

**ATTACHMENT TO
PETITION FOR ADVISORY OPINION**

State of New York – Department of Taxation and Finance - Form AD-1.8

4. The petitioner submits the following statement of facts as the basis for the requested advisory opinion:

Facts as the basis for the Advisory Opinion

Petitioner (the “Settlor”) created an irrevocable trust (the “Trust”) pursuant to a trust agreement (the “Trust Agreement”) between the Trustees and the Settlor. The Settlor is deemed to own the Trust property for Federal and New York State income tax purposes, as provided in Sections 671 to 679 of the Internal Revenue Code. Under the terms of the Trust Agreement, the Settlor has the administrative right to substitute trust property for property of equivalent value at any time (the “Substitution Power”). The provision of the Trust Agreement creating the Settlor’s Substitution Power reads as follows:

“Reacquisition of Trust Assets. The Settlor at any time or from time to time may acquire or reacquire any portion of the Trust Fund of any Trust by substituting therefor other property of an equivalent value, valued on the date of substitution. Notwithstanding any other provision of this Trust Agreement, the Settlor may exercise this power without the consent of the Trustees. Although this power is exercisable by the Settlor in a non-fiduciary capacity without the consent of any of the Trustees, the Trustees, if the Trustees believe that the property the Settlor seeks to substitute for trust property is not in fact property of equivalent value, shall seek a determination by a court of competent jurisdiction to assure that the equivalent value requirement of this provision is satisfied. The Settlor, at any time, may release this power with respect to any Trust. Any release under this section shall be irrevocable and shall be made by instrument in writing signed by the Settlor and delivered to each Trustee of the Trust with respect to which the release applies.”

The Settlor wishes to exercise the Substitution Power by substituting tangible personal property he owns (the “Substituted Property”) for Trust property other than tangible personal property (the “Trust Property”) having an equivalent value to the Substituted Property (the “Substitution”).

Applicable Law and Regulations

Section 1105 of the Tax Law provides in part:

Imposition of sales tax. On or after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon: (a) the receipts from every retail sale of tangible personal property, except as otherwise provided in this article...

Section 1110 of the Tax Law provides in part:

Imposition of compensating use tax. (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on or after June first, nineteen hundred seventy-one except as otherwise exempted under this article (A) of any tangible personal property purchased at retail...

Section 1101 of the Tax Law provides in part:

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

(1) Purchase at retail. A purchase by any person for any purpose...

(4) Retail Sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such 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 (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 526.7 of the Sales and Use Tax Regulations provides in part:

(a) Definition. (1) The words "sale," "selling" or "purchase" mean any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration.

* * * * *

(b) Consideration. The term consideration includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. Monetary consideration includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

Section 531.2 of the Sales and Use Tax Regulations provides in part:

(a) Consideration. Consideration is the amount paid for any property or service, valued in money. Consideration includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. Monetary consideration includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

Petitioner contends that the Substitution would not constitute either (i) a retail sale of tangible personal property or (ii) a purchase of tangible personal property at retail subject to New York State and City sales and/or compensating use tax because there is no consideration in connection with the Substitution.

The partial definitions of consideration contained in regulations Sections 526.7 and 531.2 do not provide an all-inclusive definition of consideration but only set forth items that are included as consideration. Consideration has been more generally defined under common law as the inducement offered to a contracting party to enter into a contract. It is an exchange of offers or mutual promises between parties that constitute the material cause of a contract or transaction. Consideration incorporates a bargain between parties that provides a motivating reason for each party to enter into the contract or engage in a transaction. *See Richman v. Brookhaven*, 80 Misc. 2d 563, N.Y.S.2d 731 (1975); *Weiner v. McGraw-Hill, Inc.* 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (2d Dep’t 1982); *In re Toscano*, 799 F. Supp. 2d 230 (2011).

Under the terms of the Trust Agreement, the Settlor alone, in a non-fiduciary capacity, decides whether to exercise the Substitution Power and what property he will substitute in place of the Trust Property. The Trustees have no power either to consent or agree. Consequently, there is no negotiation or bargaining between the Settlor and the Trustees, as there is no need to induce or motivate either party to enter into the Substitution. Once the Settlor decides to exercise his Substitution Power (considered a general power of administration under Section 675 of the Internal Revenue Code) the Trustees must comply with the terms of the Trust Agreement and permit the Substitution (their only role being to ensure that the Trust beneficiaries remain in the same economic position both before and after the Substitution). Under these facts, there could be no consideration or mutual assent for the Substitution, as the Settlor has a pre-existing right to initiate the Substitution and the Trustees a pre-existing obligation to implement it. Therefore, no consideration is provided for the transfer of the Substituted Property pursuant to the Substitution. The Substitution is merely an exercise by the Settlor of an administrative power over the Trust property.

In light of the foregoing, Petitioner contends that because there is no consideration in connection with the Substitution, the transfer of tangible personal property to the Trust as part of the Substitution does not constitute a retail sale under Tax Law Sections 1101(b)(4) and 1101(b)(5) and the receipt of the Substituted Property by the Trust does not constitute a purchase of tangible personal property at retail under Tax Law Section 1110(a). Accordingly, no New York State or City sales or compensating use tax should be imposed as a result of the Substitution.