

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

TSB-A-85(50)S  
Sales Tax  
November 7, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S850620A

On June 20, 1985 a Petition for Advisory Opinion was received from Kleen Brite Laboratories, Inc., 600 Oak Street, Rochester, New York 14608.

The issue raised is whether the conveyance of assets to a corporation in exchange for its capital stock is excluded from the definition of "retail sale", because it was a transfer of property to a corporation upon its organization.

Petitioner transferred trucks and transportation equipment as well as DOT and ICC permits to K-B Transport, Inc. (hereinafter K-B) on March 8, 1982. K-B filed a Certificate of Incorporation with the New York Secretary of State on July 18, 1980, but did not take any further action until January 15, 1982 when it held its first organization meeting. At that time the corporate officers adopted by-laws, approved the opening of a bank account, and appointed the Board of Directors. The Board then authorized the first issue of capital stock to Petitioner as payment for the acquisition of certain assets.

Petitioner does not dispute that it exchanged property in consideration for the issue of K-B stock, but contends the transaction is not a retail sale since it was made at the time of the commencement of the corporate business which, in Petitioner's view, occurred in January 1982.

The Tax Law excludes from the term "retail sale" the transfer of property to a corporation upon its organization in consideration for the issuance of its stock (Tax Law 1101 [b][4][iii][D]).

Regulations Section 526.6(d)(4) provides that (ii) "Corporate existence is deemed to begin upon the filing of the certificate of incorporation with the Secretary of State. Only transfers made at the time of the commencement of the corporate business, or within a reasonable time thereafter, while the corporation is still in the process of organizing its business, are eligible for the exclusion. (iii) Transfers made to a dormant corporation, which is being activated, are not eligible for the exclusion.

Example 4: A corporation filed a certificate of incorporation with the Secretary of State on February 1, 1974. On March 10, 1976 it is decided that the corporation is to be activated, and on March 15, 1976 a stockholder transfers tangible personal property - a truck - to the corporation, in consideration of the issuance of shares of stock. The transfer is not excluded from the definition of retail sale, as it was not made upon the organization of the corporation."

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The term "commencement of the corporate business," as used in the preceding paragraph, cannot be taken out of context. The Regulations, by providing a special rule for the transfer of property to a dormant corporation, evince the intent of the legislature as interpreted by the Tax Commission to apply the exclusion only to assets transferred to a corporation while it is engaged, after incorporation, in a continuing process of organizing its structure and operations.

Petitioner cites the Matter of E.J. Delmonte Corp., Decision of the State Tax Commission, November 9, 1984, TSB-H-85(34)S, in support of its position that corporate organization is not completed until the authorized capital stock has been issued. However, in that case the tax commission actually held that the transferee corporation came into existence on the date of incorporation and that the transfer of property to it eleven months later was a retail sale, because it was not made upon the organization of the corporation. Consequently, the conveyance of assets by Petitioner to K-B 19 months after its incorporation was not made within a reasonable time after the beginning of the corporate existence.

Moreover, as Petitioner states in the Petition that prior to K-B's organization meeting on January 15, 1982 "neither the incorporators nor the corporation engaged in any activity whatsoever", K-B's status before that event clearly was that of a dormant corporation.

Thus, Petitioner made a transfer of property to a dormant corporation which was in the process of being activated. In accordance with the provisions of the Tax Law and Regulations, quoted above, this transaction is not excluded from the term "retail sale" and is therefore subject to the applicable state and local sales or use taxes.

DATED: October 15, 1985

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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