

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(48)S
Sales Tax
November 20, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001017A

On October 17, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Mercedes Benz Credit Corporation, 27777 Franklin Road, Southfield, Michigan 48034.

The issues raised by Petitioner, Mercedes Benz Credit Corporation, are:

(1) In the transaction described below, whether the bulk transfer of motor vehicles that are part of Petitioner's retail automobile lease portfolio constitutes a sale for resale that is not subject to sales or compensating use tax.

(2) What are the filing requirements under Article 28 of the Tax Law resulting from such transaction.

(3) Whether there will be any sales and use tax consequences with respect to the underlying leases of such vehicles to the lessees under such leases as a result of such bulk transfer.

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

In a typical motor vehicle lease transaction for a year or more, a motor vehicle dealer ("Dealer") purchases a vehicle from a manufacturer. The Dealer owns the vehicle and leases it to a retail customer in a "true lease" (not an installment sale). When the lease is signed, the Dealer is listed on the lease as the lessor and the retail customer is listed as the lessee. As the lessor, the Dealer is the owner of the vehicle and is entitled to receive the lease payments from the lessee.

Because the Dealer prefers to receive the value of the vehicle lease currently, rather than receive monthly lease payments, the Dealer will often seek to sell the vehicle to a financing company and assign the lease to the financing company. If the terms of the lease are found to be acceptable, the financing company accepts the assignment, purchases the vehicle, and then it becomes the lessor of the vehicle, taking over the responsibility of collecting any sales or use tax payments due.

Petitioner and DaimlerChrysler Financial Services, LLC ("DCFS") are related financing companies within the DaimlerChrysler organization. Petitioner purchases motor vehicles and accepts lease assignments from various car dealerships as described above. Effective December 31, 2000, DCFS plans to purchase a portion of the motor vehicles and the associated leases from Petitioner. DCFS will be receiving the right to the lease income and have title to the vehicles at the conclusion of the leases. At this time, DCFS does not plan to sell or otherwise transfer the right to

the lease income. The portion of the portfolio that will be sold is comprised of motor vehicles subject to retail leases. The assets to be transferred include no trucks or company cars (i.e., cars owned by DaimlerChrysler or any of its subsidiaries for use in the context of its business). The purchase price will be at fair market value. DCFS is expected to purchase approximately 60% of Petitioner's portfolio.

Once the purchase has been completed, DCFS will become the lessor. The transfer of assets will not affect the lease terms (i.e., DCFS will continue to lease the vehicles without interruption). Further, DCFS does not intend to use the vehicles, except to lease them.

Either the Dealer or Petitioner has remitted the New York sales tax on each of the leased vehicles at the commencement of the lease. It is assumed for purposes of this Advisory Opinion that all of the leases are long-term leases (i.e., leases of one year or more).

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such. . . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor. . . .

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article. . . .

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1110(a) of the Tax Law provides, in part:

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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1111(i) of the Tax Law provides, in part:

(A) . . . with respect to any lease for a term of one year or more of (1) a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, with a gross vehicle weight of ten thousand pounds or less . . . or an option to renew such a lease or a similar contractual provision, all receipts due or consideration given or contracted to be given for such property under and for the entire period of such lease, option to renew or similar provision, or combination of them, shall be deemed to have been paid or given and shall be subject to tax, and any such tax due shall be collected, as of the date of first payment under such lease, option to renew or similar provision, or combination of them, or as of the date of registration of such property with the commissioner of motor vehicles, whichever is earlier. . . . [F]or purposes of such a lease, option to renew or similar provision originally entered into outside this state, by a lessee (1) who was a resident of this state, and leased such property for use outside the state and who subsequently brings such property into this state for use here or (2) who was a nonresident and subsequently becomes a resident and brings the property into this state for use here, any remaining receipts due or consideration to be given after such lessee brings such property into this state shall be subject to tax as if the lessee had entered into or exercised such lease, option to renew or similar provision, or combination thereof, for the first time in this state. . . .

Section 1134 of the Tax Law provides, in part:

(a)(1) (i) Every person required to collect any tax imposed by this article . . . commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business . . . (iv) every person described in this subdivision who takes possession of or pays for business assets under circumstances requiring notification by such person to the commissioner pursuant to subdivision (c) of section eleven hundred forty-one of this chapter . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. . . .

Section 1136(a) of the Tax Law provides, in part:

(1) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total less than three hundred thousand dollars . . . in every quarter of the preceding four quarters, shall only file a return quarterly with the commissioner.

(2) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total three hundred thousand dollars or more . . . in any quarter of the preceding four quarters, shall, in addition to filing a quarterly return described in paragraph one of this subdivision . . . file either a long-form part-quarterly return monthly with the commissioner.

