

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

TSB-A-94 (25)S
Sales Tax
June 14, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940414A

On April 14, 1994, a Petition for Advisory Opinion was received from Nixon, Hargrave, Devans and Doyle, Clinton Square, Post Office Box 1051, Rochester, New York 14603.

The issues raised by Petitioner, Nixon, Hargrave, Devans and Doyle, are whether the purchase of stock by Acquiring Company of a corporation which owns tangible personal property and the subsequent merger of such corporation into Acquiring Company is subject to State and local sales and use taxes.

Target Company (hereinafter the "Target") is engaged in a service business in New York State. Target owns tangible personal property located in New York and owes certain liabilities. Acquiring Company is interested in purchasing Target's business. Pursuant to a plan, Acquiring Company will purchase all of the outstanding stock of Target and shortly thereafter (i.e., within 30 days) Target will be merged into Acquiring Company. No securities or consideration other than the stock of Acquiring Company will be issued or given to Target as a result of the merger. All of Target's assets and liabilities will be merged into Acquiring Company in accordance with the laws of New York State. Acquiring Company will use Target's assets in its business in New York State.

Section 1105(a) of the Tax Law imposes a sales tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4) of the Tax Law provides, in pertinent part, as follows:

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax...

*

*

*

(iii) The term "retail sale" does not include:

(A) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction.

Section 526.6(d) of the Sales and Use Tax Regulations provides, in part, as follows:

(d) Exclusions relating to corporate and partnership transactions. (1) The following transfers of property are not retail sales:

(i) The transfer of property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consideration effected under the law of New York or any other jurisdiction.

* * *

The transfers described in this paragraph between partners and partnerships, and between corporations and stockholders are excluded from the definition of "retail sale" because while the form of ownership of the property is changed, there is a continuity of interest in the property transferred.

* * *

(6) Mergers and consolidation. (i) A merger under the law of New York is the procedure whereby two or more corporations merge into a single corporation which is one of the participating corporations.

* * *

Example 8. Corporation A owns all the stock of Corporation B. Corporation B is merged into Corporation A pursuant to the Business Corporation Law. Included among the property transferred is machinery, office equipment and supplies. The transfer of the tangible personal property to Corporation A, pursuant to the merger, is not subject to sales tax.

Section 526.8(c) of the Sales and Use Tax Regulations provides, in part, as follows:

(c) Tangible personal property does not include:

- (i) real property;
- (2) intangible personal property.

TSB-A-94 (25)S
Sales Tax
June 14, 1994

In the instant case, Acquiring Company is purchasing 100% of the stock of Target. Moreover, within 30 days from such stock purchase, Target, pursuant to the laws of New York State, will be merged into Acquiring Company. As a result of the merger, Target will receive no securities or consideration other than the stock of Acquiring Company.

Stock is an intangible rather than tangible personal property. Accordingly, since Acquiring Company is merely purchasing an intangible and not tangible personal property, pursuant to Sections 1101(b)(4) and 1105(a) of the Tax Law and Section 526.8(c) of the Sales and Use Tax Regulations the purchase by Acquiring Company of 100% of the stock of Target is not subject to State and local sales and use taxes. In addition, pursuant to Section 1101(b)(4) of the Tax Law and Section 526.6(d) of the Sales and Use Tax Regulations the merger of Target into Acquiring Company solely in exchange for the stock of Acquiring Company and in accordance with the laws of New York State is not deemed to be a retail sale of tangible personal property. Therefore, pursuant to Section 1105(a) of the Tax Law and Section 526.6(d) of the Sales and Use Tax Regulations such merger is not subject to State and local sales and use taxes.

DATED: June 14, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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