

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

TSB-A-82(49)S
Sales Tax
December 30, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820209C

On February 9, 1982 a Petition for Advisory Opinion was received from Thomas J. Troiano, 359 West Neck Road, Huntington, New York 11743.

Petitioner describes two hypothetical situations involving the rental of a vessel, and inquires as to the sales tax obligations and liabilities of the owner of the vessel in each instance.

I

A New York corporation is formed by a New York resident for the purpose of purchasing and chartering its sole asset, a pleasure craft. The vessel is federally documented and the corporation bareboat charters the vessel for one year, and intends to re-charter the vessel annually for several years, to either its sole stockholder/officer, a New York resident, or other New York residents. The corporation will obtain a Certificate of Authority and will collect and report sales tax on the annual charter fee. Petitioner inquires as to whether the owner of the vessel would, under these circumstances, have any sales tax obligations or liabilities beyond the collection, reporting and remittance of sales tax on the rental fee.

Section 1105(a) of the Tax Law, contained in Article 28, imposes the State sales tax on "the receipts from every retail sale of tangible personal property . . ." The term "retail sale" is defined, in relevant part, in section 1101(b)(4) of the Tax Law, as a "a sale of tangible personal property to any person for any purpose, other than (A) for resale. . . ." The term "sale" is defined, in relevant part, as "any transfer of title or possession or both, . . . rental, lease or license to use or consume. . . for a consideration. . . ." Tax Law, § 1101(b)(5). The applicable tax in each instance is that imposed by or for the jurisdiction within which the point of delivery to the purchaser or his designee is located. 20 NYCRR § 525.2(a)(3). The tax due is required to be collected by the vendor of the property sold, at the time the price therefor is collected, and such tax is then to be reported and remitted to the State Tax Commission. Tax Law §§1131,1132,1136,1137. The foregoing is similarly applicable to local sales taxes.

In order for the purchase of the vessel to be recognized as a purchase for resale, the annual bareboat charter must represent a true arm's length transaction. The annual charter fee, thus, must be reasonable in comparison with the annual charter fees collected by other lessors of similarly valued, sized and equipped vessels, and must fairly reflect the acquisition, maintenance and operating expenses for the vessel. Should the transaction fail to meet these standards, the purported rental would not be recognized to be such, and the corporation would be liable for sales tax on the purchase price of the boat, if the boat is delivered to it in New York, or use tax, if the boat is delivered to it outside of New York and is subsequently used in New York. 20 NYCRR 526.6(c)(4)(i). (The substance of this paragraph applies to both of the hypothetical situations presented by Petitioner.)

Accordingly, a New York corporation, which is registered as a sales tax vendor, may purchase a vessel without payment of sales tax provided such vessel is purchased solely for resale (rental) purposes, and provided that the corporation furnishes its supplier with a properly completed Resale Certificate (Form ST-120). When the vessel is annually bareboat chartered to either a stockholder or non-stockholder and harbored in New York waters, the annual charter fee collected by the New York corporation will be subject to New York State and applicable local sales taxes. The New York corporation will be required to collect sales tax on the annual rental and to remit such tax to the Tax Commission, along with the applicable sales tax return.

II

A New York resident forms a Delaware corporation which then purchases a vessel, with delivery occurring outside New York State. The vessel is federally documented and the corporation bareboat charters the vessel on an annual basis to its New York resident stockholder. The New York resident stockholder will file an annual use tax return, reporting and submitting use tax on the annual charter fee. Petitioner inquires as to whether the corporation's sales tax obligations are satisfied by the stockholder's receipt and remittance of use tax.

Section 1134 of the Tax Law provides, in part as follows: "Registration. (a)(1) Every person required to collect any tax imposed by this article . . . , (2) every person purchasing or selling tangible personal property for resale . . . shall file with the tax commission a certificate of registration, in a form prescribed by it, at least twenty days prior to commencing business or opening a new place of business or such purchasing or taking of possession or payment whichever come first"

Pursuant to section 525.2(a)(3) of the Sales and Use Tax Regulations, the Delaware corporation, which purchases the vessel with delivery occurring outside New York State, will not be liable for New York State or local sales tax on such transaction. However, when such corporation bareboat charters the vessel to a New York resident, with delivery occurring within New York State, it must register as a sales tax vendor. Further, the corporation must collect New York and local sales tax on the annual charter fee billed to the lessee and will be personally liable for the tax imposed, collected or required to be collected. Tax Law, §1132,1133. The corporation will also be required to collect sales tax on all subsequent annual charter fees where delivery occurs within New York State. Finally, the Delaware corporation is required to submit the sales tax collected, along with the applicable sales tax return, to the State Tax Commission. It will not be relieved of its obligations and liabilities under the Tax Law by reason of an agreement to have the lessee report and pay a use tax on the annual charter fee. It is to be noted, in this regard, that section 1145(a) of the Tax Law provides for the imposition of penalties and interest for failure to file a return or pay over tax, and section 1145(b) provides for criminal penalties for failure to file a return or report, failure to file a registration certificate, or willfully failing to collect the tax from a customer.

If delivery of the vessel for any charter period occurs outside New York State, the Delaware corporation will not be required to collect sales tax on the charter fee. However, if the New York resident lessee subsequently uses or harbors the vessel in New York waters, such resident will incur a compensating use tax liability based on the annual charter fee.

In the event that the purported rental failed to meet the standards for a true arm's length transaction, as described above, the corporation would be liable for use tax, upon its use of the vessel in New York, in accordance with the terms of Technical Services Bureau Memorandum TSB-M-82(1)S, which provides the following:

"The following is representative of transactions which involve New York State residents forming corporations outside this State for purposes of purchasing and owning pleasure craft.

A New York resident arranges for the purchase, financing, insuring, mooring and storage of a vessel. Either prior to or immediately subsequent to these arrangements, a corporation is formed outside New York State. One of its purposes is to purchase and own a pleasure craft to be used in New York State. The newly formed corporation completes the purchase of the pleasure craft and takes delivery outside New York State. The pleasure craft is subsequently used in New York State. Use typically includes mooring, storage, etc.

"Although sales tax is not due on this transaction, as delivery occurred outside the State, New York State and local compensating use taxes are due once the pleasure craft is used inside the State. The activities of the purchaser described above, even when the purchaser is a foreign corporation, indicate liability for use taxes.

"In the event a sales tax was properly paid to another state in which delivery occurred and such state has a reciprocity agreement with New York State, the purchaser will be entitled to a credit for such taxes paid to the other state."

DATED: December 13, 1982

s/FRANK J. PUCCIA
Director
Technical Services Bureau