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

TSB-A-97(75)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO.S970806H

On August 6, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from KPMG Peat Marwick, LLP, 345 Park Avenue, 36th floor, New York, NY 10154.

The issues raised by Petitioner, KPMG Peat Marwick, LLP, are:

(1) Whether Petitioner's client, XYZ, Inc., will be liable for sales or use tax on motor vehicles it imports and plans to offer for sale to prospective customers through a six-month free demonstration/test drive program.

(2) If XYZ, Inc. is liable for sales or use tax, what methodology and procedures must be followed to compute the sales or use tax due and register the vehicles in New York State?

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

XYZ, Inc. ("XYZ") is a foreign based importer and distributor of motor vehicles. As part of its business operations, XYZ will own and operate various dealerships throughout the State of New York. XYZ plans to introduce its product into the United States market through a free demonstration/test drive program (hereafter referred to as the "test drive program"). As part of the test drive program, XYZ plans to import a number of automobiles which it will offer to selected prospective customers ("evaluators"). These evaluators will be allowed to test drive the vehicles for a period not to exceed six months with no obligation to lease or buy at the end of the period. However, evaluators may be required to complete a customer survey at the completion of the test drive to provide objective feedback regarding the performance of the vehicle. Evaluators will be responsible for excessive wear and tear, associated fuel costs and damages not covered by insurance.

Throughout the test drive program, XYZ will retain title to the vehicles. XYZ will register as a retail dealer under the dealership name and/or obtain dealer plates and provide appropriate insurance on each vehicle. Each vehicle will be held in inventory and available for sale during the test drive program. If an evaluator does not purchase the test drive vehicle at the end of the test drive program (e.g., after the first week the evaluator decides he or she does not like the car), the vehicle may be placed with another evaluator within the six-month test drive program. The test drive vehicles will be held available for sale on dealer lots, so that anyone interested in the vehicle may enroll in the test drive program and have an opportunity to purchase it.

Any remaining unsold program vehicles at the end of the test drive program may be made available for sale (at a discount) to the general public in the United States. Once the six-month test drive program has been completed, the vehicles will be shipped out of New York State unless the evaluator wishes to purchase the vehicle in the state. In the event the vehicle is sold in New York State, XYZ will collect all applicable sales tax and remit the monies to the state. During the test drive program, employees of XYZ may use the test drive vehicles for self use.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as follows:

> A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . . .

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property. . . ."

Section 1110 of the Tax Law provides, in part:

> (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . . .
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> (b) . . . the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery . . . but excluding any credit for tangible personal property accepted in part payment and intended for resale.

With respect to the resale exclusion, Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

> (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer.
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> (2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate . . . .

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

Section 531.3(a)(2) of the Sales and Use Tax Regulations provides:

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 withdrawn from or diverted to a taxable use by the purchaser.

Technical Services Bureau Memorandum, TSB-M-87(2)S, dated January 16, 1987, entitled Taxability of Motor Vehicles Used by Dealers provides, in part:

. . . vehicles held in inventory exclusively for resale but used for demonstration to prospective customers are not taxable to the dealer if used solely for demonstration. Vehicles held in inventory for resale but used occasionally for business or pleasure by the dealer or one of his officers or employees, hereafter "mixed use vehicles," are subject to use tax. (Emphasis added) Use tax due on these "mixed use" vehicles must be reported under "purchases subject to use tax" and paid with the dealer's return which covers the period of use. Since no purchase, sale, or trade occurs when the taxable use begins or ends, and since a particular vehicle in inventory usually will be used in this manner for only a short period of time before being sold, dealers are allowed to pay tax based on depreciation instead of paying the tax usually due on a sale. . . .

Subject to the limitations and conditions described below, use tax on mixed-use vehicles may be computed by applying the state and local sales tax rate to an amount equal to 2% per month of the dealer's cost.

* * *

As of June 1, 1986, a motor vehicle dealer may apply the 2% depreciation method to a vehicle held in inventory for resale but used occasionally for business or pleasure by the dealer, his employees or officers if: (Emphasis added)

(1) the vehicle is used by the dealer for six months or less as a "mixed use" vehicle with no mileage restriction, or

(2) the vehicle is used by the dealer more than six months but no more than one year, and the mileage does not exceed 9000 miles for the entire 12 months.

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 penalties and interest computed from the date that a return for the occasion of the first use would have been due. Credit for tax paid under the 2% method will be allowed.

A dealer's total cost of a new vehicle, for purposes of computing use tax, includes total invoiced cost plus delivery charge. On a used vehicle, the dealer's total cost includes purchase price or trade allowance plus the value of all repairs made to the vehicle since being acquired by the dealer.

* * *

These additional guidelines apply when a vehicle is depreciated under the 2% method of depreciation:

(1) A dealer may not seek a trade-in allowance on a vehicle which is depreciated under this method, regardless of whether the dealer operates as a single entity or as more than one entity.

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

(3) If a dealer does *not* comply with items (1) and (2), use tax is due on the dealer's total cost of the vehicle plus penalties and interest computed from the date that a return for the occasion of first use would have been due, with a credit for use tax paid under the 2% method.

(4) A "mixed use" vehicle may be registered either in the dealer's name or used with dealer plates.

