

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

TSB-A-90 (19)S
Sales Tax
April 16, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S891215A

On December 15, 1989, a Petition for Advisory Opinion was received from BMW of North America, Inc., 300 Chestnut Ridge Road, Woodcliff Lake, New Jersey, 07675.

The issues raised by Petitioner, BMW of North America, Inc., are:

1. Whether Petitioner should compute use tax on new vehicles provided to officers and employees for business and personal purposes by applying the state and local sales tax rate to an amount equal to 2% per month of the dealer's cost of such vehicles.
2. Whether Petitioner is liable for use tax on motor vehicles displayed at Petitioner's BMW Gallery located in New York City for demonstration purposes and for viewing by prospective customers.

Petitioner is the sole authorized importer wholesaler of BMW automobiles in the United States. Petitioner coordinates the importing and subsequent wholesaling of these automobiles to independently owned and operated dealerships throughout the United States. The automobiles wholesaled to dealerships are inventory held exclusively for resale. Such automobiles, while in inventory, are occasionally used for demonstration purposes and for business and pleasure by officers and employees of BMW.

The vehicles shipped to Petitioner's BMW Gallery located within New York City are used for demonstration purposes and for viewing by prospective customers.

The vehicles used by employees and officers residing in New York are registered by Petitioner. After registering and tagging (licensing) the automobiles, Petitioner provides the vehicles to certain employees and officers, residing within New York State, for their business and personal use. Such vehicles are generally used for approximately 7,500 miles and subsequently are wholesaled to dealerships. The length in time of use for an automobile will depend on the amount of driving an individual does in order to reach 7,500 miles or the sales demand for the particular automobile being driven.

Petitioner presently determines the amount of use tax due by dividing the total cost of the vehicle by twelve months to arrive at a monthly cost. Such monthly cost is then multiplied by the applicable tax rate, resulting in the tax due and paid on the sales return for the applicable period in which such use occurs.

Section 1110 of the Tax Law imposes a use tax "for the use within this state ... of any tangible personal property purchased at retail".

Section 531.3(a)(2) of the Sales and Use Tax Regulations states in part:

"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 ... diverted to a taxable use by the purchaser ..." (20 NYCRR 531.3(a)(2)).

Additional rules publicized by the Department of Taxation and Finance in two Technical Services Bureau Memoranda on the taxability of motor vehicles used by dealers, (TSB-M-83(13)S, May 24, 1983, revised by TSB-M-87(2)S, January 16, 1987), require differentiation between the various uses of such vehicles depending on whether they are "demonstrators" or "mixed-use vehicles".

"Demonstrators" refers to vehicles held for sale, which are used with dealer plates for demonstration to prospective customers. The use of vehicles exclusively as demonstrators is not taxable. However, tax is due on gas, oil, parts and supplies used for their operation.

"Mixed-use vehicles" are vehicles intended for sale, but used occasionally for business or personal purposes by the dealer or his officers or employees. Since such vehicles will usually be used in this manner for only a short period of time and since no purchase, sale or trade, occurs at the beginning or end of taxable use, the dealer may pay use tax based on depreciation rather than on dealer cost. The taxable amounts must be reported under "purchases subject to use tax" on the sales tax returns which cover the period of use.

The rate of depreciation is 2% per month or any part thereof, computed on the total invoiced cost to the dealer including delivery ("total cost") for any vehicle purchased new and on the purchase price or trade allowance plus the value of repairs for any vehicle purchased used or taken in trade.

Prior to June 1, 1986, this method of taxation was applicable only to vehicles kept in mixed use for six months or less. Once a vehicle had been so used for more than six months, additional use tax became due in an amount equal to total cost multiplied by the tax rate, less use tax paid on depreciation. Technical Service Bureau Memorandum TSB-M-87(2)S, January 16, 1987, extends the six month limitation applicable to the period June 1, 1983, through May 31, 1986, to twelve months without imposing a mileage restriction.

As of June 1, 1986, the new departmental policy allows application of the 2% depreciation method ("2% method") to a qualifying vehicle if:

- (1) The vehicle is kept in mixed use for six months or less (no mileage limitation applies), or

- (2) the vehicle is retained in mixed use for more than six months, but not more than one year, and the mileage does not exceed 9000 miles for the entire period of mixed use.

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

These additional guidelines apply when a vehicle is taxed under the 2% method:

- (1) A dealer may not seek a trade-in allowance on a vehicle which is taxed under this method.
- (2) A dealer may not depreciate the vehicle or take an investment tax credit while computing use tax under the 2% method.
- (3) A "mixed use" vehicle, unless operated with dealer plates, must be registered in the dealership's name.
- (4) A dealer must maintain records as described in Technical Services Bureau Memorandum TSB-M-87(2)S.

If a dealer does not comply with any of these requirements, use tax is due on the dealer's total cost of the vehicle, plus penalty and interest computed from the date that a return for the occasion of first use would have been due, less credit for use tax paid under the 2% method.

The above guidelines no longer apply once use tax has been paid on the total cost or the fair market value of a vehicle, with the exception that the dealer may not take a trade-in allowance on replacement of a vehicle which has been used with dealer plates or registered in the dealer's name, whether the dealership operates as a single or more than one business entity.

Purchases of gas, oil, parts and supplies for operating mixed-use vehicles are taxable. Any such items withdrawn from the dealer's inventory are subject to use tax.

Use tax due on the mixed-use vehicle is computed by multiplying total cost by the 2% depreciation rate, the result by the number of months the vehicle was used (use in any part of a month counts as a whole month) in a quarterly filing period, and the resulting taxable amount by the State and applicable local tax rate.

Effective January 16, 1987, the issuing date of TSB-M-87(2)S, the records listed in that publication must be kept for every vehicle placed in mixed use. For the period from June 1 through December 31, 1986, records not so maintained must be reconstructed from source documents.

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Crestview Cadillac, Inc., Adv Op T & F, April 16, 1987, TSB-A-87(16)S).

Accordingly, if a vehicle is held in inventory exclusively for resale while being used occasionally for business or personal purposes, it will be considered a mixed use vehicle. As such, dependent on whether it is so used for up to 6 months (no mileage limitation applies), or for more than 6 months, but not more than one year (mileage not to exceed 9000 miles for entire period), Petitioner will be subject to use tax on such vehicle based on an amount calculated under the 2% method. If the mileage exceeds 9000 miles between six months and twelve months or if the vehicle is used by the dealer for more than twelve months, Petitioner will owe use tax based on dealer's total cost of the vehicle plus penalty and interest computed from the date that a return for occasion of first mixed used would have been due. Credit for tax paid under the 2% method or any other method will be allowed.

The use of a vehicle shipped by Petitioner to its BMW Gallery in New York City exclusively for demonstration to prospective customers or for viewing by such customers is not considered to be a taxable use.

It is noted that the method presently used by Petitioner to compute use tax due on the mixed use vehicles may result in an overpayment of the actual use tax due under the 2% method. Accordingly, Petitioner may request a refund or credit of any overpayment of use tax by submitting a completed form AU-11, Application for Credit or Refund of State and Local Sales or Use Tax. The application for credit or refund must be filed within three years after the date the tax was payable by the claimant. The application should be mailed to State of New York Department of Taxation and Finance, Central Office Audit Bureau - Sales Tax, W.A. Harriman Campus, Albany, N.Y. 12227.

DATED: April 16, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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