

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(49)S
Sales Tax
November 20, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981103B

On November 3, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from PricewaterhouseCoopers LLP, 1301 Avenue of the Americas, New York, New York 10019.

The issue raised by Petitioner is whether the activities of a Qualified Intermediary, as described below, require it to register as a vendor for sales and use tax purposes.

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

The Internal Revenue Service has ruled that exchanges of rental property by a corporation through the use of a qualified intermediary (hereinafter referred to as "Qualified Intermediary") and/or a qualified escrow account (hereinafter referred to as "Qualified Escrow Account") can qualify under Internal Revenue Code (hereinafter referred to as "IRC") Section 1031 as tax-free like-kind exchanges, for federal income tax purposes. The transactions at issue in this Petition concern the manner in which a motor vehicle is purchased, leased and sold in order for those transactions to meet the requirements of IRC Section 1031. While Petitioner describes below the course of action to be followed in order to comply with the requirements of IRC Section 1031, this opinion does not address any income tax provisions of the Internal Revenue Code.

During the course of a motor vehicle leasing transaction, events can be segmented into three categories; the acquisition of the property by the lessor, the leasing of the property, and finally the disposition of the property by the lessor at the conclusion of the lease term or terms. In a typical scenario (not an IRC Section 1031 transaction), when a lease purchase option is exercised the lessor sells the motor vehicle and collects the purchase price paid from the lessee. Or, if the motor vehicle is sold to a dealer or other reseller, the lessor obtains a resale certificate from the dealer and collects the purchase price paid from the dealer. In either case, title to the motor vehicle is then transferred from the lessor to the purchaser. Typically, when a lessor purchases a motor vehicle from a seller for purposes of leasing to an individual, the lessor supplies a valid resale certificate to the seller, makes payment for the vehicle and receives title to the motor vehicle.

It is presumed in this Advisory Opinion that for purposes of making the transactions described above meet the requirements of IRC Section 1031, a Qualified Intermediary is retained by the lessor. The lessor in this case is registered under Article 28 of the Tax Law. At the conclusion of the lease term, the lessor wants to sell the motor vehicle ("Relinquished Property") and purchase another motor vehicle of the same kind ("Replacement Property") for leasing purposes. Either the lessee will exercise an option to purchase the Relinquished Property or, when a lessee declines to exercise such an option, the motor vehicle will typically be sold by the lessor to a third party, such as a dealer. In the agreement between the lessor and the Qualified Intermediary, the lessor assigns

to the Qualified Intermediary the lessor's rights to receive payments under its agreement with the purchaser. The lessor will execute and deliver title to the motor vehicle to the purchaser, and the motor vehicle is delivered directly by the lessor to the purchaser. The purchaser will remit its payment to the Qualified Intermediary for deposit in a Qualified Escrow Account.

The lessor then identifies Replacement Property (another motor vehicle) it wishes to purchase from a seller. The lessor enters into an agreement with the seller to purchase the motor vehicle. The lessor directs the Qualified Intermediary to pay the seller from the funds in the Qualified Escrow Account. The seller executes and delivers title to the motor vehicle to the lessor and the motor vehicle is delivered directly by the seller to the lessor. The subsequent lease of the motor vehicle will remain unchanged, and the lessor will collect and remit sales tax on the lease transaction receipts.

The Qualified Intermediary's involvement is primarily limited to the receipt, management and subsequent distribution of funds in the Qualified Escrow Account. The Qualified Intermediary does not obtain title to, or possession of, the motor vehicle in the transactions described above. The role of the Qualified Intermediary is to provide a necessary service to the lessor which enables the lessor to obtain the IRC Section 1031 like-kind exchange treatment. The Qualified Intermediary receives a commission for the performance of this service.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property. . . ."

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. . . .

(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.

* * *

(8) Vendor. (i) The term “vendor” includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article. . . .

Section 1131(1) of the Tax Law defines “[p]ersons required to collect tax,” in part, as “every vendor of tangible personal property or services. . . .”

Section 1132(a)(1) 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:

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 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. (Emphasis added)

(2) Among the transactions included in the words *sale, selling or purchase* are exchanges, barters, rentals, leases or licenses to use or consume tangible personal property.

* * *

(c) *Rentals, leases, licenses to use.* (1) The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible property without a transfer of title to the property. . . .

(2) Where a lease (other than one described in section 527.15 of this Title) with an option to purchase has been entered into, and the option is exercised, the tax will be payable on the consideration given when the option is exercised, in addition to the taxes paid or payable on each lease payment.

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Section 1131(1) of the Tax Law provides that the term “person required to collect any tax imposed by this article” includes every vendor of tangible personal property. Section 1101(b)(8)(i)(A) of the Tax Law provides that the term “vendor” includes “[a] person making sales of tangible personal property or services, the receipts from which are taxed by this article.” In the transactions described by Petitioner, the Qualified Intermediary manages the payment of the purchase price in an escrow account pending the completion of the transactions. The Qualified Intermediary does not take title to any of the motor vehicles or receive possession of any of the vehicles, and does not transfer title or possession to the purchasers. Rather, it merely provides services that facilitate the sales.

Therefore, the Qualified Intermediary is not a vendor in the transactions described by Petitioner. Accordingly, the Qualified Intermediary is not required to register to collect sales tax in the transactions described by Petitioner. The lessor in these transactions is the vendor and it is registered under Article 28 of the Tax Law. The lessor is the party responsible to collect and remit New York State and local sales tax from the purchaser unless it obtains a properly completed exemption certificate, such as Form ST-120, Resale Certificate, within 90 days of the date of delivery. If the lessor purchases motor vehicles exclusively for leasing (resale), it, rather than the Qualified Intermediary, should furnish a properly completed Resale Certificate to the person from whom it purchases the motor vehicles.

It is noted that although the Qualified Intermediary in the transactions at issue does not have the responsibility of a vendor to collect sales taxes, if amounts received by the Qualified Intermediary contain payment for New York State sales tax, both the Qualified Intermediary and the lessor become jointly and severally liable for the taxes collected (see E. Parker Brown, II, Adv Op Comm T&F, February 29, 2000, TSB-A-00(13)S).

DATED: November 20, 2000

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