

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

TSB-A-97(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-97(79)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z970402A

On April 4, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from We Care Transportation, Inc., 401 East Amherst Street, Buffalo, NY 14215.

The issue raised by Petitioner, We Care Transportation, Inc., is whether We Care Transportation, Inc. meets the definition of an omnibus carrier engaged in local transit service and is eligible for a refund of taxes paid pursuant to sections 289-c(3)(d), 301-c(c) and 1119(b) of the Tax Law.

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

Petitioner operates 56 vehicles having a seating capacity of eight passengers or more in the transportation of disabled persons. Petitioner has obtained a "Certificate of Public Convenience" from the New York State Department of Transportation to operate as a common carrier of disabled persons.

Forty-five of petitioner's vehicles are operated pursuant to a contract with the County of Erie as provided for under section 4410 of the New York State Education Law. The vehicles are used to transport children between the ages of 3 and 4 years old with developmental delays to various rehabilitation facilities. These facilities offer education programs for aiding the children to become physically and/or mentally qualified to become educated at a later date when they qualify for school at the requisite age. Petitioner is required, pursuant to the contract, to provide curb-to-door service and to provide that the driver and an attendant will assist children from the curb or driveway of the children's residences or care giver to the door of the service provider and, on the return trip, from the door of the service provider to the curb or driveway of the residence or care giver. Eligibility for these transportation services is determined by Erie County and/or the resident school districts of the children. The children's needs determine the time, place and frequency of service. The contract does provide, however, certain guidelines regarding routes and schedules and does provide that if the school district of the residence of a child is closed and/or the school district of the site of the service provider is closed, no transportation service will be provided.

Eleven of petitioner's vehicles are operated pursuant to a contract with Niagara Frontier Transit Metro System, Inc. ("Metro"). The contract provides that petitioner will provide curb-to-curb paratransit services in designated service areas for designated service hours (generally during evenings and weekends). Eligible riders are determined by Metro according to the Americans

TSB-A-97(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-97(79)S
Sales Tax

with Disabilities Act (ADA) and regulations. Petitioner receives all requests for transportation directly from the eligible individuals. Reservation service is available, through the petitioner, during normal business hours as well as during times comparable to normal business hours, on a day when petitioner's offices are not open before a service day. Petitioner is required, pursuant to the contract, to provide transportation throughout the Metro identified paratransit service area, which extends 3/4 mile beyond and on either side of any Metro fixed route bus line. The paratransit service area is subject to change in the event there is a change in Metro's fixed route system. Fares charged by petitioner to passengers are governed by the ADA regulations and are directly related to the amount charged passengers of the fixed route service.

In addition to its weekend and evening operations under its contract with Metro, petitioner also uses the same 11 vehicles during daytime weekday service hours to perform the same type of service for disabled persons. During daytime weekday service hours, petitioner and Metro provide the same type of paratransit service to disabled persons.

Applicable Law and Regulations

Section 282(9) of Article 12-A of the Tax Law states:

"Omnibus carrier" shall mean every person engaged in operating an omnibus line subject to the supervision of the state department of public service under article three-a of the public service law, including every person operating omnibuses used for the transportation of school children under a contract made pursuant to the provisions of the education law.

Paragraph (1) of section 410.2(m) of Title 20 NYCRR, relating to the taxes paid on motor fuel, generally incorporates the section 282(9) statutory definition of "omnibus carrier" and paragraph (2) of such section provides:

(2) "Omnibus" for purposes of paragraph (1) of this subdivision means every motor vehicle, with a seating capacity of more than seven persons in addition to the driver, used in the business of transporting passengers for hire. Such term does not include a taxicab.

Provisions similar to those in such section 410.2(m) (1) are contained in section 422.3 of such Title for purposes of the taxes paid on diesel motor fuel.

Section 289-c(3)(b) of Article 12-A of the Tax Law and section 415.3(b) of Title 20 NYCRR provide that an omnibus carrier may claim a partial reimbursement of three cents per each gallon of motor fuel purchased upon which the taxes imposed by sections 284 and 284-a of the Tax Law have been paid.

TSB-A-97(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-97(79)S
Sales Tax

Such section 289-c(3)(b) further provides that an omnibus carrier may claim a partial reimbursement of one cent per each gallon of diesel motor fuel purchased upon which the taxes imposed by sections 282-a and 282-b of the Tax Law have been paid.

