

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

TSB-A-82(30)S
Sales Tax
September 1, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S81117C

On November 17, 1981 a Petition for Advisory Opinion was received from Inter County Motor Coach, Inc., 243 Deer Park Ave., Babylon, New York 11702.

The issue raised is whether charges to Petitioner by another carrier for the use of equipment (with operators) constitute receipts from the rental of equipment or the purchase of a transportation service, for purposes of the sales tax imposed under Article 28 of the Tax Law.

Petitioner is engaged in the business of providing bus transportation and maintains a fleet of vehicles to provide both charter and commuter route service. At times Petitioner contracts with other carriers to augment its own fleet so it can meet its transportation commitments. Such other carriers furnish Petitioner with the necessary vehicles and drivers. Petitioner instructs the drivers as to the time and place of pickup, the destination and the return time.

The sales tax imposed under section 1105(a) of the Tax Law is applicable to the "rental, lease and license to use" of 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."

Paragraph 3 of Sales Tax Information Letter Number 35, issued by the Sales Tax Bureau of the Department of Taxation and Finance, addresses the issue raised as follows:

"Where a bus company hires a bus from another bus company, this constitutes a rental, lease or license to use. The charges for such transactions are subject to sales tax. The rental charges are taxable, whether or not a driver is supplied, and even if the bus is rented for use for tours or for

charter operations. If the charge for the driver is separately stated and is reasonable in view of the prevailing wage rates for the services of a driver, such charge may be excluded from the charges subject to tax. In addition, where all registration fees and all insurance charges are paid by the lessor, the amount of tax to be collected on charges for the rental of the bus may be computed pursuant to section . . . [530.4], subdivisions (b) and (c), of the Sales and Use Tax Regulations (20 NYCRR . . . [530.4] (b) and (c)). Such provisions fix the tax base for such rentals at 82% of the total rental or leasing charge where delivery of the rented property occurs outside New York City, and at 90% where delivery occurs within New York City.

Whether the transactions at issue constitute rentals rather than the furnishing of transportation turns upon the question of dominion and control. In Buckley Funeral Homes v. City of New York, 199 Misc. 195, aff'd 277 App. Div. 1096, the court found a rental agreement to exist where a funeral director ordered cars, with drivers, from an auto rental agency for use in a funeral procession. This holding turned in large part on a finding that "the funeral procession was under the direction and control of the funeral director." Id., at 196. Cf., Maplecrest Sausage v. Tully, 67 AD 2d 329; Chartair, Inc. v. Tax Comm., 65 AD 2d 44. This same approach is reflected in section 526.7(e)(5) of the Sales & Use Tax Regulations, which provides as follows:

(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.

Example 11: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions 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, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator. The taxable receipt excludes the operator's wages.

In the present instance Petitioner contracts with charter groups and operates commuter lines. The commuter routes are presumably pre-established. With respect to charter groups, Petitioner states that it instructs the drivers as to time and place of pick-up, place of destination, and time of return. As in Buckler, supra, the critical question here is the identity of the party controlling the routes utilized by the buses. If Petitioner controls the routes followed, in addition to the foregoing factors, then the subject transactions constitute rentals, the receipts from which are subject to tax. Where, however, the drivers are given complete freedom with regard the routes to be followed in

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transporting the passengers to their desired destinations, then the receipts would be derived from the provision of the service of transportation, and thus not subject to tax.

Petitioner's reference to section 1115(a)(22) of the Tax Law is inappropriate, because such provision provides for an exemption from sales tax with respect to the rental or lease of trucks, tractors or tractor-trailer combinations only, in certain cases, and is not in any event applicable to buses.

Petitioner also inquires as to whether rental charges to Petitioner for use of another carrier's bus would be subject to tax if the bus were used to fulfill its contract to transport a group from New York to Florida and back, with a layover in Florida. 20 NYCRR 526.7(e)(1) provides that "A sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee. 20 NYCRR 525.2(a)(2) states that "the sales tax is a 'transactions tax', liability for the tax occurring at the time of the transaction." Accordingly, the leasing of a bus for a stipulated transaction period with possession transferred in New York subjects the charge for use of the bus to the applicable New York State and local sales tax (less any separately stated reasonable charge for the driver, and subject to the limitations set forth in 20 NYCRR 530.4(b) and (c)), even though a portion of the use occurs outside New York State. See Matter of Vincent S. Jerry & Sons Inc., State Tax Commission, February 22, 1980, TSB-H-80(58)S).

DATED: August 13, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau