

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

TSB-H-81 (124) S
Sales Tax
June 29, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801211A

On January 11, 1981, a Petition for Advisory Opinion was received from Adam Mcl drum and Anderson Co., Inc., P.O. Box 976-389 Main Street, Buffalo, New York 14205.

Petitioner entered into an agreement with Leaseway Deliveries, Inc. on April 29, 1968, whereby the latter agreed to transport Petitioner's merchandise between its stores and warehouse. At issue is whether Leaseway rents its vehicles to Petitioner under the agreement or whether Leaseway provides a transportation service. A rental of equipment would be subject to the New York State sales and use taxes while a transportation service would not be taxable.

Petitioner states that "dominion and control" remains with Leaseway, and cites the following: drivers are hired and fired by Leaseway; Leaseway uses its own discretion in performing its work, including the driving of the vehicles and, in general, the selection of routes; Leaseway retains responsibility for the operation of the vehicles; and, finally, Leaseway directs the work and pays all operating expenses, including the drivers' wages, tolls, fines and fuel costs.

The sales tax imposed under section 1105(a) of the Tax Law is applicable to the "rental, lease and license to use" tangible personal property. Tax Law, §1101(b)(5). The Sales and Use Tax Regulations provide that "The terms 'rental, lease, 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." 20 NYCRR 526.7(c)(1).

The Regulations further provide that:

- (3) 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) 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. 20 NYCRR 526.7(e).

The facts recited in the Petition are by themselves consonant with a finding that Leaseway has retained, and not transferred to Petitioner, that degree of control

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR

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and direction over the vehicles which, had it been so transferred, would have rendered the agreement a rental or leasing agreement within the meaning of the Tax Law. However, an examination of the written agreement between Petitioner and Leaseway reveals the presence of factors which mandate a contrary finding. Thus, section 5 provides that "Anything herein to the contrary notwithstanding, Carrier shall not be responsible for and Shipper shall save harmless Carrier from any loss, damage or destruction of any merchandise or other cargo transported by Carrier under this Agreement including, without limitation, consequential damages flowing from such loss, damage or destruction." Further, the carrier is required to dedicate ten vehicles to the fulfillment of its obligations under the contract, and for each of these dedicated vehicles the carrier is entitled to forty hours of compensation per week, even where the vehicle is operated for less than forty hours. Finally, upon termination of the agreement by either party, the carrier is to sell all the vehicles for cash. If the net sales proceeds are less than the depreciated values, such deficiency is to be paid by the shipper to the carrier. If the net sales proceeds are greater than the depreciated value, such excess amount is to be paid to the shipper.

Thus, while certain of the provisions of the agreement between Petitioner and Leaseway may suggest a characterization of the same as a contract for a transportation service, other provisions, set forth above, suggest a contrary conclusion, and it is the latter which are preponderant. Accordingly, the receipts from the performance of such contract constitute receipts from the sale (i.e., a rental or lease) of tangible personal property within the meaning and intent of section 1105(a) of the Tax Law, and are therefore subject to the sales and use taxes imposed under Article 28 of the Tax Law.

DATED: June 10, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau