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In this edition of Noonan's Notes, the authors say that New York's recently enacted 4 percent assessment on ride-sharing services may seem straightforward on the surface, but in fact has complex tax issues embedded in it.

Ride-sharing services such as Uber Technologies Inc. and Lyft Inc. got the legislative green light in June to begin operating statewide in New York, after years of being confined to New York City. The legislation permitting those services outside the city took effect June 29, and the first Ubers were prowling the upstate grid in time for the July 4 weekend. This expansion of ride-sharing throughout the state and the rapid growth of the industry itself raises some interesting state and local tax issues.

For tax practitioners in New York City and state, navigating how sales and use tax has applied to taxicabs, black cars, limousines, affiliated livery services, and other transportation services has meant sifting through confusing rules and distinctions, particularly in and around New York City — where all sorts of “street hail” and

“for-hire” vehicles flood the streets. The arrival of app-based ride-hailing services like Uber and Lyft in the Big Apple presented yet another twist: Where do they fit in the already tricky tax structure? But at least for the newly christened ride-sharing services operating outside of New York state, the tax implications are simple and straightforward. Application-based ride-sharing services will pay a flat 4 percent assessment on all intrastate trips originating outside of New York City.

The fact that the New York State Legislature settled on an “assessment” rather than placing upstate ride-sharing under the general sales and use tax umbrella is perhaps the legislation's most notable tax aspect.

Assessment on Trips Outside the City

In a technical memorandum released just ahead of the effective date for ride-sharing services, the New York State Department of Taxation and Finance explained the 4 percent assessment, recordkeeping requirements, filing requirements, and other issues.¹ Under the new law, a transportation network company (TNC), which is subject to the assessment, is defined as “any person or entity that is licensed by the [Department of Motor Vehicles] that operates in New York state exclusively through the use of a digital network to connect passengers with drivers to provide TNC prearranged trips.”² In other words, Uber, Lyft, or any competing transportation service that offers prearranged

¹ See TSB-M-17(1)S (June 23, 2017).

² *Id.*; see also, N.Y. Tax Law section 1291(c), as added by L. 2017, ch. 59, pt. AAA section 18. A prearranged trip means “the transportation provided by a TNC driver to a passenger that: (1) is arranged through the use of a TNC's digital network; and (2) begins when a TNC driver accepts a passenger's trip request, continues through the transport of the passenger, and ends when the last requesting passenger exits the vehicle.”

trips exclusively through a digital platform is subject to the tax.

The 4 percent assessment is calculated on the gross trip fare of each intrastate TNC trip originating outside New York City.³ Unlike New York's sales tax, which is imposed on the customer but collected by the vendor, the tax is levied on the TNC itself, rather than on passengers. But like sales tax reporting, TNCs are required to file a quarterly return, due 30 days after the end of the quarter. The first returns and payments are due October 30.⁴

The 4 percent assessment represents just one piece of a large legislative package governing all aspects of the ride-sharing industry — including licensing requirements, insurance obligations, and driver and vehicle requirements.⁵ The New York City Taxi and Limousine Commission has and will continue to regulate the industry within the city. Until the legislation, effective June 29, ride-sharing had not been authorized outside of the city. The issue of how ride-sharing should be taxed outside New York City emerged as one of the key points of debate in the ride-sharing legislation. An Assembly bill proposed subjecting ride-sharing trips to the existing sales and use tax on intrastate transportation services,⁶ which would have allowed counties to impose a local sales tax on top of the 4 percent statewide sales tax. A Senate proposal called for a 2 percent assessment rather than a sales tax, with 50 percent of the revenue earmarked for the state's dedicated bridge and highway fund, and the other 50 percent allocated to a special fund to assist local transit programs.⁷ Meanwhile, Democratic Gov. Andrew Cuomo's own executive proposal had called for a 5.5 percent assessment, with 20 percent of revenue specially marked for local transit programs.⁸

Ultimately, the new law included the 4 percent assessment, with all revenue allocated to the general fund and no special allocations — at least

in the legislation itself — earmarked for localities and transit programs.⁹ The assessment is expected to generate \$24 million in state revenue per year.¹⁰

What About Ride-Sharing in New York City?

