

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(27)S
Sales Tax
June 9, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070601A

On June 1, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Arnan Development Corp., 6459 State Highway 23, Oneonta, NY 13820. Petitioner, Arnan Development Corp., provided additional information pertaining to the Petition on June 26, 2007, and July 3, 2007.

The issues raised by Petitioner are:

1. Whether Petitioner's purchase of a concrete pump truck is subject to sales tax.
2. Whether Petitioner's receipts from the lease of the concrete pump truck are subject to sales tax.

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

Petitioner purchased a concrete pump truck to lease to an affiliated company (Affiliate). Petitioner will not use the concrete pump truck itself and will only lease the truck to Affiliate. Affiliate is a manufacturer of ready-mix concrete that transports its ready-mix concrete to construction sites in a concrete mixer truck and, upon request, provides the concrete pump truck and operator.

The concrete pump truck is used at a construction site to move concrete to its final position and pump it as needed to construct a floor, wall, foundation, driveway, parking lot, etc. The pump is mounted on the truck, which is used in transporting the pump around a construction site and from one construction site to another. The concrete pump truck is not used in over-the-road concrete transportation. Its only function with respect to the concrete is to pump the concrete at the construction site. The concrete pump truck weighs approximately 73,900 pounds and is not a tractor-trailer.

Upon a customer's request, Affiliate provides the concrete pump truck for an hourly charge. An operator is also provided for a separate hourly charge. Affiliate provides contractors with separate billings for the concrete pump truck and operator, but never combines the billing for the use of the pump truck and operator with the billing for the sale of ready-mix concrete.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

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, . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . 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 provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

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

Section 1111(i)(A) of the Tax Law provides, in part:

Notwithstanding any contrary provisions of this article or other law, with respect to any lease for a term of one year or more of (1) a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, with a gross vehicle weight of ten thousand pounds or less. . . or an option to renew such a lease or a similar contractual provision, all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease, option to renew or similar provision, or combination of them, shall be deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease, option to renew or similar provision, or combination of them, or as of the date of registration of such property with the commissioner of motor vehicles, whichever is earlier....

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment. . . .

* * *

(26) Tractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair, provided such vehicle is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousand pounds.

Section 532.1(a) of the Sales and Use Tax Regulations provides, in part:

Time of collection. (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

Definitions. The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

* * *

(p) Rental, lease and license to use. (1) The terms *rental*, *lease* and *license to use* refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle

or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle; and

(v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Example 6: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, as the transfer of possession has occurred by reason of the company foreman's right to direct and control the operator's use of the equipment. The separately stated operator's wages are excludable from the taxable receipts.

Section 541.9(c)(1) of the Sales and Use Tax Regulations provides, in part:

Rentals and leases of equipment to contractors.

(i) Where a contractor leases equipment, the contractor is liable for the combined State and local sales and use tax on the total charges at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period, (*e.g.*, daily, weekly, monthly, depending on the frequency of payment).

Opinion

Petitioner purchased a concrete pump truck that Petitioner does not intend to use itself. Rather, the pump truck was purchased for the sole purpose of leasing the truck to Affiliate. In this case, Petitioner's purchase is excluded from sales tax as a purchase for resale. See section 1101(b)(4) of the Tax Law.

Petitioner's lease of the concrete pump truck to Affiliate is a sale, as defined in section 1101(b)(5) of the Tax Law, of tangible personal property that, unless otherwise exempt, is subject to sales tax under section 1105(a) of the Tax Law. As the concrete pump truck has a gross vehicle weight that is more than 10,000 pounds, the lease payments are not subject to the motor vehicle lease provisions of section 1111(i) of the Tax Law. Thus, any tax due will be imposed upon the payments due for each lease period (weekly, monthly, quarterly, etc.) over the term of the lease. See section 541.9(c)(1)(i) of the Sales and Use Tax Regulations. Sales tax is to be reported on the sales tax returns covering the lease periods, regardless of when payment is received. See section 532.1(a) of the Sales and Use Tax Regulations.