Section 1141(c) of the Tax Law provides, in part:

Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. . . .

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (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. . . .

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. . . .

Section 526.7(a)(2) of the Sales and Use Tax Regulations provides:

Among the transactions included in the words *sale, selling or purchase* are . . . rentals, leases or licenses to use or consume tangible personal property.

Section 527.15 of the Sales and Use Tax Regulations provides, in part:

(a) Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that with respect to the leases described in this section the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease.

* * *

(c)(3)(i) Where an agreement to lease a motor vehicle for a term of one year or more is entered into, the lessor must collect the tax at the inception of the lease, based on the rate of tax in effect for the local jurisdiction in which the vehicle is regularly garaged or stored. . . .

* * *

(d)(1) Use tax. With respect to the lease of a motor vehicle . . . for a period of one year or more, where the lease is entered into outside New York State but the property is subsequently brought by the lessee into New York State, any remaining receipts due or consideration to be given attributable to the use of the property in New York will be subject to tax as if the lease had been entered into for the first time within New York State if:

(i) at the time of entering into the lease, the lessee was a resident of New York State and leased the property for use outside the State but subsequently brings the property into the State for use here; or

(ii) at the time of entering into the lease, the lessee was not a resident of New York State but subsequently becomes a resident and brings the property into the State for use in the State. . . .

Section 537 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) *Filing Requirements.* (1) A person who purchases in bulk the whole or any part of the business assets of a person required to collect tax must, at least 10 days before taking possession of such assets or paying for the same, whichever comes first, file with the Department of Taxation and Finance a notice of bulk sale. A form for this purpose may be obtained from the Taxpayer Assistance Bureau, Department of Taxation and Finance, State Campus, Albany, NY 12227, or from the Taxpayer Assistance Bureau at any district office of the Department of Taxation and Finance.

* * *

(d)(3) A seller shall give each prospective bulk purchaser of the business assets a copy of the notice to prospective purchasers relating to the purchaser's bulk sale notice requirements. Copies of such notice may be obtained from the Taxpayer Assistance Bureau, Department of Taxation and Finance, State Campus, Albany, NY 12227, or from the Taxpayer Assistance Bureau at any district office of the Department of Taxation and Finance.

Section 537.1 of the Sales and Use Tax Regulations provides, in part:

(a) *Bulk sale.* (1) The term *bulk sale* as used in this Part means any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance. . . .

(2) The fact that a sale is or is not a retail sale does not determine whether such sale is a bulk sale.

* * *

Example 3: Corporation A, a person required to collect tax, sells its entire inventory which is purchased by corporation B for resale. The sale by A is a bulk sale.

* * *

(d) *Ordinary course of business.* (1) The phrase *ordinary course of business* as used in this Part means any function, operation or transaction which is done ordinarily or customarily in the course of business. . . .

(2) Where a major part of the business assets are sold, such sale is clearly not in the ordinary course of business and is a bulk sale. Where fungible items are sold

in bulk or all the items of a specific kind are sold, such sales would usually not be in the ordinary course of business.

Opinion

Petitioner is a financing company that purchases motor vehicles and their associated long-term leases from various car dealerships. Typically, the leases are initially negotiated and executed by the dealers. The motor vehicles are subsequently sold to Petitioner and the leases are assigned to Petitioner. Petitioner then becomes the lessor and title holder of the motor vehicles. Petitioner plans to sell approximately 60% of its retail automobiles and their associated lease portfolio to a related financing company, DCFS. The portfolio that will be sold to DCFS is solely comprised of motor vehicles subject to a retail lease.

With respect to Issue (1), sales tax is imposed on the receipts from every retail sale of tangible personal property unless otherwise excluded or exempted. See Section 1105(a) of the Tax Law. Leases of tangible personal property are considered "sales" for sales and use tax purposes. See Section 1101(b)(5) of the Tax Law. The transfer of possession of a motor vehicle from a lessor to a lessee for the lessee's own use, for a consideration, constitutes the lease of tangible personal property. The lessor's purchases of such vehicles which will be used exclusively for this purpose fall within the resale exclusion contained in Section 1101(b)(4)(i)(A) of the Tax Law. Therefore, the lessor's purchases of motor vehicles which it will lease are not subject to State or local sales or compensating use tax.

Petitioner, the current lessor, will sell its motor vehicles to DCFS and assign the associated leases. DCFS will continue to lease the vehicles under the same lease terms, as the new lessor, without interruption. Therefore, Petitioner's sales of motor vehicles to DCFS that will be used by DCFS exclusively for rental or sale are considered to be sales for resale, and are therefore exempt from sales tax. To avoid paying sales tax at the time of purchase, DCFS must furnish Petitioner with a properly completed Form ST-120, *Resale Certificate*, no later than 90 days after the sale. Since DCFS is making multiple purchases of the same kind, DCFS may furnish, and Petitioner may accept, a blanket *Resale Certificate*, rather than individual certificates for each vehicle. See Section 532.4(d)(4) of the Sales and Use Tax Regulations.

