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

TSB-A-87(16)S
Sales Tax
April 16, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S850917A

On September 17, 1985, a Petition for Advisory Opinion was received from Crestview Cadillac, Inc., 717 W. Genesee Street, P.O. Box 311, Syracuse, New York 13204.

The issue raised is the taxability, under Article 28 and 29 of the Tax Law, of motor vehicles loaned by automobile dealers as courtesy cars, with or without charge, to customers whose vehicles are being serviced or repaired.

Petitioner has collected and remitted sales tax on all rental charges to customers. Petitioner makes no charge for the loan of a dealer car when a vehicle still under warranty is being serviced.

Vehicles used for rental or loan are registered in the dealer's name and treated as depreciable assets for accounting purposes. After removal from the rental pool, these automobiles are usually sold for an amount in excess of dealer cost and tax is collected either on the sale price or on the difference between the sale price and the trade allowed for the customer's vehicle.

Section 1105(a) of the Tax Law imposes a tax on the receipts from sales, except for resale, of tangible personal property.

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 . . . for a consideration".

Section 1110 imposes a use tax "for the use within this state . . . of any tangible personal property purchased at retail".

The Sales and Use Tax Regulations of the State Tax Commission explain further:

> The compensating use tax is due upon the use of tangible personal property which was purchased for resale or an exempt use and is subsequently. . . diverted to a taxable use by the purchaser.
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> Example 2: A retail store purchased a dozen desks at $75 each for sale to its customers at $125 each. It subsequently withdrew one of the desks from inventory to be used in its office. A compensating use tax is due for the desk withdrawn from inventory. The tax is computed on the $75 the store paid.

Example 3: A machine shop which produces machine tools for sale withdraws from it production line a drill press for use in its building maintenance shop. The drill press was originally purchased exempt from tax for use in production. The use of the drill press in the building maintenance shop is a use subject to the compensating use tax, at cost or fair market value, whichever is lower.

20 NYCRR 531.3(a)(2).

Additional rules publicized by the Department of Taxation and Finance in two Technical Services Bureau Memoranda on the taxability of motor vehicles used by dealers, (TSB-M-83(13)S, May 24, 1983, revised by TSB-M-87(2)S, January 16, 1987), require differentiation between the various uses of such vehicles.

1. Rental Vehicles

These are vehicles used for short-term rental (six months or less) or long- term lease at the current commercial rental rates. While a vehicle is employed in rental service the dealer incurs no tax liability for its purchase or use nor for the cost of gas, oil, parts or supplies expended for its operation.

For accounting purposes (i.e. depreciation, investment tax credit) the vehicle may be treated as property used in a trade or business rather than inventory property.

The dealer must collect sales tax on rental charges as defined in Regulation Section 530.4 (b) and (c). When the vehicle is thereafter sold, tax is due on the total sale price or, if a vehicle is taken in trade, on the sale price less trade allowance.

From customers claiming exemption from sales tax on rental charges, the dealer must obtain, no later then 90 days after rendition of the service, a properly completed Exemption Certificate. Tax Law 1132(c).

The vehicles described here must be registered as rental cars and operated solely for rental or lease at the market rate. Concurrent use of a vehicle by company officers or employees or as courtesy car will make it subject to the rules applicable to "mixed-use" vehicles set forth below.

2. Demonstrators

This term refers to vehicles held for sale, which are used with dealer plates for demonstration to prospective customers. The use of vehicles exclusively as demonstrators is not taxable. However, tax is due on gas, oil, parts and supplies used for their operation.

3. Mixed-Use Vehicles

These are vehicles intended for sale, but used occasionally for business or personal purposes by the dealer or his officers or employees. Since such vehicles will usually be used in this manner for only a short period of time and since no purchase, sale or trade, occurs at the beginning or end of taxable use, the dealer may pay use tax based on depreciation rather than on dealer cost. The taxable amounts must be reported under "purchases subject to use tax" on the sales tax returns which cover the period of use.

The rate of depreciation is 2% per month or any part thereof, computed on the total invoiced cost to the dealer including delivery ("total cost") for any vehicle purchased new and on the purchase price or trade allowance plus the value of repairs for any vehicle purchased used or taken in trade.

Prior to June 1, 1986, this method of taxation was applicable only to vehicles kept in mixed use for six months or less. Once a vehicle had been so used for more than six months, additional use tax became due in an amount equal to total cost multiplied by the tax rate, less use tax paid on depreciation. Technical Service Bureau Memorandum TSB-M-87(2)S, January 16, 1987, extends the six month limitation applicable to the period June 1, 1983, through May 31, 1986, to twelve months without imposing a mileage restriction.

