

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

TSB-A-87(38)S
Sales Tax
October 1, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870205A

On February 5, 1987, a Petition for Advisory Opinion was received from Monroe Contractors Equipment, Inc., 749 Phillips Road, P.O. Box F, Fishers, New York 14453.

The issues raised by Petitioner are (1) whether its truck is used in interstate or foreign commerce and thereby exempt from the sales and compensating use taxes imposed under sections 1105 and 1110 of the Tax Law and (2) whether the results would differ if Petitioner were a foreign corporation with a principal place of business in New York.

Petitioner, a domestic (New York) corporation, owns a tractor-trailer which was purchased outside of the state and which first entered the State while engaged in interstate commerce. Thereafter, it was used in interstate commerce exclusively. After six months of such use, the truck will pick up a load in Buffalo, New York with the ultimate destination of such load being Venezuela, South America. The tractor-trailer may take one of the following routes from Buffalo:

- 1) Directly to Brooklyn,
- 2) To New Jersey Port Authority,
- 3) To Connecticut,
- 4) To Brooklyn via New Jersey and Pennsylvania,
- 5) To New Jersey via New York and Pennsylvania,
- 6) To Connecticut via New York.

Issue (1)

Section 1105 of the Tax Law imposes a sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article. However, inasmuch as Petitioner took delivery of the tractor-trailer outside of the state, its purchase of the tractor-trailer cannot be subject to the sales tax imposed by section 1105 of the Tax Law.

Section 1110 of the Tax Law provides that: "[e]xcept 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 . . . of any tangible personal property purchased at retail. . . ." (emphasis added).

Section 1111(b) of the Tax Law provides that:

Tangible personal property, which has been purchased by a resident of New York State outside of this state for use outside of this state and subsequently becomes subject to the compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided, however: (1) That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this state, such property shall be taxed on the basis of current market value of the property at the time of its first use within this state. The value of such property, for compensating use tax purposes, may not exceed its cost... .

The definition of resident includes, "Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of amusement or social or athletic club in the State" 20 NYCRR 526.15(b)(1).

It is the policy of the Department of Taxation and Finance to assert use tax against vehicles used within the State when transporting goods or persons from one point in New York State to another point within New York State regardless of whether such vehicles are engaged in intrastate, interstate or foreign commerce. Tax is not asserted against a vehicle exclusively engaged in interstate or foreign commerce where either the point of departure or destination is outside of the State. It is now well established that a state tax is not per se invalid because it burdens interstate or foreign commerce since interstate and foreign commerce may constitutionally be made to pay their way. STL Transport, Inc. v New York Department of Taxation and Finance. (In Re STL Transport, Inc.), Case No. 85-20201, Adv. No. 86-0832T, (W.D.N.Y.) May 21, 1987); Japan Line, Ltd. v County of Los Angeles 441 U.S. 434, 60 L. Ed. 2d 336, 99 S. Ct. 1813; Complete Auto Transit, Inc. v. Brady 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326.

The use tax imposed by section 1110 of the Tax Law clearly meets the applicable constitutional tests enunciated in the above cases with respect to Petitioner inasmuch as the tax is imposed upon a New York resident with respect to vehicles operated upon the highways of New York State with points of departure and destination both in New York State and subject to the provisions of section 1118(7)(a) of the Tax Law. It should be noted that the vehicle at issue could not come within the taxing or regulatory jurisdiction of a foreign government as was the case in Japan Line, Ltd, supra.

Accordingly, use tax would be properly imposed under situations #1 and #4 above. The remainder of the trips (#2, #3, #5 and #6) have a destination outside of New York State. For this reason, the Department of Taxation and Finance would not assert a use tax.

Issue (2)

Inasmuch as Petitioner maintains a place of business within New York State, it is a resident of New York State for purposes of section 526.15(b)(1) of the sales and use tax regulations regardless of whether it is a New York corporation or a foreign corporation.

Accordingly, the results described above would not change merely by virtue of Petitioner being a foreign corporation.

However, it should be noted that a recent amendment to section 1115 of the Tax Law (Chapter 755 of the Laws of 1987, 5 and 6) which will take effect January 1, 1988, will change the results discussed in Issues (I) and (II) above. This amendment exempts from sales and use tax:

Tractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair, provided such vehicle, is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousand pounds; and

[Services] if performed upon tractors, trailers or semi-trailers or on property installed on such vehicles for their equipping, maintenance or repair when receipts from the retail sale of such items are exempt from tax under the provisions of paragraph twenty-six of subdivision (a) of this section. (Tax Law 1115(a)(26); (g)(2)).

Additionally, effective April 1, 1988, a taxpayer may obtain a credit or refund of any tax paid on or after July 1, 1987 with respect to:

(1) tractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair provided such vehicle is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousand pounds; and (ii) services, if performed upon tractors, trailers or semi-trailers described in paragraph (i) of this subdivision or on property installed on such vehicles for their equipping, maintenance or repair. (Tax Law 1139(g)).

DATED: October 1, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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