Concerning Issue (2), DCFS will be a vendor with respect to the vehicles located in New York, since it will be making sales of tangible personal property, the receipts from which are subject to tax. Since the various dealers were the original lessors of these long-term leases, they were required under Section 1111(i) of the Tax Law to collect tax due at the inception of the leases. But DCFS would be required to collect tax in certain instances, for example, on receipts from any additional extension of the lease period not provided for by the original lease agreement and on the purchase price if a lessee purchases the vehicle at the end of the lease. See Section 1111(i) of the Tax Law and Section 527.15 of the Sales and Use Tax Regulations. As a vendor of these vehicles,

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and thus a person required to collect tax, DCFS must register for sales and use tax purposes at least 20 days prior to commencing business in New York State. See Section 1134 of the Tax Law. In order to register, DCFS must file Form DTF-17, *Application for Registration as a Sales Tax Vendor*. Also, DCFS must keep required records and file returns and remit any tax due.

If Petitioner is a dealer for N.Y.S. Department of Motor Vehicles (DMV) purposes, it would be required to file a Form MV-50, *Retail Certificate of Sale*, for each vehicle in which title is to be transferred to DCFS. If this is the case, the properly completed MV-50 would provide a statement to the DMV that tax has been collected on a particular vehicle or that no tax is due because, for example, the sale is for resale. If it is determined by DMV that Petitioner should not use Form MV-50, Petitioner should use Form DTF-805, *Schedule of Multiple Transactions - Casual Sale of Motor Vehicle*. Form DTF-805 allows for the transfer of a number of vehicles at the same time, and it provides a check box which states that the motor vehicles listed will be used exclusively for rental to customers.

In addition to the above described filing requirements, if Petitioner is a person required to collect New York sales tax, the transfer of 60% of Petitioner's lease portfolio will constitute a bulk sale within the meaning of Section 1141(c) of the Tax Law and Section 537.1 of the Sales and Use Tax Regulations. In that case, Petitioner must provide DCFS with a copy of Form TP-153, *Notice to Prospective Purchasers of Business and Business Assets*, relating to DCFS's bulk sale notification requirements. DCFS, as bulk purchaser, is then required to notify the Department of Taxation and Finance of the impending purchase by filing, by registered mail, Form AU-196.10, *Notification of Sale, Transfer or Assignment in Bulk*, at least ten days before taking possession of, or paying for the motor vehicles, whichever comes first. See Part 537 of the Sales and Use Tax Regulations. Failure by DCFS to follow all of the bulk sale requirements would result in DCFS becoming liable for any sales and use tax liability owed by Petitioner, up to the amount of the purchase price or fair market value of the assets sold, whichever is higher. (For more information on bulk sales see Publication 750, [A Guide to Sales Tax in New York State](#)).

Concerning Issue (3), Section 1111(i) of the Tax Law contains special rules for computing the sales tax on long-term motor vehicle leases. These rules require that the sales tax be computed on the total amount to be paid to the lessor over the term of the lease; and that the tax be collected from the lessee on the date of the first payment under the lease or at the time the vehicle is registered with the Department of Motor Vehicles, whichever is earlier. Even though the lease payments are made over the course of the lease term, the tax is due and payable in full on the total lease payments at the start of the lease. Petitioner states that in this case, consistent with these requirements, an up-front payment of tax on the motor vehicle leases has been collected and remitted either by itself or the dealer involved.

If all taxes have been properly collected on the leases in accordance with Section 1111(i) of the Tax Law, the subsequent assignment of the leases by Petitioner to DCFS, who will then be the

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lessor of the vehicles, will not make DCFS liable for the collection of sales tax on such lease payments (see Mercedes-Benz Credit Corp., Adv Op Comm T&F, March 22, 1996, TSB-A-96(19)S; General Electric Capital Auto Lease, Inc., Adv Op Comm T&F, September 15, 1995, TSB-A-95(37)S). However, DCFS will be responsible for collecting any sales and compensating use taxes which arise and are incurred after its purchase of the lease portfolio. If DCFS acquires vehicles which were originally leased outside New York State to lessees who are non-residents of New York, and such lessees then move to New York and bring such vehicles into New York, DCFS would be required to collect compensating use tax on those lease payments required to be paid after the lessee becomes a resident. See Section 1111(i) of the Tax Law and Section 527.15(d)(1) of the Sales and Use Tax Regulations.

DATED: November 20, 2000

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