To understand TNCs' statewide tax obligations, it's helpful to explore how taxicabs and various livery transportation services have been taxed within and outside New York City. The sales tax on in-state transportation service took effect in 2009. The tax law defines transportation service, generally, as:

The service of transporting, carrying or conveying a person or persons by livery service; whether to a single destination or to multiple destinations; and whether the compensation paid by or on behalf of the passenger is based on mileage, trip, time consumed or any other basis.¹¹

But traditional taxicabs and buses have been exempt since that law was enacted, and the ride-sharing legislation that took effect June 29 amended the definition to exclude TNC rides subject to the 4 percent assessment (that is, TNC trips originating outside New York City).¹² Seems simple enough, but that leaves other livery services subject to sales tax statewide. The tax law defines livery service generally as "service provided by a limousine, black car, or other motor vehicle, with a driver" (excluding taxis and buses).¹³ In 2010, however, an exemption was carved out for "affiliated livery vehicles" operating in New York City.¹⁴ That covers livery vehicles seating six persons or fewer that don't qualify as black cars or luxury limousines, provided the trip originates or terminates in the city.¹⁵

⁹ See N.Y. Tax Law section 1298, as added by L. 2017, ch. 59, pt. AAA section 18.

¹⁰ See Press Release, Assembly member Kevin A. Cahill (D), "Assemblyman Cahill Welcomes Ride-Hailing to Upstate New York and Long Island" (Apr. 8, 2017).

¹¹ N.Y. Tax Law section 1101(b)(34).

¹² *Id.*

¹³ *Id.*

¹⁴ See TSB-M-10(15)S (Aug. 27, 2010); and TSB-M-13(2)S (Feb. 25, 2013) (expanding exemption to trips beginning or ending within New York City).

¹⁵ See TSB-M-10(15)S.

³ N.Y. Tax Law section 1292, as added by L. 2017, ch. 59, pt. AAA section 18.

⁴ See TSB-M-17(1)S.

⁵ L. 2017, ch. 59, pt. AAA.

⁶ See A. 06661, 2017-18 reg. sess. section 14.

⁷ See S. 04159, 2017-18 reg. sess. section 16.

⁸ See FY 2018 Executive Budget, Article VII bill, pt. G section 15.

But defining the difference between an exempt affiliated livery car and a black car in New York City has also been a nuanced exercise for New York City purposes. The tax law doesn't define the term, and the department's policy guidance offers only that a black car is a "for-hire vehicle . . . dispatched from a central facility."¹⁶ The Taxi and Limousine Commission's regulations provide a bit more, defining a black car as a vehicle dispatched from a "central facility" where:

- all vehicles are dispatched on a pre-arranged basis (for example, by phone);
- all vehicles are owned by franchisees of the facility or members of the entity that operates the facility; and
- more than 90 percent of the revenue comes from payment means other than cash paid directly to the driver.¹⁷

Enter Uber. Until the June 29 legislation, the law did not explicitly address how ride-sharing services fit into the taxing scheme. Yet ride-sharing services operating in New York City have generally been collecting sales tax on in-state trips. In fact, Uber itself has been in the news over how that sales tax should be factored into the slice of revenue the company's drivers receive for each ride.¹⁸ But the basis for taxability has not been entirely defined, because a vehicle answering an Uber or Lyft call in New York might be affiliated with either a black car base or a general livery base. The new law seems to clarify the issue for insurance, tax, and other purposes by specifying TNCs as a type of black car service. Specifically, the definition of a black car central facility was amended to include a transportation network company, and the definition of a black car operator now includes "a TNC driver that is engaged in a TNC prearranged trip."¹⁹

That's all quite the quagmire. But to sum it up:

- Ride-sharing trips by TNCs originating within New York City continue to be subject to state and local sales and use tax if the trip is intrastate.
- In contrast, intrastate ride-sharing trips by TNCs that originate outside New York City are subject to the 4 percent assessment on TNCs.
- Other types of livery services (excluding taxicabs and buses) outside of the TNC definition continue to be subject to sales and use tax statewide on intrastate trips within and outside New York City. However, the exemption for affiliated livery vehicles (that is, non-TNC cars with a six-person capacity that don't qualify as black cars or luxury limousines) covers trips that either begin or end in New York City.

