

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

TSB-A-91 (34)S
Sales Tax
April 17, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S901227A

On December 27, 1990 a Petition for Advisory Opinion was received from Majestic Pools Inc., 4370 Walden Avenue, Lancaster, New York 14086.

The issue raised by Petitioner, Majestic Pools Inc., is whether a newly-formed corporation, wholly owned by the shareholders of Petitioner, may purchase swimming pool construction material for resale to Petitioner, issuing a resale certificate to its suppliers but collecting sales tax on all sales to Petitioner.

Petitioner is a corporation which constructs in-ground concrete swimming pools and sells certain pool accessories. Petitioner purchases swimming pool construction material and the heaters, chlorinators, ladders and slides for use in constructing the pools. Petitioner also purchases other items such as floats, long-handled strainers, pool chemicals and pool liners and resells these items to its customers. In order to separate its construction and pool accessory functions, and for other business reasons, Petitioner's shareholders wish to form a new corporation (hereinafter "Newco") to purchase all construction material and pool supplies from third-party vendors. Newco will take title and possession of all of its purchases. Newco will register with New York State for sales tax collection and will issue resale certificates (Form ST-120) to all of its suppliers. It will then sell construction material to Petitioner for Petitioner's use in constructing pools and will sell pool accessories to retail customers (including purchasers of Petitioner's swimming pools). When Newco sells the purchased items, it will collect sales taxes from both Petitioner and the retail customers, and will remit the taxes to New York State.

Newco will have the same shareholders, officers and directors as Petitioner and will utilize space and equipment rented from Petitioner. Newco will have its own federal employer identification number and one or more employees who will handle all of Newco's purchases and sales. Petitioner will not buy or sell for Newco, but will buy from Newco. Virtually all of Newco's sales will be to Petitioner or customers of Petitioner. Newco will not file consolidated federal returns or combined reports with Petitioner and will not distribute its profits to Petitioner. Title and possession of all purchased items will remain with Newco until they are resold to Petitioner or Newco's other customers. Neither Petitioner nor Newco will act as agent for the other or have the ability to enter into contracts for or to bind the other. Each corporation will do business under its own name.

Pursuant to Section 1105(a) of the Tax Law sales taxes are payable when a retail sale of tangible personal property occurs. Section 1101(b)(4)(A) of the Tax Law defines the term "retail sale" as any sale of tangible personal property to any person for any purpose, other than for resale. Purchases by a contractor such as Petitioner do not qualify as purchases for resale if the purchased items are used by the contractor to perform a repair or a capital improvement pursuant to Section 1101(b)(4) of the Tax Law and Section 541.1(b) of the Sales and Use Tax Regulations. Purchases by an entity such as Newco may qualify as purchases for resale, since Newco is not a contractor and

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since all of its purchases are resold to Petitioner or unrelated third parties.

Retail sales by a corporation to a related corporation are treated, for sales tax purposes, in the same manner as sales between unrelated taxpayers, unless the first corporation purchased the property as the agent of the other, or the transfer qualifies for an exclusion, not applicable here, under Sections 1101(b)(4)(iii) (A) (merger or consolidation); (B) (liquidating dividend); or (D) (incorporation) of the Tax Law. Agency may be found when one entity purchases for the other under a written agency agreement, identifies the agency relationship in purchase documents, and passes on the purchased items at cost plus a normal agency fee. See, Section 541.3(d)(4) of the Sales and Use Tax Regulations. In certain unusual cases, agency may be found when one entity solicits business on behalf of the other or sells property obtained from the other. In these instances, both the agent and the principal may be held liable for sales taxes payable on sales by the agent in accordance with Section 526.10(a)(11) of the Sales and Use Tax Regulations. Case and administrative law has established that affiliated corporations, such as a parent and its subsidiaries and brother-sister corporations, are usually treated as independent entities for sales tax purposes. See Tops, Inc., Tx App Trib, November 22, 1989, TSB-D-89(66)S; 107 Delaware Associates, 64 N.Y.2d 935. The facts of this case do not permit "agency" treatment because Newco will not function as Petitioner's agent. When Newco purchases or sells property, it will be treated as a separate entity for sales tax purposes.

Based upon the facts presented, sales by third party vendors to Newco will be treated as sales for resale if Newco issues valid resale certificates (Form ST-120) to its suppliers. Sales of pool construction materials by Newco to Petitioner will be taxable. Newco must collect and remit to New York State taxes on all such sales where delivery to Petitioner occurs in New York State.

DATED: April 17, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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