

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

TSB-A-97(65)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970806B

On August 6, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from David E. Dufresne, S Dufresne Livery, Inc., 216 Columbia Street, Cohoes, NY 12047.

The issue raised by Petitioner, David E. Dufresne, is whether he is correctly collecting the 5% special tax on passenger car rentals, imposed by Section 1160 of the Tax Law, on receipts from the sale of his automotive vehicle livery service.

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

Petitioner's business provides automotive vehicle livery services to funeral homes in the Capital District area. The services are contracted for on a funeral by funeral basis. Petitioner provides a car and a driver to the requesting funeral home for the purpose of transporting the deceased, family members, or other people as part of a funeral activity or service. Petitioner charges a fee for each occasion that a vehicle and driver are provided. Historically, Petitioner has charged and collected both sales tax and the special tax of 5% imposed upon the receipts from every short term (less than one year) rental of a passenger car pursuant to Sections 1105(a) and 1160 of the Tax Law.

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 1160 of the Tax Law provides, in part:

(a) (1) On and after June first, nineteen hundred ninety, in addition to any tax imposed under any other article of this chapter, there is hereby imposed and there shall be paid a tax of five percent upon the receipts from every rental of a passenger car which is a retail sale of such passenger car.

* * *

(b) For purposes of this section, the following definitions shall apply:

(1) Motor vehicle. A motor vehicle as defined in section one hundred twenty-five of the vehicle and traffic law, but not including a motorcycle.

(2) Passenger car. A motor vehicle having a gross vehicle weight of nine thousand pounds or less with a seating capacity of nine persons or less designed for passenger transportation.

(3) Rental. The transfer of possession of a motor vehicle, whether or not the motor vehicle is required to be or is registered by this state, for a consideration, without the transfer of the ownership of such motor vehicle, but not including a lease described in subdivision (i) of section eleven hundred eleven of this chapter.

Section 1165 of the Tax Law provides, in part:

The tax imposed by section eleven hundred sixty of this article shall be administered and collected in a like manner as and jointly with the taxes imposed by sections eleven hundred five and eleven hundred ten of article twenty-eight of this chapter. . . .

Sections 526.7(e) (4) and (6) of the Sales and Use Tax Regulations provide, 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:

* * *

(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 541.9(c) (2) (vi) of the Regulations provides:

(vi) The total amount of the lease or rental charge is subject to tax. However, if nontaxable items such as insurance (including collision damage waivers) and driver's wages (if reasonable in relation to prevailing wage rates) are sold outright to the lessee in conjunction with the lease or rental, the charges for such items are not subject to tax if they are separately stated.

Opinion

Petitioner contracts with area funeral directors to furnish automobiles and drivers to them for their use in conducting funerals. Such an agreement entered into between a funeral director and an auto rental establishment is a rental of tangible personal property, provided the funeral procession is under the direction and control of the funeral director and a transfer of possession of such vehicles takes place (see Section 1101(b)(5) of the Tax Law and Sections 526.7(e)(4) and (6) of the Sales and Use Tax Regulations.) For example, the funeral director will be deemed to have direction and control of the funeral procession where he sets the itinerary for the funeral and determines the route to be taken by the drivers (see Limousine Operators of Western New York, Inc., Adv Op Comm T&F, October 27, 1988, TSB-A-88(55)S). The receipts from such rentals would be subject to State and local sales and use taxes under Sections 1105 and 1110 and Article 29 of the Tax Law since they constitute sales of tangible personal property (see Buckley Funeral Homes v City of New York, 199 Misc 195, aff'd 277 AD 1096); Limousine Operators of Western New York, Inc., supra).

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. The automobiles rented by Petitioner to the funeral directors are motor vehicles as defined in Section 1160(b)(1) of the Tax Law. The transfer of automobiles for a consideration constitutes a rental as defined in Section 1160(b)(3) of the Tax Law (see BEJ Taxi Corp., Adv Op Comm T&F, February 13, 1991, TSB-A-91(20)S). Therefore, the 5% special tax on passenger car rentals will be applicable to the receipts received by Petitioner provided the automobiles constitute passenger cars as defined in Section 1160(b)(2) of the Tax Law (i.e., have a gross vehicle weight of nine thousand pounds or less with a seating capacity of nine persons or less designed for passenger transportation). Since a hearse is not designed for passenger transportation, the rental of a hearse is not subject to the special 5% tax.

Therefore, Petitioner is correct in collecting the State and local sales and use taxes on each payment from the funeral director for any vehicle rented. Petitioner is also correct in collecting the additional 5% special short-term rental tax on passenger cars designed for passenger transportation.

DATED: November 4, 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.