

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

TSB-A-97(1)S
Sales Tax

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961101A

On November 1, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from David P. McKelvey, c/o Grassi & Co., 76 South Central Avenue, Valley Stream, NY 11580.

The issue raised by Petitioner, David P. McKelvey, is whether, for purposes of sales tax, the transaction described below constitutes a transportation service or the rental of equipment.

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

A trucking company is hired to pick up asphalt from a plant and deliver it to a job site. The trucking company provides a truck and a driver, selects which driver will be used, pays the wages of the driver, and has the ability to hire and fire the drivers. The trucking company pays all of the operating expenses of its equipment including insurance, tolls and fuels, and will invoice its customers based on an hourly rate for the truck and the driver.

The trucking company will be instructed when to be at the job site with the asphalt, and is free to choose any route to get from the plant to the job site. Upon reaching the job site, the driver will be instructed to either back up to a paver and dump the asphalt into the paver, or wait on line with other trucks carrying asphalt before backing up to the paver.

In dumping the asphalt into the paver, the truck must move in unison with the paver as the paver transforms the loose asphalt into a compressed layer of pavement. The paver cannot hold a complete load of asphalt from the truck. Therefore, the dumping of the asphalt into the paver is not regulated by the trucking company. If the paver stops, the dumping of the asphalt will stop. Once the truck has dumped its load, it will leave the job site.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on the receipts from sales (including rentals) of tangible personal property.

Section 1101(b)(5) of the Tax Law defines the terms "sale, selling or purchase," in part, to mean:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . for a consideration, or any agreement therefore,

including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 526.7(e)(4) and (6) of the Sales and Use Tax Regulations provides, 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.

* * *

(6) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates.

Section 541.2(p) of the Sales and Use Tax Regulations provides, in part:

(1) The terms "rental, lease and license to use" refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle; and

(v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels. (Emphasis added)

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Opinion

In the situation described by Petitioner, the contractor's payment to the trucking company for the use of its truck to transport asphalt as described by Petitioner is not a payment for a taxable rental, lease or license to use equipment. Although the truck drivers are instructed when and where to load and unload the asphalt, they are not told how to do so or what routes to use (see Matter of C.D. Perry & Sons, Inc., State Tax Commission, June 24, 1977). The timing of the asphalt unloading is regulated by the paver as opposed to the driver only because the paver's equipment cannot hold a complete load of asphalt from the truck at one time.

The trucking company agrees to furnish trucks for the pick up and delivery of asphalt as required, scheduled and directed by a contractor. The trucking company pays all operating expenses for its equipment. The contractor pays for the trucks, including the driver, at an hourly rate. The trucks are not left on the job site during nights or weekends. The trucking company has exclusive possession of the trucks and a sufficient degree of control over them while performing the service paid for by the contractor so as to be furnishing a transportation service. Transportation is not one of the enumerated services upon which sales tax is due (see Matter of Firelands Sewer & Water Construction Co., Inc., State Tax Commission, November 17, 1983, TSB-H-83(184)S).

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If the trucking company fails to supply the driver or fails to retain dominion and control over the vehicle, then the transaction is a taxable rental, lease or license to use (see C.K. Industries Corp., Adv Op Comm T&F, February 8, 1988, TSB-A-88(14)S).

DATED: January 23, 1997

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

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