

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

TSB-A-96 (65) S  
Sales Tax  
October 2, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S950913D

On September 13, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Rolston Woltin, franchisee of a 7-Eleven Food Store, 149 01, 41 Ave., Queens, New York 11355.

The issue raised by Petitioner, Rolston Woltin, is whether Petitioner as a franchisee, or Southland Corporation as franchisor of 7-Eleven stores, is personally liable for sales tax.

Petitioner presented the following facts in its Petition For Advisory Opinion as the basis for this Advisory Opinion.

As a matter of course the 7-Eleven system provides that the franchisee operates the franchised store operation under a license-lease contract with the Southland Corporation (hereinafter "Southland"). The contract also provides for a bookkeeping service and an inventory collateral loan program.

The franchisee is responsible for the "in store" operation. Southland is responsible for and sets all policies, programs and the "7-Eleven" system of operations.

Generally, receipts from sales at the franchised store, after payment for any purchases or operating expenses (as specified in the Store Franchise Agreement below) are deposited daily to a "locked box" bank account from which bank account only Southland can draw money. Sales and purchases are reported daily to Southland by the franchisee.

Southland creates and maintains all bookkeeping records; prepares monthly financial statements; issues and signs all checks for purchases, payroll, franchisee draw, (payroll, sales and other business) taxes; and, prepares, signs and files all sales, payroll and other business tax returns.

The following are relevant sections of Petitioner's Store Franchise Agreement.

9. Franchisee's Draw. If FRANCHISEE is not in breach of this Agreement, 7-ELEVEN shall: (i) weekly remit to FRANCHISEE the amount provided in Exhibit D; (ii) within 10 business days (Monday through Friday) after the end of each Accounting Period, inform FRANCHISEE of the available Monthly Draw and Excess Investment Draw for the Accounting Period; and (iii) remit to FRANCHISEE, upon FRANCHISEE'S written request, within 10 days after receipt of such request, that amount of Monthly Draw or Excess Investment Draw, or both, specified by the FRANCHISEE in such request, provided that the total amount so requested by FRANCHISEE shall not exceed the greater of the available Monthly Draw or Excess Investment Draw.

10. Daily Deposits, Bookkeeping Records and Financial Summaries. 7-ELEVEN shall have the right, under the terms hereof, to maintain, as part of its records and in accordance with this Agreement, Bookkeeping Records on FRANCHISEE's operation of the Store. FRANCHISEE may perform or obtain any additional bookkeeping FRANCHISEE desires. Either party may inspect records pertaining to the operation of the Store prepared or obtained by the other, where maintained, and during normal business hours. FRANCHISEE shall: (i) properly date and timely submit the Cash Report; (ii) deposit the Receipts for each Collection Period within 24 hours after the end of the Collection Period, in the Bank or night depository designated by 7-ELEVEN, except cash expended by FRANCHISEE from that day's Receipts for Purchases or Operating Expenses, which Purchases and/or Operating Expenses shall be properly reported and accompanied by invoices reflecting such payment; and (iii) deliver to 7-ELEVEN, at those times specified by 7-ELEVEN, written verification by the Bank of such deposit, which verification must be dated as of the business date next following the end of the Collection Period. If requested by 7-ELEVEN, FRANCHISEE shall deliver the Receipts (net of cash expenditures for authorized Purchases and Operating Expenses) to 7-ELEVEN rather than depositing such Receipts in the Bank. Amounts deposited by FRANCHISEE or delivered by FRANCHISEE to 7-ELEVEN may be withdrawn from the Bank by or otherwise used for the benefit of 7-ELEVEN at any time, without payment by 7-ELEVEN of interest or other compensation to FRANCHISEE.

