

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

TSB-A-03(7)S
Sales Tax
March 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010829A

On August 29, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sean and Francesca Kennedy, 980 Motsie Road, Biloxi, MS 39532.

The issue raised by Petitioners, Sean and Francesca Kennedy, is whether monthly receipts received from the lease of their vessel are exempt from sales and compensating use tax under Section 1115(a)(8) of the Tax Law.

Petitioners submitted the following facts as the basis for this Advisory Opinion.

Petitioners plan to enter into a 15-year lease of their 50-foot “commercial vessel” with a lessee who will operate the vessel as an excursion/sightseeing tour boat. The lessee will make trips in and around the New York and New Jersey Harbors and provide narrated tours in front of the Statue of Liberty and various other waterfront attractions. The lessee’s captain will maintain control of the vessel at all times en route.

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:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor. (i) The term “vendor” includes:

* * *

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such

property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession. . . .

* * *

(16) Commercial vessel. A vessel used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the vessel to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property unless otherwise exempted or excluded from tax.

Section 1110 of the Tax Law provides, in relevant 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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1111(i)(A) of the Tax Law provides, in part:

Notwithstanding any contrary provisions of this article or other law, with respect to any lease for a term of one year or more of (1) a motor vehicle, as defined in . . . the vehicle and traffic law . . . (2) a vessel, as defined in section twenty-two hundred fifty of such law (including any inboard or outboard motor and any trailer, as defined in section one hundred fifty-six of such law, leased in conjunction with such a vessel) . . . all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease, option to renew or similar provision, or combination of them, shall be deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease, option to renew or similar provision, or combination of them, or as of the date of registration of such property with the commissioner of motor vehicles, whichever is earlier. Notwithstanding any inconsistent provisions of subdivision (b) of this section or of section eleven hundred seventeen of this article or of other law, for purposes of such a lease, option to renew or similar provision originally entered into outside this state, by a lessee (1) who was a resident of this state, and leased such property for use outside the state and who subsequently brings such property into this state for use here or (2) who was a nonresident and subsequently becomes a resident and brings the property into this state for use here, any remaining receipts due or consideration to be given after such lessee brings such property into this state shall be subject to tax as if the lessee had

entered into or exercised such lease, option to renew or similar provision, or combination thereof, for the first time in this state and the relevant provisions of sections eleven hundred ten concerning imposition and computation of tax, eleven hundred eighteen concerning exemption from use tax for tax paid to another jurisdiction, eleven hundred thirty-two concerning presumption of taxability and conditions for registration and eleven hundred thirty-nine concerning refunds, of this article, shall be applicable to any sales or compensating use tax paid by the lessee before the lessee brought the property into this state, except to the extent that any such provision is inconsistent with a provision of this subdivision. . . .

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(8) Commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship).

Section 1131(1) of the Tax Law provides, in part:

“Persons required to collect tax” or “person required to collect any tax imposed by this article” shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. . . .

Section 1132(c)(1) of the Tax Law provides, in part:

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 of any type mentioned in subdivisions (a), (b), (c) and (d) 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. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser’s name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser’s certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased

for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four . . . the sale shall be deemed a taxable sale at retail. . . Where such a resale or exemption certificate . . . has been furnished to the vendor, the burden of proving that the receipt . . . is not taxable hereunder shall be solely upon the customer. . . .

Section 2250 of the Vehicle and Traffic Law provides, in part:

. . . a vessel shall be every description of watercraft, other than a seaplane, used or capable of being used as a means of transportation on water. A vessel propelled by an outboard motor shall include the hull, but shall not include the outboard motor.

Section 527.15 of the Sales and Use Tax Regulations provides, in part:

(a) Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that with respect to the leases described in this section the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease.

(b)(4) *Vessel* means any vessel as defined in section 2250 of the Vehicle and Traffic Law, including any inboard or outboard motor and any trailer, as defined in section 156 of such law, leased in conjunction with such a vessel.

* * *

(d)(2)(ii)(a) With respect to the lease of a vessel (including any inboard or outboard motor) the use tax is based on the rate in effect where the vessel is primarily used or moored.

Section 528.9 of the Sales and Use Tax Regulations provides, in part:

(a) *Definitions*. The definitions in this section shall apply only for the purpose of the exclusions and the exemptions provided by Tax Law, sections 1105(c)(3)(iv) and 1115(a)(8) with respect to commercial vessels.

(1) *Vessel*. A *vessel* shall mean any type of water craft used for the transportation of property or persons on water. . . .

* * *

(3) Commercial vessel. A *Commercial vessel* is any vessel used or engaged in the transportation for hire of persons or property on water. Any vessel used or engaged for other purposes on more than an occasional basis is not a commercial vessel.

(4) Commercial vessel primarily engaged in interstate or foreign commerce. A commercial vessel [is] primarily engaged in interstate or foreign commerce when 50 percent or more of the receipts from the vessel's activities are derived from interstate or foreign commerce.

(5) Interstate or foreign commerce. *Interstate or foreign commerce* means the transportation of persons or property between states or countries.

