

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

TSB-A-89(14)S  
Sales Tax  
June 7, 1989

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890118A

On January 18, 1989, a Petition for Advisory Opinion was received from BRM MOTORSPORTS, LTD., 30 Howard Place, Ronkonkoma, New York 11779.

The issue raised is whether sales or use tax applies to items purchased out-of-state by Petitioner, which are delivered to Petitioner in New York State, and then transported outside New York State by Petitioner for use in performing a repair and maintenance service outside New York State.

Petitioner contracts to transport race cars to various race tracks, all of which are outside New York State. Along with transporting the race cars, Petitioner also performs repair and maintenance services on such race cars while at the various race tracks. Due to the cars being of a type which must be prepared just prior to each race and during the course of the race, Petitioner's repair and maintenance services are performed exclusively at the various race tracks.

Parts purchased out-of-state by Petitioner for use on the race cars are delivered to Petitioner in New York State and then transported by Petitioner to each race. Such parts are not available at the various race tracks.

Section 526.6 of the Sales and Use Tax Law states:

Retail Sale. [Tax Law, § 1101 (b) (4)]

- (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

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- (c) Resale Exclusion

- (1) Where a person in the course of his business operations, purchases tangible personal property ... 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.
- (2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate ....

- (3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

Section 1132 of the Tax Law provides:

Collection of tax from customer ...

(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services ... mentioned in subdivision (a)...(c)... 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. ... unless (1) a vendor, not later than ninety days after delivery of the property ... shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address, ... the number of his registration certificate, together with such other information as said commission may require, to the effect that the property or service was purchased for resale...

Section 532.4 (d) of the Sales and Use Tax Regulations states:

Resale Certificate

- (1) A resale certificate is used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when the:

\* \* \*

- (ii) Tangible personal property is for use in performing taxable services under paragraph ... (3) ... of subdivision (c) of section 1105 of the Tax Law where such property becomes a physical component part of the tangible personal property upon which the services are performed or will be actually transferred to the purchaser of the service in conjunction with the performance of the service ...

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Example 3: An auto service station operator will give his parts supplier a resale certificate covering the purchase of repair parts incorporated into customers' cars.

Section 526.9 of the Sales and Use Tax Regulations states:

Use. (Tax Law, §1101 [b] [7])

- (a) The word use means and includes the exercise of any right or power over tangible personal property by the purchaser thereof, and

includes, but is not limited to, the receiving ... of such property.

(b) Some of the terms used in the preceding paragraph may be defined as follows.

(1) Receive is to obtain or gain possession of tangible personal property for any purpose whatsoever by means of purchase.

Section 531.1 of the Sales and Use Tax Regulations states:

Imposition of compensating use tax. (Tax Law § 1110).

(a) Imposition. The compensating use tax is imposed on the use within the State of tangible personal property and certain services, except to the extent they have been or will be subject to sales tax.

Example 1: A lumber yard in New York State purchases for resale, a car load of lumber from a west coast supplier who is not a registered New York State vendor and who will deliver the lumber to the purchaser by rail within this State. No tax is collected by the supplier. Upon delivery of the lumber, the purchaser withdraws enough lumber to construct workbenches and shelves in its milling room. The lumber withdrawn for use by the lumber yard is subject to a compensating use tax on its cost.

In the instant case, Petitioner is deemed to be purchasing parts for resale purposes as the parts are actually transferred to the purchasers of Petitioner's repair and maintenance service in conjunction with the performance of such service and also actually become a physical component of the purchasers' race cars.

Accordingly, sales and use tax does not apply to Petitioner's purchases of parts. If the out-of-state supplier is registered as a vendor with the Department of Taxation and Finance, Petitioner may purchase the parts tax exempt by issuing the supplier a properly completed Form ST-120, Resale Certificate within 90 days after taking delivery of the parts as required under Section 1132 (c) of the Tax Law.

If the out-of-state supplier is not registered as a vendor, the supplier cannot collect sales tax from Petitioner nor can Petitioner issue a Resale Certificate to the supplier. In this instance, Petitioner's receipt of the parts falls within the meaning of use as defined in Section 526.9 of the Sales and Use Tax Regulations. However, Petitioner will not be liable for the compensating use tax

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imposed under Section 1110 of the Tax Law as Petitioner's purchase of the parts falls within the exception to the compensating use tax provided under Section 531.1 (a) of the Sales and Use Tax Regulations. The fact that Petitioner will transfer the parts in conjunction with repair and maintenance services performed outside New York State, thereby causing the receipts from Petitioner's sale of such parts and services to not be subject to New York State or Local Sales Tax, will not create a compensating use tax liability for Petitioner.

DATED: June 7, 1989

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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