FRANCHISEE shall prepare and furnish to 7-ELEVEN, on forms and at times acceptable to and as requested by 7-ELEVEN: (i) daily summaries of Purchases; (ii) daily reports of Receipts; (iii) weekly time and wage authorizations for FRANCHISEE's Store employees; (iv) all information requested by 7-ELEVEN regarding the vendors from which FRANCHISEE makes purchases; and (v) all such additional reports as 7-ELEVEN may require from time to time. FRANCHISEE also shall deliver or furnish to 7-ELEVEN copies of bank drafts, vendor and other receipts, invoices for Purchases, and receipts and bills for Operating Expenses, and keep 7-ELEVEN currently advised in writing of all of FRANCHISEE's actual retail selling prices (which FRANCHISEE shall solely select) and of all discounts, allowances, and/or premiums received by FRANCHISEE. FRANCHISEE shall retain and make available to 7-ELEVEN any records or other documents relating to the operation of the Store that 7-ELEVEN requests that FRANCHISEE retain and/or make available.

If FRANCHISEE is not in breach of this Agreement, 7-ELEVEN shall: (i) provide Financial Summaries for FRANCHISEE for the Store prepared from the Bookkeeping Records in the form of an income statement and a balance sheet for each Accounting Period and for each calendar year, payroll checks for FRANCHISEE's Store employees, draw checks, and merchandise reports; (ii) timely pay on behalf of FRANCHISEE, upon approval and submission to 7-ELEVEN, bank

drafts and invoices for Purchases (as verified by vendor statements), bills for Operating Expenses, and the payroll for FRANCHISEE'S Store employees; and (iii) assist FRANCHISEE in the preparation and filing of business tax reports and returns (except FRANCHISEE's income tax and related returns) to the extent the information is available from the Bookkeeping Records.

FRANCHISEE authorizes 7-ELEVEN to collect discounts and allowances not deducted from the face of invoices, and to charge FRANCHISEE for the market value of any premiums FRANCHISEE receives based upon purchases.

11. Open Account and Financing. As part of the Bookkeeping Records, 7-ELEVEN shall establish and maintain an Open Account for FRANCHISEE. FRANCHISEE's draw, Purchases, Operating Expenses, and amounts owed by FRANCHISEE to 7-ELEVEN which relate directly or indirectly to operation of the Store, shall be charged to the Open Account. All Receipts deposited or delivered to 7-ELEVEN shall be credited to the Open Account, and any amounts due from 7-ELEVEN to FRANCHISEE may be credited to the Open Account. The balance in the Open Account shall be computed on a monthly basis and shall be reflected in the Financial Summaries prepared by 7-ELEVEN for each Accounting Period. All Receipts shall be credited to the Open Account for the Accounting Period during which the Cash Report relating to those Receipts is dated (provided such Receipts are properly deposited in the Bank or delivered to 7-ELEVEN as provided herein); and all Purchases, Operating Expenses and amounts owed by FRANCHISEE to 7-ELEVEN shall be charged to the Open Account for the Accounting Period during which invoices, reports or information thereon is received by 7-ELEVEN (regardless of when paid by 7-ELEVEN on behalf of FRANCHISEE).

If FRANCHISEE is not in breach of this Agreement, and so long as 7-ELEVEN has a first lien on the Inventory and the Security Interest, 7-ELEVEN will finance (as a loan) any unpaid balance in the Open Account. FRANCHISEE shall execute a security agreement and financing statement(s) and such renewal or continuation financing statements or other documents relating to the Security Interest as are requested by and acceptable to 7-ELEVEN. If, at any time, in 7-ELEVEN's sole opinion, there has been a Material Breach by FRANCHISEE or 7-ELEVEN believes its Security Interest is threatened, 7-ELEVEN may discontinue the financing, described above, and the unpaid balance in the Open Account shall be immediately due and payable. FRANCHISEE may obtain financing other than from 7-ELEVEN.

