

Amendments Affecting the Application of Sales and Use Tax to the Transfer, Contribution, or Distribution of an Aircraft or Vessel in Connection with Certain Corporate or Partnership Transactions

As a result of recently enacted legislation (Chapter 57 of the Laws of 2010), the transfer, contribution, or distribution (hereinafter “transfer”) of an aircraft or vessel in connection with certain corporate or partnership transactions is no longer excluded as a *retail sale*. Accordingly, the transfer is subject to New York State and local sales and use taxes. However, in certain situations a refund or credit is provided for the sales and use tax previously paid by the seller. This new law applies to sales and uses of aircraft or vessels occurring on or after August 11, 2010.

Background

Unless otherwise exempt, New York State and local sales and use taxes are imposed on the retail sale of tangible personal property and the sale of certain enumerated services. The Tax Law provides for purposes of the imposition of sales and use tax, that the term *retail sale* **does not include**:

- 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 laws of New York or any other jurisdiction;
- the distribution of property by a corporation to its stockholders as a liquidating dividend;
- the distribution of property by a partnership to its partners in whole or partial liquidation;
- the transfer of property to a corporation upon its organization in consideration for the issuance of its stock; and
- the contribution of property to a partnership in consideration for a partnership interest therein.

Amendments affecting the exclusions from the definition of *retail sale* for transfers of an aircraft or vessel

Chapter 57 amended the Tax Law to provide that the exclusions from the term *retail sale* for sales and use tax purposes as previously described do not apply to the transfer of an aircraft or vessel, except with regard to mergers between “unaffiliated persons” as defined in subdivision (q) of Tax Law section 1111. Therefore, unless this one exception applies, the transfer of an aircraft or vessel to or by affiliated corporations or partnerships, or between

corporations or partnerships and their shareholders or partners/members is now a retail sale subject to state and local sales tax, unless another exemption applies.¹

Computation of sales and use tax for a transfer of an aircraft or vessel that qualifies as a *retail sale* under the new law

Sales tax on the transfer of an aircraft or vessel that qualifies as a *retail sale* under the new law is computed based on the price paid for the aircraft or vessel upon its acquisition by the transferor/seller. However, if the transferor/seller or transferee/purchaser affirmatively shows that the seller owned the aircraft or vessel for six months prior to making the transfer that qualifies as a *retail sale* under the new law, the sales tax is computed on the lesser of the current market value of the aircraft or vessel, or the price paid for the aircraft or vessel when it was acquired.

Refund or credit for sales and use tax previously paid upon the acquisition or prior use of an aircraft or vessel

The transferee/purchaser of an aircraft or vessel, the transfer of which is subject to sales or use tax under the new law, is entitled to and may apply for a refund or credit against the sales or use tax due as a result of the transfer. The refund or credit is the amount of the sales or use tax paid to New York State or any other state on the transferor's/seller's purchase or previous use of the aircraft or vessel, but not more than the sales tax due on the transfer or the use tax due on the purchaser's use in New York State of the aircraft or vessel. In addition, the refund or credit based on the tax paid on the transferor's/seller's purchase or previous use of the aircraft or vessel is allowable regardless of the date on which the transferor/seller purchased or used the aircraft or vessel (i.e., a refund or credit would be allowed for tax paid before August 11, 2010).

An application for refund or credit must be filed using Form AU-11, *Application for Credit or Refund of Sales or Use Tax*, within three years after the date the tax due from the transferee/purchaser was payable to the Tax Department. If the transferee/purchaser is registered for sales tax purposes, and where an application for refund or credit has been filed, the applicant may take the credit on the return which is due coincident with or immediately subsequent to the time the application for credit is filed. However, the taking of the credit on the return is deemed to be part of the application for credit.

The new law gives the Commissioner of Taxation and Finance the discretion to waive the requirement that an application for refund or credit be filed in order to claim the refund or credit where the refund or credit is equal to the amount of the tax due from the transferee/purchaser. In these cases the Tax Department will waive the requirement for an application for a refund or credit to be filed.

In addition, no interest is allowed or paid on any refund or credit that is granted relating to these transfers.

¹ There are certain exemptions in the Tax Law that apply to commercial aircraft, commercial vessels, commercial fishing vessels and vessels sold to nonresidents. For example, see section 1115(a)(21) of the Tax Law for the exemption applicable to commercial aircraft. Aircraft and vessels as referred to throughout this memo mean those aircraft and vessels that are not otherwise exempt under the Tax Law.

The following examples illustrate the application of the amendments described in this memorandum.

Example 1: *On September 1, 2010, Mr. K, a resident of New York State for sales tax purposes, purchased a new yacht outside of New York State for \$1,050,000. The yacht was delivered to Mr. K outside of New York State, so no New York State sales tax was paid by Mr. K at the time of the purchase. Also, the sale of the yacht to Mr. K was not subject to any other state or local sales tax at the time of its purchase. On September 30, 2010, Mr. K formed new Corporation X, and transferred the yacht to Corporation X upon its organization. As consideration for the transfer Mr. K received all the newly issued and outstanding stock of Corporation X. Corporation X is a resident of New York State for sales tax purposes. The yacht is delivered to Corporation X outside of New York State. Since the yacht is delivered to Corporation X outside of New York State no New York State sales and use tax is due on that retail sale. On October 2, 2010, Mr. K, the sole shareholder of Corporation X, brings the yacht into New York State and moors it at a yacht club in Tarrytown (Rockland County). Since Corporation X acquired the yacht in a retail sale, and is a New York State resident, the use of the yacht in New York State is subject to state and local use tax, with the tax being computed on \$1,050,000, using the combined state and local use tax rate in effect in Rockland County of 8 3/8%. Therefore, Corporation X will owe a use tax of \$87,937.50 ($\$1,050,000 \times .08375$).*

It should be noted that even if Corporation X was not a resident of New York State for sales tax purposes when the yacht was contributed to it, if the yacht was used primarily by Mr. K, (i.e., at least 50% of the time), in New York State it would be subject to state and local use tax. (See TSB-M-09(4)S, Amendments Affecting the Application of Sales and Use Tax to Aircraft, Vessels and Motor Vehicles.)

Example 2: *Corporation A owns 15% of the issued and outstanding stock of Corporation B. Accordingly, Corporations A and B are affiliated corporations. On August 20, 2010, Corporation B is merged into Corporation A with Corporation A being the surviving corporation. One of the assets transferred to Corporation A by Corporation B under the merger is a large pleasure boat. The boat is delivered to Corporation A in New York State in a locality where the combined state and local sales tax rate is 8%. The boat was purchased by Corporation B in New York State 5 months before the merger for \$850,000. Upon purchase, state and local sales tax of \$68,000 was paid by Corporation B, based on a combined state and local sales tax rate of 8%. The transfer of the boat to Corporation A in the merger constitutes a retail sale of tangible personal property. The sales and use tax due on the transfer of the boat to Corporation A is based on the \$850,000 original purchase price that Corporation B paid when it purchased the boat 5 months earlier. The state and local sales tax on the retail sale of the boat to Corporation A is \$68,000 ($8\% \times \$850,000$). However, since the tax due on the transfer/sale to Corporation A is cancelled out by the credit allowed of \$68,000, based on the sales tax paid when the boat was purchased by Corporation B, no tax is due on the transfer of the boat to Corporation A. The necessity for Corporation A to file an application for a refund or credit based on the tax paid by Corporation B when it purchased the boat would be waived by the Tax Department in this instance.*

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.