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

TSB-A-86(16)S
Sales Tax
April 25, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S831207A

On December 7, 1983, a Petition for Advisory Opinion was received from the Coca-Cola Bottling Company of New York, 20 Horseneck Lane, Greenwich, Connecticut 06836.

The issues raised are (1) whether automobile mechanics hired by and on the payroll of Petitioner, but made available to a vehicle leasing company are employees of the Petitioner, (2) whether the labor costs billed to the Petitioner in connection with its vehicle maintenance agreement with the leasing company should be excluded from sales tax in accordance with regulation Section 527.5(b)(7) of the Tax Law.

Petitioner distributes soft drinks in the New York metropolitan area through route salesmen who are either employees of Petitioner or independent distributors in an assigned territory. Petitioner owns a truck fleet, but requires its distributor's to lease their trucks from Soft Drink Leasing Corporation (hereinafter "SDLC") and to garage the vehicles on Petitioner's premises.

Petitioner entered into a maintenance agreement with SDLC for the periodic servicing of all its vehicles and fork lift equipment. Conditions of the agreement provide, in part, for Petitioner to pay for maintenance according to an established rate schedule and for SDLC to submit monthly invoices to Petitioner for services rendered. The agreement further states that Petitioner "will furnish to SDLC without charge . . . shop space . . . and facilities. . . ."

The Maintenance and Services Schedule attached to the agreement requires SDLC to supply all fuel, oil, lubricants, tires, tubes and manpower necessary to operate and properly maintain the fleet. The schedule then lists various services to be performed by SDLC and continues: "So long as the aggregate number of vehicles leased to distributors together with the vehicles maintained for the Coca-Cola Bottling Company is not reduced below 580, SDLC will employ a work force of not less than 44 men . . . . SDLC will maintain on-premise management of one capable fleet administrator, one maintenance superintendent, and two assistant maintenance superintendents."

To provide SDLC with the workforce needed to perform the maintenance labor, automobile mechanics in Petitioner's employ are made available to SDLC. SDLC is billed by Petitioner for the total payroll expenses incurred by Petitioner for these workers, who under direct supervision by SDLC employees, service Petitioner's vehicles and equipment, and the distributor's trucks. Upon completion of that work, the mechanics are available for work on other vehicles leased by SDLC.

SDLC bills Petitioner only for the maintenance service (including labor charges) applicable to the company owned vehicles. However, it is presumed that this charge includes the cost of fuel, oil, lubricants, tires and tubes.

Petitioner contends that its payments for the labor charges represent wages, salaries and other compensation paid by an employer to his employees.

Section 1105(c) of the Tax Law imposes a tax on "the receipts from every sale, except for resale, of the following services:. . . (3) . . . maintaining, servicing or repairing tangible personal property . . .".

Section 1105(c) of the Tax Law also states: "Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under this subdivision."

Sales and Use Tax Regulations Section 527.5(c)(1) of the Tax Law states that the purchase of a maintenance or service contract is a taxable transaction.

The facts described and the documents supplied by Petitioner indicate that two separate and distinct financial transactions have taken place. Petitioner sold the services of its vehicle mechanics to SDLC and then purchased from SDLC a maintenance service taxable under section 1105(c)(3) of the Tax Law. When Petitioner sold the services of its vehicle mechanics to SDLC, it relinquished dominion and control of its employees to SDLC. Thus, the amounts paid by Petitioner were not wages; nor were they paid to employees for performing as employees. Rather, they were payments to SDLC for maintenance services. As such, they cannot qualify for the exclusion from tax under section 1105(c) of the Tax Law. The fact that Petitioner could have conducted business in such a manner that it would not have been subject to tax does not change this result. Petitioner chose its form of business operation and must bear the tax consequences of that decision. (See: Matter of Ormsby Hauler v Tully, 72 AD2d 845); (Matter of Sverdlow v Bates, 283 App. Div. 487, 491, 129 N.Y.S. 2d 88, 91) and 107 Delaware Associates v. State Tax Commission, 64 NY2d 935.

Accordingly, the labor costs billed by SDLC to Petitioner are not "wages, salaries, or other compensation" within the meaning and intent of the exclusion provided in Section 1105(c) of the Tax Law, but charges for maintenance service, taxable pursuant to Section 1105(c)(3) of the Tax Law.

DATED: April 25, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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