Other Issues: Rentals to Ride-Share Drivers

The expansion of the ride-share industry has made it relatively easy for car owners to link with services like Uber and Lyft and use their own cars to generate income. However, being authorized to drive for a TNC involves some costs. Vehicles must meet both the TNC's vehicle requirements and the Department of Motor Vehicles inspection standards. Vehicles and drivers must also meet stringent insurance thresholds. With the rise of ride-sharing already in New York City, an industry has sprung up allowing ride-share drivers to rent for-hire cars specifically for use with TNC businesses — offering pre-licensed, inspected vehicles meeting standards of the various TNCs. In the city, where TNC vehicles and drivers must obtain special licenses from the Taxi and Limousine Commission and must undergo multiple vehicle inspections per year, the lease option can provide an alternative to those otherwise out-of-pocket costs. We'd expect the leasing industry to grow with the expansion of ride-sharing statewide.

Of course, what would an industry be without complicated sales and use tax questions? Anyone who's rented a car from Hertz, Avis, or any short-term rental company can probably attest to the steep tax hit. In fact, renting a passenger car in New York for less than 12 months is subject not only to the general state and local sales tax applicable to renting tangible personal property,

¹⁶ TSB-M-09(7)S (May 22, 2009).

¹⁷ See R.C.N.Y. section 51-03.

¹⁸ See Noam Scheiber, "How Uber's Tax Calculation May Have Cost Drivers Hundreds of Millions," *The New York Times*, July 5, 2017.

¹⁹ L. 2017, ch. 59, pt. AAA section 11 (the amendments were to section 160-cc of the N.Y. Executive Law, but the Taxi and Limousine Commission's regulations reference that section in its definitions of a black car base and central facility). See R.C.N.Y. section 51-03.

but also to a special supplemental tax of 6 percent imposed on short-term passenger vehicle rentals (less than 12 months), and a second supplemental tax of 5 percent if the rental occurs in New York City or one of the surrounding counties comprising the Metropolitan Commuter Transportation District.²⁰ So, for example, a short-term rental in New York City — where the combined state and local sales tax rate is 8.875 percent — results in a combined tax rate on the rental payments of 19.875 percent. By contrast, long-term rentals (12 months or more) are not subject to the additional 11 percent of “special” taxes. However, the sales tax on a long-term vehicle rental is due up front — on the total value of all lease payments under the lease — rather than on the payments as they become due.²¹ No wonder people prefer Uber!

Tax costs affect the bottom line for ride-share drivers looking to lease. One question in that context is whether some deduction would be allowable from the taxable receipt on a rental to account for the intangible benefit conferred to the driver. Such a concession has been allowed in the context of yellow cab rentals in New York City. In *Matter of Best Taxi Management Inc.*,²² the New York Tax Appeals Tribunal considered whether an \$80-per-shift charge by a New York City taxi garage to drivers for the use of a yellow cab was rental of property for sales tax purposes, and if so, whether some of that fee could be attributed to intangible property — namely the temporary use of the taxi medallion authorizing the cab to operate in the city. The tribunal held that the \$80 fee essentially constituted two transactions: a car rental (taxable) and a charge for use of the intangible rights conferred by the medallion (nontaxable). In fact, based in part on the extreme value attributable to the limited number of taxi medallions issued in the city, the tribunal held it reasonable to allocate only \$24 of the \$80 shift fee to the taxable car rental itself, with the remaining 70 percent attributable to the intangible use of the medallion.

Of course, any intangible value inherent in renting a pre-licensed, Uber-ready vehicle would

be far less than that of a medallion taxicab (although their value has declined, taxi medallions are still a six-figure investment). Still, a valid question arises whether New York would recognize a similar deduction for rentals in the ride-sharing industry.

Conclusion

The expansion of ride-sharing services beyond New York City and throughout the state brings more revenue for the state — and more tax issues for practitioners. While the 4 percent assessment may seem straightforward on paper, time will tell how things play out. As is always the case, few things are simple in the tax world. ■

²⁰ N.Y. Tax Law sections 1105(a), 1160, 1166-A.

²¹ See N.Y. Tax Law section 1111(i).

²² N.Y. Tax Appeals Trib. (Jan. 24, 2002).