

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-14(5)S
Sales Tax
January 29, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S121010A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether the purchase of a commercial vessel would be subject to New York State and local sales or use tax if: (1) the vessel is located in New York State for less than six months each year; or (2) the hailing port displayed on the vessel's stern reads "New York, NY."

We conclude that the purchase of the vessel would not be subject to State and local sales or use taxes if Petitioner's charter service entails transporting persons or property for hire between states or countries, and 50 percent or more of Petitioner's receipts from the vessel's activities are derived from this service. We further conclude that the hailing port displayed on the stern is not determinative of whether purchase of the vessel is subject to tax.

Facts

Petitioner is considering purchasing a commercial vessel that is United States Coast Guard-certified to carry up to 149 passengers for hire. The vessel would operate between the East Coast of the United States and the Caribbean each year. The yearly schedule for the vessel would be to arrive in New York State around May 1st of each year. While in New York State, the vessel would be docked in New York City. The vessel may depart New York State one or more times each summer while performing charter service. The vessel would depart New York State around October 15th of each year. From November through April, the vessel would operate a charter service in the Caribbean. The hailing port displayed on the vessel's stern may say "New York, NY."

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, unless a specific exemption applies. Tax Law § 1110(a) imposes a compensating use tax on the use of tangible personal property within the State by a resident, except to the extent that the property has not or will not be subject to State and local sales taxes, or unless a specific exemption applies. For purposes of the use tax, a "resident" includes any "entity doing business in the State or maintaining a place of business in the State." Petitioner is a "resident" for use tax purposes, because it has a place of business in the State. Moreover, under the facts provided, Petitioner's charter business within the state would be an additional basis of residency for use tax purposes.

Commercial vessels primarily engaged in interstate or foreign commerce are exempt from sales and use taxes. See Tax Law §§ 1115(a)(8), 1118(3). A “commercial vessel” is defined as 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.” Tax Law § 1101(b)(16). A vessel is “engaged in interstate or foreign commerce” if it transports persons or property for compensation between states or countries.” 20 NYCRR § 528.9(a)(5). A vessel is “primarily engaged in interstate or foreign commerce” if “50 percent or more of the receipts from the vessel’s activities are derived from interstate or foreign commerce.” 20 NYCRR § 528.9(a)(4)

Petitioner may be engaged in interstate or foreign commerce if its charter service entails transporting persons or property for hire between states or countries. If 50 percent or more of Petitioner’s receipts from the vessel’s activities are derived from interstate or foreign commerce, the purchase of the vessel would be exempt from State and local sales and use taxes. The amount of time the vessel is present in or absent from the State is not determinative of whether it meets this requirement.

Petitioner’s entitlement to the exemption will turn on its intent at the time of sale. If Petitioner intends at the time the vessel is purchased that 50% or more of the receipts from the vessel’s activities will be derived from interstate or foreign commerce, it may purchase the vessel exempt from New York State and local sales and use taxes. See *Matter of D.J.H. Construction v. Chu*, 145 AD2d 716 (3d Dep’t 1988). Although not determinative, later activities may be relevant to ascertain Petitioner’s intent at the time of sale.

If the vessel is not intended at the time of purchase to be used primarily in interstate or foreign commerce, its purchase would be subject to State and local sales or use tax. Sales tax would apply if the vessel is delivered to Petitioner within the State, and would be calculated on the receipt from the sale of the vessel. See Tax Law § 1105(a). Use tax would apply if Petitioner takes delivery of the vessel outside the State and subsequently uses it within the State. The use tax would be calculated based on the consideration paid or contracted to be paid for the vessel. See Tax Law § 1111(b)(1). The use tax exemptions provided in Tax Law §§ 1117 and 1214 would not apply because Petitioner would be engaged in a business in which the vessel is used. The applicable rate of sales or use tax is the combined State and local rate in effect in the jurisdiction in which the vessel is docked or primarily used. If the vessel is used briefly or occasionally in another local jurisdiction within the State, it would not be subject to use tax in that other jurisdiction. See *Xerox Corp. v. State Tax Comm’n*, 71 AD2d 177 (3d Dep’t 1979).

If Petitioner can prove that it used the vessel outside New York for more than six months prior to its first use within the State, the use tax will be calculated on the market value of the vessel at the time of its first use within New York, not to exceed its cost. See Tax Law § 1111(b)(2). In addition, Tax Law § 1118(7)(a) provides an exemption from use tax to the extent that tax on the purchase of the vessel was legally due and paid to another state, without any right to refund or credit, if that state allows a corresponding exemption for such taxes paid to New York.

Finally, Petitioner's use of "New York, NY" as the hailing port displayed on the vessel's stern would not control whether sales or use tax applies to the purchase of the vessel, or whether the vessel qualifies for exemption. The requirement that a vessel be labeled with a hailing port is a requirement of the United State Coast Guard, and it may provide some evidence of the vessel's location. However, by itself, it is not determinative of whether the vessel is present in the State or qualifies for exemption from sales and use taxes for commercial vessels.

DATE: January 29, 2014

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.