* * *

Receipts from rentals of vehicles to customers as "loaners" are subject to sales tax when the customer is charged a market rate for such rental. Vehicles loaned to customers without a separate charge or at a rate which does not reflect the fair market rental are treated as "mixed use" vehicles subject to the 2% per month rules. (Emphasis added)

Computing Use Tax on a "Mixed Use" Vehicle

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Example:

Cost of vehicle	$15,300
Depreciation rate (2%)	X .02
	$306.00
Months used (2½)	X 3
	$918.00
Tax rate (7% combined state and local rate)	X .07
Tax due on use	$ 64.26

Records to be kept:

(1) Stock number identifying the vehicle.

(2) Name and title of person to whom vehicle is assigned.

(3) Date assigned and date returned.

(4) Mileage at date of assignment and date of return.

(5) Disposition of vehicle.

(6) Whether registration is in dealer's name or the vehicle is used with dealer plates.

(7) Whether depreciation or an investment tax credit has been or will be claimed on the vehicle.

(8) Whether a trade-in allowance has been or will be taken on the vehicle.

Effective January 16, 1987 . . . a dealer who withdraws a motor vehicle from inventory for use as a "mixed use" vehicle must keep records (previously listed) as use of the vehicle occurs... . All required information must be maintained on "mixed use" vehicles, including "loaners" treated as such. If the records are not properly maintained for any vehicle, it will be assumed, for use tax purposes, that the vehicle is not a "mixed use" vehicle. Accordingly, use tax will be due on the total cost of the vehicle, with interest and penalties from the date of first use, as described above, with a credit for tax paid under the 2% method.

Opinion

XYZ may register the vehicles it imports exclusive of sales tax. XYZ should use Form MV-50, Retail Certificate of Sale, to register the automobiles without payment of sales or use tax, since, as a registered vendor, XYZ collects the tax from its customer and pays over the tax with its sales tax returns. See Section 1132(f) of the Tax Law. In order for XYZ to transact any taxable business within New York State, XYZ must be registered as a New York State sales tax vendor. See Sales Tax Regulations Section 539 for requirements respecting vendor registration.

Once purchased, XYZ plans to use the automobiles as part of a six-month test drive program. Employees of XYZ will also be allowed to use the test drive vehicles during the program for self use. The rules set forth in TSB-M-87(2)S, supra, on the taxability of motor vehicles used by dealers, require differentiation between the various uses of such vehicles depending on whether they are demonstrators, mixed-use vehicles or rental vehicles. "Demonstrator" refers to vehicles held in inventory exclusively for resale, which are used with dealer plates solely for demonstration to prospective customers. The use of vehicles held in inventory exclusively as demonstrators is not taxable. "Rental

vehicles" are vehicles used for short-term rental and must be registered as rental cars and operated solely for rental or lease at the market rate. "Mixed-use vehicles" are vehicles held in inventory for resale, but used occasionally for business or pleasure by the dealer or its officers or employees (see BMW of North America, Inc., Adv Op Comm T&F, April 16, 1990, TSB-A-90(19)S; Crestview Cadillac, Inc., Adv Op Comm T&F, April 16, 1987, TSB-A-87(16)S). Vehicles loaned to customers without a separate charge are treated as mixed-use vehicles (see TSB-M-87(2)S, supra).

The test drive vehicles held in inventory for resale by Petitioner's client, XYZ, but used by the evaluators in the test drive program and also by XYZ's employees for business or pleasure are mixed-use vehicles. This use of the test drive vehicles renders such vehicles subject to compensating use tax. Since such vehicles will usually be used in this manner for only a short period of time and since in many cases no purchase, sale or trade occurs at the beginning or end of taxable use, XYZ may pay use tax based on depreciation rather than on its purchase price of the vehicles, in accordance with the rules set forth in TSB-M-87(2)S, supra (see BMW of North America, Inc., supra).

XYZ should apply the formula established by the Department in TSB-M-87(2)S, supra, to compute use tax due on a mixed-use vehicle. This would include the test drive vehicles, if the requirements set forth in TSB-M-87(2) are met. XYZ may not seek a trade-in allowance on any vehicle which is depreciated under this method, regardless of whether XYZ operates as a single entity or as more than one entity. Also, XYZ may not depreciate or take an investment tax credit on any vehicle depreciated under the 2% method. Provided that these conditions are met, and that XYZ is a New York State registered motor vehicle dealer and the mixed-use vehicles are registered in XYZ's name or are used with XYZ's dealer plates, the mixed-use vehicles would be subject to use tax based on depreciation of 2% per month or any part thereof, computed on the total invoiced cost of the vehicle to XYZ, including any delivery charge, for any vehicle purchased new, and on the purchase price or trade allowance plus the value of all repairs made to the vehicle since XYZ acquired it, for any vehicle purchased used or taken in trade. The tax is not computed on the fair market rental value of the vehicles as Petitioner suggests.

With respect to issue "2", use tax due on these mixed-use vehicles must be reported under "purchases subject to use tax" and paid with XYZ's sales and use tax return (ST-100 or ST-809) which covers the period of use (see TSB-M-87(2)S, supra). In order to pay use tax based on depreciation, XYZ must follow the record keeping requirements set forth in TSB-M-87(2)S for each mixed-use vehicle.

/s/
DATED: December 4, 1997 John W. Bartlett
Deputy Director
Technical Services Bureau

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