

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(45)S
Sales Tax
October 8, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090720A

The Department received a petition for an advisory opinion from Petitioner [REDACTED], on July 20, 2009. Petitioner asks whether its service of providing a driver to drive a customer's vehicle, without providing any vehicle, constitutes a transportation service subject to sales tax. Since Petitioner does not provide any vehicle when it provides its driving service to its customers, Petitioner's driving service does not constitute a transportation service, and Petitioner's charge for such a driving service is not subject to New York State and local sales taxes.

Facts

Petitioner provided the following facts in support of its petition: Petitioner is a staffing company that offers driving (chauffeur) services to the public. Petitioner does not provide any vehicle when it provides its driving service to a customer. Rather, Petitioner's employee drives the customer's vehicle. The customer may own or lease or rent the vehicle driven by Petitioner's employee. Petitioner's customers may be individuals or companies or other entities, including governmental entities. Petitioner pays worker's compensation insurance and employer payroll taxes with respect to its employees.

When a customer wants to purchase Petitioner's driving service, the customer either makes a reservation request through a toll-free telephone number that is managed centrally by Petitioner or makes a reservation on-line. Reservations must be made at least 24 hours in advance of Petitioner providing the driver. There is a 3-hour minimum for driving service. Petitioner charges for its driving service at an hourly rate. The customer must make the reservation directly with Petitioner, regardless of whether Petitioner's employee will drive the customer's own vehicle or a vehicle that the customer rents or leases from a third party. Each customer must establish an account with Petitioner. Petitioner assigns each customer an account number and uses the account number to track the customer. In order to open an account, a potential customer must review Petitioner's "Driving Agreement" and "Terms of Service" and agree to those terms. Petitioner provided copies of those documents with its petition. Petitioner also furnished sample account setup and reservation web pages as further documentation supporting the facts in the Petition. Petitioner's Driving Agreement requires each customer to carry vehicle insurance on the vehicle to be driven by Petitioner's employee. The customer's vehicle insurance is primary.

The "Reservation Request" makes clear that the customer is reserving a driver for the customer's car. Likewise, the "Driving Agreement" provides that Petitioner will provide a chauffeur to drive "Client's" automobile as requested by Client; and the client "so authorizes such chauffeur."

The customer pays Petitioner for the driving service separate and apart from any payment the customer may make to a third party to purchase, rent, or lease a vehicle. Individuals pay Petitioner for its driving service by credit card. Petitioner sends an invoice to its corporate customers, who then typically pay by check. Companies other than Petitioner do not collect money for Petitioner's driving services.

No transportation company or rental car company has an ownership interest in Petitioner. At this time, Petitioner is privately owned.

Analysis

Tax Law Section 1105(c)(10) imposes the State's 4% sales tax on receipts from every sale, other than for resale, of transportation service. Section 1210(a)(1) of Article 29 of the Tax Law authorizes counties and cities to impose general sales and compensating use taxes similar to the State's taxes, including the sales tax on transportation service. As relevant here, section 1101(b)(34) defines "transportation service" as the "service of transporting, carrying or conveying a person or persons by livery service; whether to a single destination or to multiple destinations; and whether the compensation paid by or on behalf of the passenger is based on mileage, trip, time consumed or any other basis.... Livery service means service provided by limousine, black car or other motor vehicle, with a driver, but excluding a taxicab and a bus, and excluding any scheduled public service." Thus, for a service to be a transportation service, the seller/provider of the service must provide that service by means of a vehicle with a driver.

Because Petitioner does not provide any vehicle with its driving service, its driving service does not constitute a transportation service for purposes of New York State and local sales taxes, and its charge for its driving/chauffeur service, as described in the facts above, is not subject to the sales taxes imposed by section 1105(c)(10) and pursuant to the authority of section 1210(a)(1) of the Tax Law. We note that Petitioner states that no transportation company or rental car company has an ownership interest in Petitioner. We also note that Petitioner does not require its driving service customer to obtain a vehicle from a particular company. If Petitioner required its customer to obtain a vehicle from a particular company, the Tax Department would consider whether the separate charges made by Petitioner for its driving service and by the vehicle company for its vehicle were reasonable in light of all the facts and circumstances and what relationship existed between Petitioner and the vehicle company. For example, if Petitioner overstated its non-taxable driving service charge to its customer and shared a portion of that charge with the vehicle company, that amount shared by Petitioner with the vehicle company would likely be considered to be for the rental of the vehicle and would be subject to applicable State and local sales taxes, payable by Petitioner to the vehicle company. Likewise, the vehicle company would have to separately state and collect State and local sales taxes on its charge to rent the vehicle to the customer. In both cases, the applicable State and local sales taxes on the vehicle rental would include the State's 4% sales tax, the local county and/or city sales tax, and the special State 6% tax on passenger car rentals and, if the rental is in the MCTD, the section 1109 MCTD 3/8% sales tax and the special supplemental 5% MCTD passenger car rental tax.

DATED: October 8, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.