The unpaid balance in the Open Account at the beginning of each Accounting Period (the amount financed by 7-ELEVEN) shall bear interest for that Accounting Period at the rate specified in Exhibit D. A credit balance reflected in the Open Account at the end of an Accounting Period shall bear interest for the number of days in the

current Accounting Period, at the rate specified in Exhibit D, which interest will be credited to the Open Account; provided, however, 7-ELEVEN may, at its option, limit the credit balance amount upon which 7-ELEVEN will pay interest upon notice to FRANCHISEE.

19. Taxes. 7-ELEVEN shall pay all real and personal property taxes on the Store and Equipment (specified in Exhibits A and B). FRANCHISEE shall be solely responsible for and pay all other taxes, including, but not limited to, sales, inventory, payroll, business, and income taxes.
  
21. Independent Contractor. FRANCHISEE shall be an independent contractor and shall control the manner and means of the operation of the Store and exercise complete control over and responsibility for all labor relations and the conduct of FRANCHISEE's agents and employees, including, but not limited to, the day-to-day operations of the Store and all Store employees. FRANCHISEE and FRANCHISEE's agents and employees shall not (i) be considered or held out to be agents or employees of 7-ELEVEN or (ii) negotiate or enter any agreement or incur any liability in the name or on behalf of, or that purports to bind, 7-ELEVEN. No actions taken by FRANCHISEE or FRANCHISEE's agents or employees shall be deemed to be actions obligating 7-ELEVEN. FRANCHISEE acknowledges that nothing herein shall create a fiduciary or similar relationship with 7-ELEVEN.

#### Applicable Law

Section 1101(a) of the Tax Law provides:

When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

Section 1101(b)(8) of the Tax Law provides in part:

Vendor. (i) The term "vendor" includes: (A) A person making sales of tangible personal property or services, the receipts which are taxed by this article;

Section 1131(1) of the Tax Law provides in part:

"Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services ....

Section 1132(a) of the Tax Law provides in part:

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. . . The tax shall be paid to the person required to collect it as trustee for and on account of the state.

Section 1133(a) of the Tax Law provides in part:

**Liability for the tax.** (a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.

...

Section 1135(a)(1) of the Tax Law provides in part:

Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require. . . .

#### OPINION

Petitioner, as the franchisee of Southland, licenses-leases a 7-Eleven store. Petitioner is a vendor since it makes sales of tangible personal property or services, the receipts from which are subject to tax. See section 1101(b)(8)(i)(A) of the Tax Law. As a vendor, Petitioner is a "person required to collect any tax imposed by this article" under section 1131(1) of the Tax Law. Petitioner, therefore, is personally liable for the sales tax that it collects or is required to collect on sales from the store it operates.

Each day Petitioner is required to deposit all receipts, net of purchases and operating expenses, in a "locked box" bank account from which only Southland can draw. Under the contract, Petitioner, as franchisee is solely responsible for sales tax. However, Petitioner states that Southland creates and maintains bookkeeping and financial records including filing sales tax returns. Sales and compensating use taxes are paid to Petitioner as trustee for and on account of New York State and are not the property of either Petitioner or Southland, notwithstanding any contrary provision of the contract. Thus, Petitioner is liable for the collection and payment over of tax and the filing of returns.

If Petitioner conveys these trust tax monies to Southland and Southland prepares, signs and files sales and use tax returns, Southland thereby also becomes liable for the taxes, whether or not it is a vendor for purposes of article 28 of the Tax Law with respect to sales by Petitioner. (See, Tilden Commercial Alliance, Inc., Adv Op St Tx Comm, May 11, 1981, TSB-H-81(105)S) Consequently, because of the contractual relationship between Southland and Petitioner, and because Southland prepares, signs and files returns which Petitioner is also required to file, each of them becomes jointly and severally liable for the tax collected by Petitioner and deposited in the locked

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box account administered by Southland. It should be noted that the Department of Taxation and Finance is not required to collect sales and use tax due from another person liable for the tax before it collects it from Petitioner. (See, Matter of Kieth Pierpont, Dec St Tax Comm, October 21, 1983, TSB-H-83(199)S)

DATED: October 2, 1996

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

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