

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

TSB-A-88 (55)S
Sales Tax
October 27, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880801A

On August 1, 1988, a Petition for Advisory Opinion was received from Limousine Operators of Western New York, Inc., c/o Mark S. Klein, Esq., Hodgson, Russ, Andrews, Woods and Goodyear, 1800 One M&T Plaza, Buffalo, New York 14203.

The issue raised is whether services provided by Petitioner's members are a rental, lease, or license to use tangible personal property pursuant to section 1101(b)(5) of the Tax Law.

Petitioner represents various operators of limousine services. Through their operations, Petitioner's members provide several different types of service to their clients. The specific services provided by Petitioner's members depend on the situation.

The eight most common situations are:

- I. Funerals. A client hires the services of a limousine and driver to transport family and close friends to and from the funeral. The funeral director determines the route to be taken by the limousine. The itinerary is set prior to the funeral by the funeral director. Any deviation from the itinerary is solely within the discretion of the funeral director as is the route to be taken.
- II. Weddings. A client hires the services of a limousine and driver to provide transportation for members of the wedding party. The client predetermines the itinerary. The route is determined by the driver.
- III. Bar Tours.
 - a. Destinations determined by passengers en route:

A client hires the services of a limousine and driver to provide transportation for a given period of time. The passengers determine destinations while en route and there is no predetermined itinerary. The route taken between destinations is determined by the driver.
 - b. Stag-tours.

A client hires the services of a limousine and driver to provide transportation to predetermined destinations for a fixed period of time. Although the destinations are predetermined, the itinerary is flexible and determined by the passengers. The route taken between destinations is determined by the driver.

- IV. Proms. The client hires the services of a limousine and driver to pick up the couple(s) at home, drive the couple(s) to dinner, and then drive the couple(s) to the location of the prom. During the prom, the driver and vehicle are free to drive for other clients. At a prearranged time, the limousine and driver will return to the location of the prom and pick up the couple(s) and deliver the couple(s) to their final destination. The route taken between destinations is determined by the driver.
- V. Celebrity/VIP/As Pre-Directed. The client hires the services of a limousine and driver to shuttle a particular person to certain places or events. The itinerary is determined at the time that the agreement is executed. For example, a concert promoter hires a limousine to pick up a rock star at the airport, drive him (her) to the hotel, drive him (her) to the show, drive him (her) back to the hotel after the show is over, and drive him (her) back to the airport the next morning. All of the pick up and delivery times are prearranged by the parties prior to the execution of the agreement subject to minor alterations of the schedule if required (e.g., late arrival of the airplane). The route taken between destinations is determined by the driver.
- VI. Airport Transfers. The client hires a limousine and driver to pick up a traveler at a predetermined location and time, and deliver the traveler to the airport. Alternatively, the limousine and driver are hired to pick up a traveler at the airport and deliver him (her) home. The route taken is determined by the driver.
- VII. Stand by/Retainer. The client pays a flat rate to secure the services of a limousine and driver at short notice. The client's right to use the service is limited by some predetermined variable (e.g. time, distance). The client does not have the right to choose a particular driver or limousine.
- VIII. Driver Only. The client hires the services of a driver only, to drive a car owned by the client.

Petitioner also states that:

In all situations where the services of a limousine and driver are hired (all situations except VIII) the petitioner's members are solely responsible for the operation of their vehicles and pay all registration fees, insurance fees and miscellaneous expenses (repair, fuel, maintenance, tolls, etc.) as well as the driver's wages.

Petitioner does not indicate whether its members retain the right to hire and fire drivers.

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

Section 1101(b)(5) defines "sale" as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use...".

Section 526.7(e) of the Sales and Use Tax Regulations states, in part:

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

(5) It is not essential for a transfer of possession to include the right to move the tangible personal property which is the subject of a rental, lease or license to use." 20 NYCRR 526.7(e)(4) & (5).

In Technical Services Bureau Memorandum TSB-M-84(7)S, Bus Company Transactions, Transportation Service v. Equipment Rental, it was determined that:

Where a bus company charters a bus to a group, and the bus company retains dominion and control over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. ... Dominion and control remains with the owner of a vehicle when pursuant to an agreement or contract:

1. there is no transfer of possession, control and/or use of the vehicle during the terms of the agreement or contract; and
2. the owner maintains the right to hire and fire the drivers; and
3. the owner uses his own discretion in performing the service (even though the customer may designate the area where passengers will be picked up and delivered) and generally selects his own routes; and

4. the owner retains the responsibility for the operation of the vehicle; and
5. the owner directs the operation, pays all operating expenses, including drivers' wages, insurance, tolls and fuels.

While the provisions of TSB-M-84(7)S do not specifically apply to limousine services, the criteria set forth therein are also useful in determining whether a limousine service has relinquished dominion and control of the vehicle within the meaning of regulation section 526.7(e).

In situations II, III, IV, V and VI, Petitioners' members meet requirements 1, 3, 4 and 5 set forth above. If, in addition, Petitioner's members maintain the right to hire and fire the drivers, they will fulfill requirement #2, as well. If Petitioner's members fulfill all five requirements, Petitioner's members will be deemed to retain dominion and control over the limousines and thus to be providing an exempt transportation service.

In situations I and VII, Petitioner's members relinquish dominion and control over the limousines inasmuch as Petitioner's members do not use their own discretion in performing the service and do not select their own routes. Accordingly, situation I and VII are rentals of tangible personal property the receipts from which are subject to sales tax as further described below.

The final service which Petitioner's members provide is a driver only service (situation VIII). In this situation, no equipment is provided to the customer. Accordingly, this transaction would not be subject to sales tax.

Additionally, Sales and Use Tax Regulation section 530.4(b) provides in part:

(b) State and local sales and use tax schedule covering certain rentals or leases of motor vehicles. Except as set forth in subdivision (c) of this section, [regarding New York City rentals] provided all registration fees and all insurance charges are paid by the lessor, the amount of tax to be collected on charges for the rental or lease of motor vehicles may be computed under article 28 or pursuant to articles 28 and 29 of the Tax Law on 82 percent of the total rental or lease charge, and such method of computation shall be in lieu of separately stating a charge for these or other nontaxable items, such as vehicle parking (including any amounts separately stated on billings, other than charges for chauffeurs and helpers).

Accordingly, in those instances when Petitioner's members are deemed to be renting tangible personal property (situations I and VII), Petitioner's members may avail themselves of the provisions of regulation section 530.4(b) and compute their taxable receipts based upon 82% of the total rental or lease charge.

Additionally, it should be noted that the results described above are based upon the facts described by Petitioner in its Petition for Advisory Opinion. If a customer enters into an agreement for the use of a limousine (e.g. for a prom or for a "night on the town") and the customer is able to dictate the routes, schedule the time of arrival and departure, have the driver and limousine stand by while the customer is having dinner or attending a function and for all intents and purposes have the limousine available to the customer and subject to the customer's direction for the entire period of rental, then the customer is exercising dominion and control over the vehicle and the transaction would properly be deemed a taxable rental of tangible personal property.

DATED: October 27, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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