Section 289-c(3)(d) of Article 12-A of the Tax Law and section 415.3(c) of Title 20 NYCRR provide that an omnibus carrier may claim a full reimbursement of eight cents per each gallon of motor fuel purchased upon which the taxes imposed by sections 284, 284-a and 284-c of the Tax Law have been paid, provided that the motor fuel has been consumed in the operation of an omnibus "in local transit service" in New York State. Paragraph (2) of such section 415.3(c) further provides, in part:

(2) An "omnibus in local transit service" is an omnibus providing a mass transit service (as distinguished from a charter, contract, school bus, sightseeing or other such service) by carrying passengers from one point in this State to another point in this State and which either:

(i) regularly picks up or discharges such passengers at their convenience or at bus stops on the street or highway, as distinguished from buildings or facilities used for bus terminals or station; or

(ii) picks up and discharges passengers at bus terminals or station, the distance between which is not more than 75 miles, measured along the route traveled by the bus (emphasis added)....

Such section 289-c(3)(d) and section 422.4 of Title 20 NYCRR contain a substantially similar reimbursement with respect to diesel motor fuel purchased upon which the taxes imposed by sections 282-a, 282-b and 282-c of the Tax Law have been paid provided that the diesel motor fuel has been consumed in the operation of an omnibus "in local transit service" in New York State.

Section 301-c(c) of Article 13-A of the Tax Law provides for a reimbursement of the tax imposed by such Article 13-A on motor fuel or diesel motor fuel gallonage which has been included in the measure of the tax imposed by such Article 13-A and consumed by an omnibus carrier in the operation of an omnibus "in local transit service" as described in section 289-c(3)(d) of Article 12-A of the Tax Law or consumed in the transportation of school children in the State under a contract made pursuant to the provisions of the Education Law.

Section 1119(b) of Article 28 of the Tax Law and section 534.4 of Title 20 NYCRR provide that an omnibus carrier engaged in local transit service is allowed a refund or credit of state and local sales and uses taxes paid, subject to certain conditions and limitations, with respect to the omnibus carrier's purchase or use of an omnibus and of parts, equipment lubricants, motor fuel, diesel motor fuel and certain maintenance and repair services purchased and used in the operation of a qualifying omnibus.

TSB-A-97(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-97(79)S
Sales Tax

Section 534.4 of such regulations provides, in part:

...(1) "Omnibus Carrier". For purposes of this section, an "omnibus carrier" is a carrier which provides local transit service in this State and which operates pursuant to a certificate of public convenience and necessity issued by the Commissioner of Transportation of this State, by the Interstate Commerce Commission of the United States, or pursuant to a contract, franchise, or consent between the carrier and a city having a population of more than one million inhabitants, or any agency of such city....

Section 534.4 further defines "omnibus" and "local transit service" to mean the same as such terms are defined for purposes of Article 12-A in, respectively, sections 410.2(m) (2) and 415.3(c) of Title 20 NYCRR.

Opinion

Petitioner meets the definition of an "omnibus carrier" for purposes of Articles 12-A, 13-A and 28 of the Tax Law.

Petitioner's operations with respect to the 45 vehicles operated pursuant to petitioner's contract with Erie County do not qualify as operating "in local transit service" because these vehicles are not providing a mass transit service. These services are available to only a select group of individuals, namely 3 and 4 year olds with developmental delays whom the County/Local Early Intervention Official has determined to be eligible to receive transportation services, to specific locations, and at specific times, as determined by the resident school districts. Therefore, petitioner does not qualify for the reimbursements, refunds and/or credits allowed for "in local transit service" pursuant to sections 289-c(3)(d) or 1119(b) of the Tax Law on such operations. Petitioner's operations with respect to these 45 vehicles, however, do qualify for the partial reimbursement allowed omnibus carriers under section 289-c(3)(b) of such law. Moreover, since these operations are pursuant to a school contract made pursuant to the provisions of the Education Law, they qualify for reimbursement under section 301-c(c)(ii) of the Tax Law.

Niagara Frontier Transit Metro System, Inc. has established a paratransit service for eligible riders within a specified service area. Since this paratransit service is a mass transit service available to disabled persons which regularly picks up or discharges such passengers at their convenience, this service qualifies as "local transit service." Since petitioner's operations pursuant to its contract with Metro are an extension of the mass transit service provided to disabled persons by Metro, petitioner's operations under that contract qualify as being "in local transit service." Where petitioner's 11 vehicles are not operated under the Metro contract but are used to regularly pick

TSB-A-97(1)M
Motor Fuel Tax
Petroleum Business Tax
TSB-A-97(79)S
Sales Tax

up or discharge disabled persons at their convenience within the same general area established by Metro as the paratransit service area, these operations of these vehicles also qualify as being "in local transit service." Accordingly, petitioner's 11 vehicles qualify for the reimbursements, refunds and/or credits allowed under Tax Law sections 289-c(3)(d), 301-c(c)(i) and 1119(b) (subject to the proportionate limitations set forth in such section).

DATED: December 11, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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