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

TSB-A-98(4)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S971020A

On October 20, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Robert A. King, 10 Dana Lane, Smithtown, New York 11787.

The issues raised by Petitioner, Robert A. King, are:

1. Whether, under certain conditions, sales and compensating use tax is due on equipment provided to a joint venture by its members.

2. Whether, if tax is due on the transactions referred to in issue 1, the members of the joint venture are entitled to a credit for sales tax previously paid on the equipment.

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

Corporation A and Corporation B are New York corporations that have non-related shareholders. The corporations are contemplating bidding on a contract as a joint venture. If they are the successful bidders, they plan to enter into a written agreement confirming the establishment of a joint venture. The joint venture requires each corporation will 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.

Each corporation paid sales tax on the equipment it owns at the time of purchase. The corporations are not in the business of renting or leasing equipment but are in the construction contracting business.

Petitioner asks about the application of sales and compensating use tax in the following scenarios.

1. The joint venture agreement simply divides all profits equally.

2. The joint venture agreement requires the joint venture to hire each corporation (i.e., partner) as a subcontractor, each subcontractor providing all its own labor and equipment.

3. The joint venture agreement requires each corporation (i.e., partner) to provide equipment to be operated by joint venture operators but under the supervision of the corporation’s employees. The equipment operators will be instructed by partners’ personnel when and where to work, what hours to work, and which equipment is to be used and how it is to be used. The partners through their supervising personnel would have the right to hire and fire the equipment operators at any time. The equipment operators are on the corporations' payrolls.

4. Assume the facts as number three, except that the equipment operators are also employees of each corporation, paid by the joint venture when assigned to the joint venture and returned to the corporations' payrolls upon completion of the joint venture. The equipment operators remain under the direct and constant supervision of the corporation’s employees.

Applicable Law and 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 service subject to tax. . . .

* * *

(iv) The term "retail sale" does not include:

* * *

(C) The distribution of property by a partnership to its partners in whole or partial liquidation.

* * *

(E) The contribution of property to a partnership in consideration for a partnership interest therein.

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article. . .

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 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.

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

Contractor owned equipment. (i) The purchase of equipment, other than motor vehicles such as trucks, by a contractor is subject to tax on the total purchase price at the combined State and local tax rate in effect in the jurisdiction where the equipment is delivered to the contractor.

(ii) Purchases of equipment for both use and rental by the contractor are taxable on the total purchase price. The contractor is liable for tax on the equipment purchased by him and must collect tax on equipment rented by him to others without credit for any tax paid on the purchase. Only that equipment which is purchased exclusively for rental purposes qualifies for the resale exclusion. (Emphasis supplied)

Opinion

A joint venture is considered to be a partnership for sales 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 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. The State Tax Commission (65 NY2d 339). It was held in Great Lakes - Dunbar-Rochester that a taxable rental of tangible personal property occurred between a partner and the partnership. However, in Aberthaw-Cowper - Joint Venture, supra, it was held that:

[A]pplicant, Aberthaw-Cowper, received certain equipment from John W. Cowper Company as its contribution to the joint venture or partnership. No consideration was exchanged or paid, and no lease or sale incident thereto occurred or can be inferred, and accordingly, no sales or use tax can be imposed on such a transaction since such affairs fall within the parameters of the exclusion set forth at section 1101(b)(4)(ii)(E) of the Tax Law.

Accordingly, the taxation of equipment provided by the partners to the joint venture depends on the circumstances of each transaction. If the equipment is a contribution of capital, it is not subject to sales tax; however, if the equipment is part of a lease or rental agreement, it is subject to sales tax. See Great Lakes-Dunbar-Rochester, supra.

The four scenarios described above are discussed below in the order that they were presented by Petitioner.

1. Since the contribution of property to a partnership in consideration for a partnership interest is not a retail sale, the fact that the joint venture agreement divides the profit equally among its members does not, by itself, make the provision of the equipment to the joint venture subject to sales or use tax. See Section 1101(b)(4)(iv)(E) of the Tax Law. If, however, the agreement also prescribes a rate schedule for payments that must be made by the joint venture to the partners for the use of the equipment, the transfer of equipment to the joint venture may be considered to be a rental of tangible personal property that is subject to sales tax under Section 1105(a) of the Tax Law.

2. If the joint venture hires each corporation (partner) as a subcontractor, it is hiring an entity separate from itself, for purposes of the sales and use tax, for the performance of services and any payments made by the joint venture for the partners' services may be subject to sales tax. The taxation of any transaction between them depends upon the nature of the services performed. Thus, if the contract the joint venture has bid on is for a capital improvement, no tax would be due. However, if the contract is one for repair and maintenance, the subcontractor (partner) may be required to collect sales tax from the joint venture. See Sections 541.5(d)(1) and 541.9 (c)(1)(ii)(*a*) and (*b*) of the Sales and Use Tax Regulations.

3., 4. Where the equipment operators will be instructed by the corporations' employees 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, and the corporations through their supervisory personnel have the right to hire and fire the equipment operators at any time, dominion and control of that equipment is retained by the corporations, regardless of whether the equipment operators are on the joint venture's payroll or the corporations' payrolls. Under these circumstances, the corporations are considered to be performing a service for the joint venture rather than renting equipment to the joint venture. See Section 541.9(c)(1)(ii) of the Sales and Use Tax Regulations. The taxation of the transaction depends upon the service performed. That is, if the service results in a capital improvement, no tax is due. However, if the service is a repair, sales tax may be due on the entire charge to the joint venture as stated above.

The corporations will not be allowed any credit for sales tax paid on equipment unless such equipment was purchased exclusively for resale purposes as provided in Section 541.9(b)(1)(ii) of the Sales and Use Tax Regulations.

/s/
DATED: February 2, 1998 John W. Bartlett
Deputy Director
Technical Services Bureau

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