

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

TSB-A-00(8)S
Sales Tax
February 2, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990429B

On April 29, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Aron Security, Inc., 390C Suffolk Avenue, Islandia, New York 11722. Petitioner, Aron Security Inc., provided additional information pertaining to the Petition on July 12, 1999.

The issues raised by Petitioner are:

- (1) Whether its purchases of motor vehicles used to provide security services are exempt from sales tax as purchases for resale.
- (2) Whether its purchases of supplies and parts used to maintain such motor vehicles are exempt from sales tax as purchases for resale.
- (3) Whether it is correctly supplying Form DTF-803, *Claim for Sales Tax Exemption-Title/Registration*, in connection with its purchases of motor vehicles.

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

Petitioner began business in 1995 to provide security services to individuals, businesses, shopping centers and governmental entities located primarily in Long Island, New York. Petitioner derives its income from two sources: (1) by supplying security guards and (2) by supplying security vehicles. Only Petitioner's dealings with customers requesting security vehicles are at issue in this Advisory Opinion.

Petitioner purchases used cars for use in its business from available sources such as local police departments. Many of the vehicles say "Security" on them and are intended to act as a deterrent to wrongdoing. Petitioner has grown by focusing on a niche market of leasing these vehicles to its customers. It also derives profits from contracting out drivers for the vehicles.

Petitioner's customers have a choice of leasing a vehicle with or without a driver. If leased without a driver, the car is parked in an area chosen by the customer to create an impression that a security force is present. Petitioner does not tell its customers where to park the unmanned vehicles. The car keys are left with the customer at the customer's location so that the car may be moved as the customer wishes. When a car is leased with a driver, the customer determines where the vehicle patrols and for how long, e.g., around the parking areas of a shopping center. The driver and car are under the control and direction of the customer during the lease period, and the customer is contractually liable for the driver's actions during the time the car and driver are under the customer's control. All drivers are licensed security guards. As such, they do not carry firearms but

are authorized to make a citizen arrest or call the police for assistance. The customers are billed one price, either for the use of the vehicle for a certain period of time or, for a higher fee, for the use of the vehicle with the driver for a certain period of time. Sales tax is collected from customers who lease vehicles from Petitioner.

Petitioner maintains a fleet of about thirty-eight vehicles which necessitates the employment of a full-time mechanic and a fully equipped indoor repair facility which can service at least three cars at one time. Petitioner purchases supplies, car parts and equipment which become an integral part of its leased cars so that they remain mechanically sound and safe. On a regular basis, the repair shop mechanic, together with management, determine if a car should be sold rather than held for lease and repaired. It is the nature of Petitioner's business that cars are constantly being bought and sold such that a profit on each car occurs when the expenses associated with that car are less than the total income from the car. The expenses of each car include the purchase price, repair costs, insurance and other overhead. The income from each car includes the lease income and the sales price of the car.

When Petitioner purchases a car, it files New York State Department of Taxation and Finance form DTF-803, *Claim for Sales Tax Exemption - Title/Registration*, and provides its sales tax certificate of authority number as required on the form. It elects, by checking box 3 on the form, to claim a sales tax exemption and states that the motor vehicle will be exclusively used for rental or lease to its customers.

Applicable Law and Regulations

Section 1101(b) of the Tax Law states, 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 or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. . . .

(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. (Emphasis added)

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. – . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith. (Emphasis added)

Opinion

Petitioner provides security services to individuals, businesses and governmental entities. As part of the services it offers, Petitioner provides security vehicles (cars) to its customers, available either with or without a driver. A driver licensed as a security guard is used to periodically patrol the customer’s protected premises in the security vehicle. In this instance, Petitioner charges one fee that includes compensation for the driver and for providing the security vehicle. For a lower fee, the car is provided without a driver, in which case it is parked in an area chosen by the customer to create an impression that a security force is present. The keys are left with the customer so that the vehicle may be moved if the customer wishes.

