts subject to the tax. If the operator's or driver's wages are not separately stated the total charge is subject to the tax. If the operator's or

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driver's wages are not reasonable in relation to prevailing wage rates, the "wages" must be included in the receipts subject to the tax until the contractor satisfies his burden, under section 1132(c) of the Tax Law, of proving that the taxable receipts are less than the total charge.

(iv) All expenses incurred by a lessor in determining the amount charged for rental of tangible personal property to a contractor, such as: setting up, assembling, installing and/or dismantling, are elements of the total receipt subject to tax, regardless of their taxable status and whether they are separately billed to the lessee.

Opinion

A joint venture is considered to be a partnership for sales and use tax purposes. Aberthaw-Cowper - Joint Venture, Det St Tx Comm, July 18, 1980, TSB-H-80(161)S. A partnership may be treated as an entity separate and distinct from its members for sales and compensating use tax purposes and, as such, transactions occurring between the partnership and its members may or may not be subject to sales tax depending upon the facts surrounding the transactions. See Matter of Great Lakes Dunbar-Rochester, A Joint Venture v. State Tax Commission, 65 NY2d 339.

Where a joint venture enters into a transaction with a corporate partner of the joint venture (hereafter "partner") as a subcontractor and the partner provides equipment and an operator to the joint venture, the transactions are between two separate and distinct entities for purposes of sales and use taxes; and any payments made by the joint venture to the partner for services or property provided by the partner may be subject to sales and use tax. The taxation of any transaction between them depends upon the nature of the services performed or the property provided.

A threshold question in regard to the application of the sales and use tax to the transaction between the joint venture and one of the partners is whether the transaction amounts to a lease or a license to use the equipment provided along with the provision of a service, or whether the transaction is properly viewed as an integrated service with no lease of equipment.

Whether a transaction where both equipment, such as construction vehicles, and an operator of the equipment is furnished constitutes the rental of tangible personal property or a sale of a service (such as the creation of a capital improvement or a repair to real property) is a question of fact that can only be decided after the review of all the facts and circumstances. See Section 541.2(p)(2) of the Sales and Use Tax Regulations. The key issue is whether the partner providing the equipment and the operator is maintaining dominion and control over the equipment.

The proposed joint venture agreement submitted by Petitioner contains language that suggests each partner supplying equipment maintains dominion and control over the equipment. However, while the language of the joint venture agreement is relevant to the inquiry, it is not conclusive on

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the issue of whether the partner supplying the equipment transfers dominion and control of the equipment to the joint venture. The determinative factor in that regard is whether the partner supplying the equipment actually controls the use of the equipment supplied to the joint venture, maintains the right to hire and fire the operators of the equipment, and pays all operating expenses, including tolls, insurance, fuel costs, and the wages of the operators of the equipment. See Section 541.2(p) of the Sales and Use Tax Regulations. Whether the operators of the equipment are on the payroll of the joint venture or the partner supplying the equipment is only one factor to be considered in determining who has dominion and control over the transferred equipment. This factor is not, by itself, determinative of that issue.

To the extent that the transaction between the partner and the joint venture constitutes the lease or rental of tangible personal property, then such lease or rental of the equipment would be subject to sales and use tax. The operator's wages may be excluded from the taxable receipts if separately stated and reasonable in relation to prevailing wage rates. See Section 541.9(c)(1)(iii) of the Sales and Use Tax Regulations.

In the present case, the equipment operators will be instructed by the partner's employees when and where to report to work, what hours to work, which equipment is to be used and how it is to be used, and the partner, through its supervisory personnel, has the right to hire and fire the equipment operators at any time. These facts and the proposed agreement submitted by Petitioner appear to support a conclusion that the partner maintains dominion and control of the equipment, and is performing a service for the joint venture rather than renting equipment to the joint venture. As noted above, however, this determination can only be made in a particular case after review of all the facts and circumstances. To the extent that the partner is performing a service for the joint venture, the taxation of the transaction depends upon the service performed. That is, if the service constitutes a capital improvement, no tax is due. However, if the service is a repair, sales tax is due on the entire charge to the joint venture as stated above, unless the repair service is performed for resale, or is otherwise exempt.

DATED: March 29, 2000

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

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