

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

TSB-A-98(2)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971209E

On December 9, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Deloitte and Touche, LLP, Two World Financial Center, South Tower, 8th Floor, New York, New York, 10281-1414.

The issue raised by Petitioner, Deloitte and Touche, LLP, is whether the transactions described below constitute retail sales subject to sales and compensating use tax.

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

A corporation ("C") is restructuring its multi-state operations. C owns a corporate subsidiary B, which currently owns tangible personal property located in New York State. As part of the proposed restructuring, this property will be transferred to a new entity, either a new corporation, partnership, or single member limited liability company (LLC), as discussed in the three scenarios below.

Scenario 1

As part of the proposed restructuring, B contributes tangible personal property located in New York State to a new corporation ("Newco") upon its organization in consideration for the issuance of Newco stock. B subsequently transfers its interest in Newco to another affiliated corporation.

Scenario 2

As part of the proposed restructuring, B contributes tangible personal property located in New York State to a new partnership ("NewPart") in consideration for an interest in the partnership. B subsequently transfers its interest in NewPart to another affiliated corporation.

Scenario 3

As part of the proposed restructuring, B contributes the tangible personal property located in New York State to a new single member LLC organized by B in consideration for the interest in the LLC. Subsequently, B sells its interest in the LLC.

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 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(b)(4)(iv) of the Tax Law provides, in part:

The term "retail sale" does not include:

\* \* \*

(D) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock.

(E) The contribution of property to a partnership in consideration for a partnership interest therein.

Section 1105(a) of the Tax Law imposes sales tax on the receipts of every retail sale of tangible personal property, except as otherwise provided.

Section 526.6(d)(4)(i) of the Sales and Use Tax Regulations provides:

The purchase or surrender of a partnership interest for cash, or the substitution of one partner for another, is the sale of intangible personal property and is not subject to sales tax.

Section 526.8(c) of the Sales and Use Tax Regulations provides, in part: Tangible personal property does not include:

- (1) real property.
- (2) intangible personal property.

Opinion

The proposed transfer of corporation B's tangible personal property located in New York State to a newly formed corporation upon its organization is not subject to sales and use tax under the Tax Law. Section 1105(a) of the Tax Law imposes sales tax on all retail sales of tangible personal property. Section 1110(a) of the Tax Law imposes a tax on the use of tangible personal property purchased at retail, except to the extent that the property has already been or

will be subject to sales tax. Transfers of tangible personal property to a corporation solely in consideration for the issuance of its stock are specifically excluded from the definition of a retail sale subject to sales and use tax under Section 1101(b) of the Tax Law. Therefore, as described in Scenario 1, if corporation C restructures its multi-state operations and transfers the property belonging to subsidiary B to Newco upon its organization in exchange for the issuance of Newco stock, the transfer will not be considered a retail sale subject to sales and compensating use tax.

As described in Scenario 2, the proposed transfer of corporation B's tangible personal property located in New York State to a partnership in exchange for an interest in the same partnership is not taxable. Section 1101(b) of the Tax Law specifically excludes from the definition of a retail sale the contribution of property in exchange for an interest in a partnership. Therefore, if corporation C restructures its multi-state operations and subsidiary B contributes the tangible personal property located in New York to NewPart in exchange for an interest in NewPart, the contribution will not be a retail sale subject to sales and compensating use tax.

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. In Section 2(5) of the Tax Law, a limited liability company is defined as "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." Therefore, when a company is formed as a limited liability company in accordance with the Limited Liability Company Law or Banking Law, it will be treated as a partnership under Section 2 of the Tax Law. Accordingly, if corporation C or corporation B reorganizes and transfers tangible personal property to a limited liability company in exchange for an interest in the company, as described in Scenario 3, the transfer of the property will be treated the same as a transfer of assets in exchange for an interest in a partnership. Therefore, the transfer of property will not constitute a retail sale subject to sales and compensating use tax.

Any subsequent sale of any stock, partnership interest or interest in a limited liability company is the sale of intangible personal property not subject to sales and compensating use tax. (See Sections 526.6 and 526.8 of the Sales and Use Tax Regulations, and Nixon, Hargrave, Devans and Doyle, Adv Op Comm T & F, June 14, 1994, TSB-A-94(25)S)

DATED: January 30, 1998

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

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