

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

TSB-A-98(86)S
Sales Tax
December 23, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980512A

On May 12, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Andrew B. Sabol, Hodgson Russ Woods & Goodyear LLP, 1800 One M&T Plaza, Buffalo, New York 14203.

By letter dated May 1, 1998, followed up by a completed petition form dated May 7, 1998, Petitioner submitted this petition for advisory opinion. Petitioner stated that he sought advice relating to a "hypothetical situation." Petitioner checked the "None of the above" box on the petition, thereby representing that the petition did not relate to:

- A. A matter presently under audit;
- B. A claim for credit or refund;
- C. An issued statutory notice;
- D. An Application for a Declaratory Ruling;
- E. Any other matter or proceeding that is currently before the Department of Taxation and Finance or the Division of Tax Appeals.

It appears, however, that, on July 31, 1998, the Division of Tax Appeals received a petition naming Petitioner and two other attorneys in his law firm as representatives in a matter virtually identical to that raised in the petition for advisory opinion. The Tax Appeals petition indicates that it relates to a Bureau of Conciliation and Mediation Services Conciliation Order dated May 8, 1998 and is accompanied by a power of attorney dated April 5, 1998 appointing Petitioner and three others (including the two other attorneys in the firm indicated on the Tax Appeals petition) as representatives.

Section 171, subdivision twenty-fourth of the Tax Law authorizes the Commissioner, in his discretion, to issue advisory opinions to other than a taxpayer and, in numerous instances, advisory opinions have been issued to representatives on behalf of unnamed clients. Since an advisory opinion is only binding on the Commissioner "with respect to the person to whom such opinion is rendered," it is not binding with respect to the unnamed client.

Section 2376.1(c)(1) of the Department's Regulations provides that:

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An advisory opinion will not be issued where the petition for advisory opinion relates to a pending question raised by the Petitioner in:

(i) a petition for a decision or determination by the Division of Tax Appeals pursuant to Part 3000 of this Title, or any appeals therefrom;

(ii) a request for a conciliation conference and issuance of a conciliation order by the Division of Taxation's Bureau of Conciliation and Mediation Services pursuant to Part 4000 of this Title;

(iii) a petition for a declaratory ruling by the commissioner pursuant to section 2375.3 of this Title; or

(iv) a request for an opinion of counsel pursuant to section 2375.4 of this Title.

Although section 171, subdivision twenty-fourth of the Tax Law authorizes the Commissioner, in his discretion, to issue an advisory opinion to other than the taxpayer, section 2376.1(c)(1) of the Department's Regulations provides that an advisory opinion will not be issued with respect to a pending question raised by the Petitioner in a Tax Appeals petition. This provision may not be circumvented by merely naming the attorney as the Petitioner for the advisory opinion. Since the matter raised in the petition for advisory opinion is the same as that raised in the Tax Appeals petition, an advisory opinion addressing the issues raised by Petitioner will not be issued.

DATED: December 23, 1998

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

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