As of June 1, 1986, the new departmental policy allows application of the 2% depreciation method ("2% method") to a qualifying vehicle if:

(1) The vehicle is kept in mixed use for six months or less (no mileage limitation applies), or

(2) the vehicle is retained in mixed use for more than six months, but not more than one year, and the mileage does not exceed 9000 miles for the entire period of mixed use.

If mileage exceeds 9000 miles between six months and twelve months of use, or if the vehicle is used by the dealer for more than twelve months, use tax is due based on the dealer's total cost of the vehicle plus penalty and interest computed from the date that a return for the occasion of first mixed use would have been due. Credit for tax paid under the 2% method will be allowed.

However, if a vehicle prior to being placed in mixed use has been used by the dealer for exempt purposes (such as leasing) for more than six months, fair market value (not to exceed cost) rather than total cost may be used as the basis for calculating use tax.

Any vehicle assigned to a family member not actively associated with the business as an officer or employee who actually performs duties or services, does not qualify for the 2% method of computing use tax. The "mixed use" vehicle must be held in inventory available for sale.

These additional guidelines apply when a vehicle is taxed under the 2% method:

(1) A dealer may not seek a trade-in allowance on a vehicle which is taxed under this method.

(2) A dealer may not depreciate the vehicle or take an investment tax credit while computing use tax under the 2% method.

(3) A "mixed use" vehicle, unless operated with dealer plates, must be registered in the dealership's name.

(4) A dealer must maintain records as described in Technical Services Bureau Memorandum TSB-M-87(2)S.

If a dealer does not comply with any of these requirements, use tax is due on the dealer's total cost of the vehicle, plus penalty and interest computed from the date that a return for the occasion of first use would have been due, less credit for use tax paid under the 2% method.

The above guidelines no longer apply once use tax has been paid on the total cost or the fair market value of a vehicle, with the exception that the dealer may not take a trade-in allowance on replacement of a vehicle which has been used with dealer plates or registered in the dealer's name, whether the dealership operates as a single or more than one business entity.

Vehicles loaned to customers without charge or at a rate below the market rental rate (courtesy cars) are considered to be in mixed use even if rented occasionally at the commercial rate. Receipts from the rental of such vehicles at the market rate are taxable.

However, no tax is due for the loan of a mixed-use car at a daily charge significantly lower than the market rental rate since, for sales tax purposes, the dealer is considered the end user of the vehicle rather than a vendor of property or services as defined in Tax Law 1101(b)(8)(i). Consequently, when a nominal charge bearing no relation to true rental cost is made for the loan of a courtesy car, the transaction is not deemed a "rental" within the meaning and intent of Section 1101(b)(5) of the Tax Law. 20 NYCRR 526.6(c)(4).

No tax liability arises from the loan of these vehicles to a High School Driver Education Program.

Purchases of gas, oil, parts and supplies for operating mixed-use vehicles are taxable. Any such items withdrawn from the dealer's inventory are subject to use tax.

Use tax due on the mixed-use vehicle is computed by multiplying total cost by the 2% depreciation rate, the result by the number of months the vehicle was used (use in any part of a month counts as a whole month) in a quarterly filing period, and the resulting taxable amount by the State and applicable local tax rate.

Effective January 16, 1987, the issuing date of TSB-M-87(2)S, the records listed in that publication must be kept for every vehicle placed in mixed use. For the period from June 1 through December 31, 1986, records not so maintained must be reconstructed from source documents.

Petitioner specifically inquires about the taxability of seven new automobiles removed from inventory for company use before June 1, 1986. Petitioner states these vehicles were placed "in rental service".

However, only motor vehicles purchased exclusively for rental purposes, operated with rental plates and rented at the market rate qualify as rental cars and therefore for the resale exclusion under the Tax Law. Since the vehicles in question were sometimes loaned as courtesy cars without charge, they do not qualify as rental cars.

If the vehicles had been held in inventory exclusively for resale while being used occasionally for business or personal purposes, they would be considered mixed-use vehicles. As such, dependent on whether they were so used (without regard to mileage) for up to 12 months or more than 12 months, they would be subject to tax based on an amount calculated under the 2% method or on total cost, respectively.

Nevertheless, the vehicles here at issue do not qualify as mixed-use vehicles because they have been depreciated and otherwise treated as business assets rather than inventory property. Accordingly, they are subject to State and local sales tax based on total cost of the vehicles as of the date the vehicles was removed from inventory.

DATED: April 16, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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