Petitioner's lease of the concrete pump truck to Affiliate will not be subject to sales tax if the truck is leased by Affiliate exclusively for resale or re-rental to its customers. If Affiliate uses the concrete pump truck to perform services for its customers, then the lease of the truck to Affiliate will be a retail sale subject to sales tax under section 1105(a) of the Tax Law, unless otherwise exempt. See section 1101(b)(4)(i) of the Tax Law. Whether the transaction where Affiliate furnishes the concrete pump truck with an operator to its customer constitutes a rental of tangible personal property or the sale of a service is a question of fact that can only be determined after review of all the facts and circumstances of the transaction. See section 541.2(p)(2) of the Sales and Use Tax Regulations. See also *Brendan P. McCafferty, Esq., CPA*, Adv Op Comm T&F, December 31, 2003, TSB-A-03(47)S. Such a determination is not possible given the facts provided; therefore, this Opinion discusses some of the relevant factors in making this determination.

An important consideration is whether Affiliate had contracted with its customer to make a foundation, create walls and floors, build parking lots, pave highways, etc. If, pursuant to its contract, Affiliate is responsible for the construction of such buildings and structures, then Affiliate would be considered to be using the concrete pump truck in its performance of such services, notwithstanding separate statements to the customer of charges for Affiliate's use of the truck and charges for the services of the operator.

Another important factor in determining whether Affiliate leases the concrete pump truck to its customers or uses the truck in performing services is the degree of dominion and control maintained by Affiliate's operator over the truck. Affiliate's operator will be considered to have dominion and control over the concrete pump truck if the operator has discretion as to the

manner in which the work is performed and the timing of the work. However, while the operator may be responsible for driving or operating the concrete pump truck, if the operator has no discretion as to the manner in which the truck is used in performing the work, the transaction appears to be a rental of the truck with an operator supplied. See section 541.2(p), Example 6, of the Sales and Use Tax Regulations.

If it can be determined that Affiliate has relinquished dominion and control of the concrete pump truck to the customer, the transaction would be the rental of tangible personal property. If Affiliate used the concrete pump truck solely for rentals to its customers during a given lease period with Petitioner, the lease payment to Petitioner for this lease period would be excluded from sales tax as a purchase for resale. Affiliate should provide Petitioner with a properly completed *Resale Certificate* (Form ST-120) for a period in which Affiliate will not use the concrete pump truck itself but will exclusively use the truck for resale. However, if Affiliate engages in the rental of the truck, it must collect and remit any sales tax due on such transaction.

If Affiliate, rather than its customer, maintains dominion and control over the concrete pump truck, then Affiliate is considered to be using the truck in performing a service. If, during a single lease period, Affiliate uses the truck to provide a service or otherwise uses the truck itself in addition to leasing the concrete pump truck to customers, then, during such period, Affiliate is not exclusively using the truck for resale and will owe sales tax on its lease payment to Petitioner unless otherwise exempt. See *Micheli Contracting Corp. v New York State Tax Commn*, 109 AD 2d 957.

Machinery or equipment used directly and predominantly in the production of tangible personal property for sale is exempt from sales and use tax under section 1115(a)(12) of the Tax Law. Affiliate is engaged in the sale of ready-mix concrete. However, Affiliate uses concrete mixer trucks to deliver the concrete to a construction site. The concrete pump truck is only provided for use at a construction site if requested by the customer. Thus, the pump truck is not used by Affiliate in the production of the concrete it sells. The concrete pump truck, not being a part of Affiliate's process of producing ready-mix concrete for sale, does not qualify for exemption under section 1115(a)(12).

Tractors, trailers, or semi-trailers, as such terms are defined in Article 1 of the Vehicle and Traffic Law, are exempt from sales and use tax under section 1115(a)(26) of the Tax Law, provided such vehicles are used in combination where the gross vehicle weight of such combination exceeds 26,000 pounds. Since the concrete pump truck in this case is not a tractor, trailer, or semi-trailer, the truck is not exempt under section 1115(a)(26).

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Since the concrete pump truck leased to Affiliate is not exempt from tax under section 1115 of the Tax Law, Affiliate's lease payments to Petitioner for lease periods in which the truck is not used exclusively for resale will be subject to sales tax.

DATED: June 9, 2008

/s/
Jonathan Pessen
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.