

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

TSB-A-99(7)S  
Sales Tax  
January 28, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980713D

On July 13, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Arthur Andersen LLP, 101 Eisenhower Parkway, Roseland, New Jersey 07068. Petitioner, Arthur Andersen LLP, provided additional information pertaining to the Petition on August 13, 1998.

The issues raised by Petitioner are:

1. Whether, under the circumstances described below, a single member limited liability company ("SMLLC"), and the supplier of the SMLLC, may purchase tangible personal property for resale.
2. Whether a lease transaction between a client and a SMLLC is subject to sales or use tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's client (hereafter "Client") is primarily engaged in the business of acquiring and developing real estate for purposes of constructing and operating hotels. Client has business operations in thirty-two states and currently owns or leases hotels in New York. Client is organized as a "C" corporation for federal income tax purposes and is incorporated under the laws of Delaware.

In order to develop additional hotels, Client acquires development property in transactions that qualify as nonrecognition events for federal income tax purposes pursuant to Internal Revenue Code Section 1031. Specifically, Client identifies a particular property it wishes to acquire, and makes arrangements with the property owner to purchase that property. Client then assigns the purchase contract for the property to an unrelated company ("PropCo"), which has been created by a third party qualified intermediary to specifically represent Client in these transactions. Client does not have an ownership interest in PropCo or the third party qualified intermediary, and PropCo will not act as agent for the Client. PropCo is a wholly owned corporation created by the qualified intermediary to facilitate the IRC Section 1031 transactions between Client and the qualified intermediary.

At all times relevant to this transaction, Client provides PropCo with all funds necessary to purchase acquired properties, and in the case of raw land purchases, funds necessary for the subsequent development of the parcel.

Once construction of Client's hotel property has commenced, Client will acquire large quantities of tangible personal property, including furniture, fixtures, beds, linens and other property commonly used in hotel rooms. Since Client has in place the structure described above to acquire real property, it proposes to acquire tangible personal property in a similar manner. Under a contract separate from the real property contract, PropCo will purchase tangible personal property from a vendor, either based in New York, or who ships such property into New York by common carrier. At the time of purchase, PropCo will provide the vendor with a duly completed resale certificate. PropCo, in turn, will transfer this tangible personal property to a single member limited liability company, SMLLC, in which the Client is the single member, in an exchange which qualifies for nonrecognition of gain or loss pursuant to Section 1031 of the Internal Revenue Code. SMLLC will provide PropCo with a duly completed resale certificate, and will lease the tangible personal property to Client. SMLLC will not be leasing real property to Client. SMLLC will be a registered New York State vendor.

### **Applicable Law and Regulations**

Subdivisions 5 and 6 of Section 2 of the Tax Law provide:

5. The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law, a limited liability investment company formed pursuant to section five hundred seven of the banking law, or a limited liability trust company formed pursuant to section one hundred two-a of the banking law.

6. "Partnership and partner," unless the context requires otherwise, shall include, but shall not be limited to, a limited liability company and a member thereof, respectively.

Section 1101 of the Tax Law provides, in part:

(a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

\* \* \*

(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 sold 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.

\* \* \*

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law imposes a sales tax on the following:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

### **Opinion**

Client is primarily engaged in the business of acquiring and developing real estate for use in constructing and operating hotels. Client is proposing to acquire tangible personal property for use in its hotels in a transaction that qualifies for nonrecognition of gain or loss under Internal Revenue Code Section 1031. Specifically, PropCo will purchase tangible personal property and transfer the property in a like-kind exchange to a SMLLC in which Client is the single member. This property will be leased by the SMLLC to the Client. The SMLLC will only be leasing tangible personalty, not real property. Petitioner inquires whether Client is the ultimate consumer and responsible for payment of sales tax on the lease payments, and whether the initial purchase and subsequent transfer of the tangible personal property qualify as sales for resale.

PropCo's initial purchase of the tangible personal property from the vendor is a sale under Section 1101(b)(5) of the Tax Law. However, PropCo may purchase the tangible personal property exempt from tax if the purchase qualifies as a purchase for resale. Section 1101(b)(5) of the Tax Law defines a sale as any "transfer of title or possession or both, barter or exchange..." Propco's subsequent exchange of this tangible personal property for like property to the SMLLC qualifies as a sale under this definition. Therefore, PropCo's purchase of this property from the vendor will not

TSB-A-99(7)S  
Sales Tax  
January 28, 1999

be subject to sales tax, if the property is purchased exclusively for resale to the SMLLC. PropCo should supply the vendor with a properly completed resale certificate (Form ST-120) within ninety days of the date of delivery. See Section 1132(c) of the Tax Law and Section 532.4(d) of the Sales and Use Tax Regulations.

Since the exchange of this tangible personal property between PropCo and the SMLLC qualifies as a sale, this transaction is also subject to sales tax unless it qualifies as a purchase for resale by the SMLLC to the Client. Section 2(6) of the Tax Law provides that, for purposes of the Tax Law, a partnership includes, but shall not be limited to, a limited liability company. (See Deloitte and Touche, LLP, Adv Op Comm T & F, January 30, 1998, TSB-A-98(2)S.) A member of a partnership is a separate and distinct entity from the partnership for purposes of Article 28 of the Tax Law. Accordingly, the subsequent lease of tangible personal property by the SMLLC to the Client is a sale as defined in Section 1101(b)(5) of the Tax Law. Therefore, the exchange of this tangible personal property between PropCo and the SMLLC constitutes a purchase for resale, if the property is purchased by the SMLLC exclusively for lease to the Client. The SMLLC is not required to pay sales tax on this exchange of property. The SMLLC should furnish PropCo with a properly completed resale certificate (Form ST-120) as described above.

The lease of the tangible personal property by the SMLLC to the Client constitutes a retail sale subject to tax under Section 1105(a) of the Tax Law. Client is responsible for the payment of sales tax on the lease payments made to the SMLLC.

DATED: January 28, 1999

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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