(b) *Exemption*. (1) Receipts from the sale of the following are exempt from the sales and compensating use tax:

(i) commercial vessels primarily engaged in interstate or foreign commerce;

(ii) property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs; and

(iii) the services of installing, maintaining, servicing or repairing such commercial vessels or property. . . .

Section 532.4(b) of the Sales and Use Tax Regulations provides, in part:

Burden of proof. (1) The burden of proving that any receipt . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(3) When a vendor has met the criteria in paragraph (2) of this subdivision, it is protected from liability for failure to have collected tax from the purchaser and the burden of proving the nontaxability of such transaction rests solely on the purchaser.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

Opinion

Petitioners' receipts from the lease of their vessel are subject to the sales tax imposed under Section 1105(a) of the Tax Law if the boat is delivered in New York, or the use tax imposed under Section 1110(a)(A) of the Tax Law if the boat is delivered outside of New York and subsequently used by a business in New York waters, unless the vessel meets the criteria for exemption as a "commercial vessel" primarily engaged in interstate or foreign commerce under Section 1115(a)(8) of the Tax Law. If the vessel is used as described by Petitioners, i.e., to transport persons for hire (sightseeing tours), and not for other purposes on more than an occasional basis, it appears to meet the statutory and regulatory definitions of a commercial vessel engaged in transportation for hire contained in Sections 1101(b)(16) of the Tax Law and Section 528.9(a)(3) of the Sales and Use Tax Regulations. See Matter of The Absolute Difference, Inc., Dec Tax App Trib, November 24, 1993, TSB-D-93(43)S.

However, the exemption for commercial vessels provided in Section 1115(a)(8) of the Tax Law also requires that the vessel be primarily engaged in interstate or foreign commerce. Merely because a vessel crosses state lines does not establish that it is primarily engaged in interstate commerce for purposes of the exemption in Section 1115(a)(8) of the Tax Law. See Matter of Circle Line - Statue of Liberty Ferry, Inc., State Tax Commission, August 21, 1980, TSB-H-80(164)S. Interstate commerce has been defined by reference to the origin and destination of what is moved in commerce. The focus is on what the taxpayer does, not where it does it. See Matter of Moran Towing and Transportation Co., Inc. v. State Tax Commission, 72 NY2d 166. For example, if the sightseeing excursions of the vessel in question were to begin and end in New York with the only stop being at a point or points in New York, the vessel would not be considered primarily engaged in interstate commerce. Likewise, sightseeing trips to view the Statue of Liberty and Ellis Island commencing and terminating at New York docks are not in interstate commerce, notwithstanding that the trips may pass into New Jersey waters (see Matter of Circle Line - Sightseeing Yachts, Inc., State Tax Commission, August 21, 1980, TSB-H-80(162)S; Matter of Day-Line, Inc., State Tax Commission, August 21, 1980, TSB-H-80(163)S; Circle Line - Statue of Liberty Ferry, Inc., *supra*).

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On the other hand, vessels used for the transportation, for compensation, of property through New York and New Jersey waters from a company's New York plant to its New Jersey distribution center and for transportation from the New Jersey distribution center to customers in New York qualify as being engaged in interstate commerce for the purpose of the exemption provided by Section 1115(a)(8) of the Tax Law. See Lone Star Industries, Inc., Adv Op State Tax Commission, November 25, 1981, TSB-A-81(53)S. Accordingly, transportation of persons for compensation from destinations in one state to destinations in another would qualify as a use of a vessel commercially in interstate commerce.

Whether the vessel in Petitioners' case meets the criteria for exemption under Section 1115(a)(8) of the Tax Law is a question of fact that cannot be determined based on the information provided in this Advisory Opinion, but must be resolved based on evidence which shows the actual extent of the vessel's activity within New York waters and in interstate and foreign commerce.

If the vessel is not exempt from sales and use tax, Petitioners, as vendors, would be required to collect any tax due on the lease of the vessel. See Sections 1101(b)(8)(i)(F) and 1131(1) of the Tax Law. In the case of a 15-year lease, such tax is to be computed on the total amount of payments due under the lease, option to renew or similar provision, or combination of them. The tax is due and payable to the Tax Department as of the date of the first payment made under the lease or at the time the vessel is registered with the Department of Motor Vehicles, whichever is earlier. See Section 1111(i) of the Tax Law.

In the event that it is expected that the vessel's use will meet the criteria for exemption, the lessee must properly complete and submit Form ST-121, *Exempt Use Certificate*, to Petitioners within 90 days after delivery of the vessel in order to relieve Petitioners of their liability to collect tax. See Section 1132(c)(1) of the Tax Law and Section 532.4(b) of the Sales and Use Tax Regulations. Therefore, if Petitioners, in good faith, timely accept a properly completed exempt use certificate from the lessee, Petitioners are relieved of their liability for failure to collect sales tax with respect to the lease, and the burden of proving that the lease is not taxable rests solely upon the lessee. The lessee continues to be liable for the tax where actual use of the vessel is not in qualifying exempt activity. Petitioners are not relieved of this duty to collect tax if they have knowledge that the exempt use certificate is false or fraudulent. See Carolyn Mazzenga, CPA, Adv Op Comm T&F, January 10, 2001, TSB-A-01(1)S.

DATED: March 4, 2003

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