TSB-A-00(8)S
Sales Tax
February 2, 2000

Petitioner characterizes part of its business operations as “vehicle rental,” and collects New York State sales tax on its fees described as rental charges for the leasing of motor vehicles. However, in determining a service’s taxability, the New York courts have focused their analyses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated (see Matter of Atlas Linen Supply Co., Inc. v. Chu, 149 AD2d 824, lv denied 74 NY2d 616; Matter of Penfold v. State Tax Commn., 114 AD2d 696; Matter of Waste Management of New York v. New York State Tax Appeals Tribunal, 185 AD2d 479, lv denied 80 NY2d 762). In those instances where Petitioner provides vehicles with licensed security guards as drivers, it is clear that Petitioner’s primary function is to provide security services to its customers. The provision of a security vehicle with a patrolling security guard is one of the services specifically subjected to the tax imposed under Section 1105(c)(8) of the Tax Law. Accordingly, Petitioner is providing taxable protective services as described in Section 1105(c)(8) of the Tax Law (see Price Waterhouse LLP, Adv Op Comm T&F, September 9, 1998, TSB-A-98(62)S and TSB-A-98(63)S).

Under Section 1101(b)(4)(i)(B) of the Tax Law, purchases of tangible personal property for use in performing services which are subject to sales tax may be excluded from sales tax as purchases for resale under certain conditions. To qualify for this resale exclusion, the tangible personal property must become a component part of the property upon which the services are performed, or it must be later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. As described above, the security vehicles provided by Petitioner are an integral and inseparable component of Petitioner’s security service and Petitioner is not, in reality, selling two separate items or services. Like the compactors in Waste Management, supra, and the linens in Atlas Linen Supply, supra, title or possession of the vehicles is never permanently transferred to Petitioner’s customers. They remain the property of Petitioner, do not become part of the real property being protected and are removed at the end of the contract period. Since Petitioner will be using the vehicles in performing its security service, Petitioner is not considered to be reselling the vehicles to its customers but is considered to be the ultimate consumer of the vehicles. Accordingly, Petitioner’s purchases of such motor vehicles, and their parts/supplies, which are used in providing its protective services do not qualify as purchases for resale as described in Section 1101(b)(4)(i) of the Tax Law and are subject to sales or compensating use tax (see Model Auto Driving School, Inc., Adv Op Comm T&F, May 2, 1996, TSB-A-96(25)S; Price Waterhouse LLP, supra).

On the other hand, if Petitioner furnishes vehicles without drivers to its customers for the customers’ own use as described above, and does not provide any protective services, the transfer of such vehicles for a consideration will constitute a rental of tangible personal property. Petitioner’s purchases of vehicles (and their parts/supplies) used exclusively for this purpose are purchases for resale within the meaning and intent of Section 1101(b)(4)(i) of the Tax Law, and are therefore not subject to State or local sales tax, provided Petitioner furnishes its supplier a properly completed *Resale Certificate* (Form ST-120) no later than 90 days after the purchase. When registering such vehicles with the Department of Motor Vehicles, Petitioner’s submission of a properly completed

TSB-A-00(8)S
Sales Tax
February 2, 2000

Form DTF-803, *Claim for Sales Tax Exemption-Title/Registration*, is acceptable proof that no sales tax is due on such vehicles. (See Section 1132(f) of the Tax Law.)

It is emphasized that for these purchases to be eligible for the resale exclusion, Petitioner must show that each vehicle was purchased for only one purpose, resale (see Matter of P-H Fine Arts Ltd. v. New York State Tax Appeals Tribunal, 227 AD2d 683, lv denied 89 NY2d 804). A mixed use of the vehicles between Petitioner's own use in providing protective services and the leasing of such vehicles to its customers does not satisfy this requirement (Model Auto Driving School, Inc., supra). Therefore, if Petitioner uses its vehicles interchangeably for rental and non-rental purposes, the purchases of all the vehicles are subject to sales or use taxes.

As a consequence of leasing motor vehicles to its customers, Petitioner is subject to the provisions of either Section 1160 or Section 1111(i) of the Tax Law, depending on the term of the lease. Section 1160 of the Tax Law imposes an additional special tax on short term passenger car rentals (less than one year) at the rate of 5% of the rental receipts (see BEJ Taxi Corp., Adv Op Comm T&F, February 13, 1991, TSB-A-91(20)S). Section 1111(i) of the Tax Law provides that with respect to any lease for a term of one year or more, sales tax must be collected on the total amount of receipts due under the entire term of the lease as of the date of first payment under the lease, or as of the date of registration of such vehicle with the Commissioner of Motor Vehicles, whichever is earlier. See Section 527.15 of the Sales and Use Tax Regulations.

DATED: February 2, 2000

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

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