

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

TSB-A-89 (4)S
Sales Tax
January 31, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S881114A

On November 14, 1988, a Petition for Advisory Opinion was received from Binghamton Burial Vault Co., Inc., Phelps Street, Binghamton, New York 13901.

The issue raised is whether a transaction, in which a corporation transfers the assets of a division to a newly created corporation in exchange for stock of such newly created corporation, qualifies for the exclusion from sales tax provided under Section 1101(b)(4)(iii)(D) of the Tax Law.

Petitioner, Binghamton Burial Vault Co., Inc., will enter into a transaction in which the assets of Binghamton Precast & Supply, a division of Petitioner, will be transferred to a newly created corporation. In exchange for the assets, Petitioner will receive the stock of the new corporation. Petitioner will then distribute the new corporation's stock pro-rata to all of Petitioner's stockholders.

Section 1101(b)(4) of the Tax Law states, in part:

- (iii) The term retail sales does not include:
 - (D) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock.

Section 526.6(d) of the New York State Sales and Use Tax Regulations states, in part:

- (d) Exclusions relating to corporate and partnership transactions.
- (1) The following transfers of property are not retail sales:
 - (iv) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock.
- (5) Transfers of property to a corporation upon its organization.
 - (i) The transfer of property to a corporation upon its organization, in consideration for issuance of its stock, is not a retail sale.
 - (ii) Corporate existence is deemed to begin upon the filing of the certificate of incorporation with the Secretary of State. Only transfers made at the time of the commencement of the corporate business, or

within a reasonable time thereafter, while the corporation is still in the process of organizing its business, are eligible for the exclusion.

- (iii) Transfers made to a dormant corporation, which is being activated, are not eligible for the exclusion.

Example 4: A corporation filed a certificate of incorporation with the Secretary of State on February 1, 1974. On March 10, 1976 it is decided that the corporation is to be activated, and on March 15, 1976 a stockholder transfers tangible personal property - a truck - to the corporation, in consideration of the issuance of shares of stock. The transfer is not excluded from the definition of retail sale, as it was not made upon the organization of the corporation.

- (iv) Where a transfer of property is made to a corporation upon its organization in consideration of the issuance of stock, and other property, the transfer is a sale to the extent of the other consideration.

Example 5: A contribution of tangible personal property is made to a corporation upon its organization in consideration of the issuance of \$3,000 in shares of stock and \$7,000 in notes. The transfer is a retail sale to the extent of \$7,000.

- (v) Where a transfer of property is made to a corporation upon its organization in consideration of the issuance of stock, and the assumption of debts and liabilities representing security interests in the property transferred, the transfer is eligible for exclusion from the definition of retail sale.

Accordingly, as Petitioner will receive stock issued by the newly created corporation, the assets of Petitioner's division, Binghamton Precast & Supply, may be transferred without the incurrance of a sales tax liability by Petitioner.

It is noted that even though this transaction qualifies for exclusion from sales tax, the transfer of assets from a corporate division to a newly formed corporation in exchange for the issuance of the new corporation's stock constitutes a bulk sale. Section 537.1 of the Sales Tax Regulations defines the term bulk sale as any sale, transfer, or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Tax Commission.

Inasmuch as Petitioner will be liable for filing a notice of bulk sale with the Department of Taxation and Finance, Petitioner may wish to contact the Central Office Audit Bureau, Bulk Sales Unit, Department of Taxation and Finance, W.A. Harriman Campus, Albany, N.Y. 12227 for assistance in complying with its bulk sales obligations.

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Accordingly, if Petitioner transfers the assets of its Binghamton Precast & Supply Division to the newly created corporation upon its organization solely in consideration of the issuance of its stock, such transfer will not be subject to sales tax. However, if such transfer is in consideration of the issuance of stock and other property, such transfer will be subject to tax to the extent specified by regulation section 526.6(d)(5).

DATED: January 31, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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