

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

TSB-A-01(16)S  
Sales Tax  
May 23, 2001

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001016A

On October 16, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Gary F. Karwowski, 5 Ardsley Circle, Churchville, New York 14428.

The issue raised by Petitioner, Gary F. Karwowski, is whether or not motorcycle funeral escorts are subject to New York State and local sales and use tax.

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

Petitioner provides motorcycle escorts to funeral directors. Petitioner provides the funeral director with a motorcycle and a driver. The motorcycle driver escorts the funeral procession to the church and from the church to the place of interment.

The motorcycle driver determines the safest route and leads the funeral procession, monitoring all traffic control devices at all intersections, and determining whether to stop or proceed, change lanes, or change routes. In some instances, the family of the deceased requests the motorcycle escort to drive by the family's residence or business. That route is determined by the escort as well. In summary, the motorcycle escort determines the itinerary of the procession with respect to the route to be taken.

At no time is the funeral director allowed to drive or otherwise take control or possession of the motorcycle. Petitioner maintains the right to hire and fire the drivers, and pays all operating expenses, including drivers' wages, insurance and tolls.

**Applicable Law & Regulations**

Section 1101 (b)(5) of the Tax Law defines "sale, selling or purchase" as:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law provides, in part:

**Imposition of sales tax.**—On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 541.2(p) of the Sales and Use Tax Regulations provides:

*Rental, lease and licence to use.* (1) The terms “rental, lease and 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.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle; and

(v) directs the work, pays all operating expenses, including drivers’ and/or operators’ wages, insurance, tolls and fuels.

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Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Example 6: 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 a sale, as the transfer of possession has occurred by reason of the company foreman's right to direct and control the operator's use of the equipment. The separately stated operator's wages are excludable from the taxable receipts.

### Opinion

Petitioner provides motorcycle escorts to funeral directors in which he supplies both the motorcycles and drivers. Petitioner's drivers determine the routes, monitor traffic devices and determine whether to stop or proceed. Petitioner maintains the right to hire and fire the drivers, and pays all operating expenses, including drivers' wages, insurance and tolls. Based on these facts, Petitioner does not relinquish dominion and control of the motorcycles to its customers. Petitioner, therefore, is not renting the motorcycles to funeral directors but is supplying a service that is not one of the enumerated services in Section 1105(c) of the Tax Law. Petitioner's charges to funeral directors for this service are not subject to sales tax.

DATED: May 23, 2001

/s/  
Jonathan Pessen  
Tax Regulations Specialist III  
Technical Services Division

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