

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

TSB-A-95 (13)S
Sales Tax
April 25, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941227B

On December 27, 1994, a Petition for Advisory Opinion was received from Morton L. Coren, P.C., 638 Meadow Court, Westbury, NY 11590-5925.

The issue raised by Petitioner, Morton L. Coren, P.C., is whether, for purposes of sales tax, the service being rendered by Petitioner's client constitutes a transportation service or the rental of vehicles.

Petitioner represents a corporation that is engaged in business in New York. Petitioner's client operates school busses for a school district which is an instrumentality of the State of New York.

Petitioner's client operates a fleet of busses. Petitioner's client is responsible for operating expenses such as employee wages, insurance and fuel. The busses are driven by employees of Petitioner's client. Petitioner's client maintains the right to hire and fire drivers and other employees.

The contract with the school district specifies the following:

1. The type and age of the equipment to be used.
2. That the equipment types used by Petitioner's client may not be changed without the school district's approval.
3. The interval between inspections of the vehicles used is specified by the school district.
4. The qualifications the bus drivers must hold and that drivers must be hired from a list provided by school district.
5. The qualifications other personnel used on the busses must hold and that such personnel must be hired from a list provided by school district.
6. The general route that the busses must follow, including the exact location of each bus stop and the times the busses must appear at each stop.
7. The final destinations of each bus run.

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 term "sale" to mean "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume. . .for a consideration. . . ."

Section 526.7(e)(4) of the Sales and Use Tax Regulations provides, in part, as follows:

(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.

* * *

(5) It is not essential for a transfer of possession to include the right to move the tangible personal property which is the subject of a rental, lease or license to use.

Section 541.2(p) of the Sales and Use Tax Regulations provides as follows:

(p) Rental, lease and license to use. (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.

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.

Example 6: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instruction from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, as the transfer of possession has occurred by reason of the company foreman's right to direct and control the operator's use of the equipment. The separately stated operator's wages are excludable from the taxable receipts. (emphasis added)

In Buckley Funeral Homes v. City of NY, 199 Misc 195 (Sup Ct 1948), affd 277 AD 1096 (1st Dept 1950) the Court held that an agreement entered into between a funeral director and an auto rental agency that supplied automobiles and drivers for funeral processions constituted a rental since the funeral procession was under the direction and control of the funeral director.

In Grand Island Transit Corporation, Dec St Tx Comm, March 9, 1984, TSB-H-84(29)S the Tax Commission held that where the owner of a vehicle retains control over and responsibility for the operation of the vehicle, including the selection of routes and drivers, there is no taxable transfer of possession of the vehicle, but rather the transaction constituted a transportation service.

Technical Service Bureau Memorandum, TSB-M-84(7)S, April 19, 1984, entitled Bus Company Transactions, Transportation Service vs. Equipment Rental provides, in pertinent part, that "[w]here a bus company charters a bus to a group, and the bus company retains dominion and control over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. A chartering party's rights are limited to boarding the bus and riding to the agreed destination."

In the instant case, Petitioner's client does not transfer possession, control and/or use of the busses to the school district during the term of the contract. Petitioner's client's employees are responsible for the operation of the busses. In addition, Petitioner's client maintains the right to hire the drivers and other personnel used on the busses from a list of perspective candidates provided by the school district. Further, Petitioner's client maintains the right to fire any drivers or other personnel used on the busses. Moreover, Petitioner's client is responsible for paying operating expenses such as employee wages, insurance and fuel. Accordingly, pursuant to Section 541.2(p) of the Sales and Use Tax Regulations, supra, and TSB-M-84(7)S, supra, since Petitioner's client

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retains dominion and control over the busses operated for the school district, Petitioner's client is providing a transportation service and not a rental service pursuant to Sections 1105(a) and 1105(b)(5) of the Tax Law, Section 526.7 of the Sales and Use Tax Regulations, and Buckley Funeral Homes v. City of New York, supra.

DATED: April 25, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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