ASSESSMENT OF PUBLIC COMMENT

DEPARTMENT OF TAXATION AND FINANCE

On January 27, 2005, Mr. Mark R. Baker, the chief business officer of New York Water Taxi (hereafter NYWT), submitted written comments on the proposed rule to the Department of Taxation and Finance. NYWT engages in two relevant types of waterborne transportation services: interstate commerce transportation services between a point in New York and a point in New Jersey, and transportation services between points in New York.

Mr. Baker provided NYWT's view of the background for the amendments enacted in Part M of Chapter 60 of the Laws of 2004, upon which the rule is based.

> The Legislation was adopted by the Legislature to address an imbalance that had arisen in the sales taxation treatment of purchases for vessels engaged in waterborne transportation in New York. Under the existing exemption for vessels operating in interstate commerce, ferry and water taxi operators primarily traveling between a point in New York and a point in New Jersey receive a 100% New York sales tax exemption on vessel purchases, but, prior to the adoption of the Legislation, ferry and water taxi operators traveling between points in New York received no exemption.
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> The legislation was designed to change this imbalance by providing a New York sales tax exemption on vessel purchases for operators providing local transit service between points in New York.

Mr. Baker refers to the exemption from sales and compensating use taxes in section 1115(a)(8) of the Tax Law for "[c]ommercial vessels primarily engaged in interstate or foreign commerce." This exemption is addressed in 20 NYCRR 528.9 and is distinct from the local transit service refund or credit provisions pursuant

to section 1119(b) of the Tax Law at issue here.

Mr. Baker explained that if NYWT's vessels were engaged primarily (50 percent or more [see 528.9(a)(4)]) in interstate commerce between New York and New Jersey, its purchases of such vessels would be completely exempt from tax under section 1115(a)(8). Also, he pointed out that if NYWT's vessels were engaged solely in local transit service between points in New York, its purchases of the vessels would be completely "exempt" by virtue of the refund and credit provisions under section 1119(b) of the Tax Law.

Mr. Baker's concern is that since NYWT provides both types of services, the "sales tax exemption is diminished by a percentage and is less than complete" under the proposed rule. In his analysis of the proposed rule, Mr. Baker continued:

> The Proposed Regulations eliminate from the definition of 'local transit service in this state' any local transit service which is interstate in character, and we believe that this exclusion is appropriate and consistent with the Legislation. [See section 534.10(a)(3) of the rule.]
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> The Legislation then requires that a percentage be calculated, which is the proportion that an operator's vessel 'hours spent in local transit service in this state' bear to 'total hours operated in this state'. However the Proposed Regulations, which eliminate interstate travel from 'hours spent in local transit service in this state', requires that the vessel hours spent in interstate travel in New York State waters be included in 'total hours operated in this state'.
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> By eliminating the interstate travel hours from the numerator of the percentage, but by adding a portion of those hours to the denominator, the Proposed Regulations lead to the undesired result that an operator engaged solely in interstate travel and local transit service in this state, both completely exempt under the tax law, finds itself with less than a complete sales tax exemption.

This result is not required by the Legislation, which only requires that the denominator of the percentage be calculated as 'total vessel hours operated in this state' and which does not require the inclusion of any vessel hours spent in interstate commerce in that calculation. If the Proposed Regulations treated interstate commerce vessel hours consistently, eliminating them both from 'hours spent in local transit in this state' and from 'total hours operated in this state', then the percentage would be properly calculated and the undesired result eliminated.

This suggested approach is consistent with the treatment of interstate commerce generally, which is not to be regulated by the states, as opposed to commerce wholly within the state, which may be.

Mr. Baker also provided an illustration regarding two vessel operators having the same number of hours in local transit service in the State as well as the same total number of hours in interstate commerce, but a different amount of hours spent in New York waters during the interstate trips.

Mr. Baker suggested that the rule be revised to eliminate "the hours spent in interstate commerce from both the definition of 'hours spent in local transit service in this state' [*i.e.,* the numerator] and the definition of 'total hours operated in this state' [*i.e.,* the denominator]. Alternatively the portion of hours spent in the waters of New York State while engaged in interstate commerce could be added to both 'local transit service in this state' and 'total hours operated in this state.'"

Part M of Chapter 60 of the Laws of 2004 amended section 1119(b) of the Tax Law, in pertinent part, to read as follows (underlined text added):

Any such omnibus carrier <u>or vessel operator</u> must provide local transit service in this state….

The amount of such refund or credit shall be determined by first computing the local transit service percentage which shall be the proportion that<u>, in the case of such a carrier,</u> such carrier's

vehicle mileage or, in the case of such an operator, such operator's vessel hours in local transit service in this state… bears to such carrier's total mileage operated in this state… or such operator's total hours operated in this state.…

The rule as a whole was patterned after 20 NYCRR 534.4, "Refunds and credits for omnibus carriers engaged in local transit service" and long-standing Department policies. Based on the plain language in section 1119(b) of the Tax Law (*i.e.,* "bears to such carrier's *total mileage operated in this state*… or such operator's *total hours operated in this state*…." [emphases added]), both section 534.4(a)(5), "Total mileage operated," of the existing regulations and section 534.10(a)(5), "Total hours operated" of this rule have been written with obvious meanings, without interpretation or construction beyond what is expressed in the Tax Law. Accordingly, the Department considers the suggestion to eliminate hours spent in interstate commerce from the definition of "total hours operated in this state" to be contrary to the plain statutory language, and no changes have been made to the rule in this regard. It is noted that under the rule, such hours are not included in local transit service.

Mr. Baker has indicated (*supra*) that the rule "eliminate[s] from the definition of 'local transit service in this state' any local transit service which is interstate in character, and we believe that this exclusion is appropriate and consistent with the Legislation." The Department also believes that this is a correct reading of the statute and consistent with the legislative intent, and with long-standing Department regulations and policies (*e.g.,* 534.4[a][3]). Therefore, no changes have been made to the rule to add the portion of hours spent in the waters of New York State while engaged in interstate commerce to the definition of "local transit service in this state." It is noted that under the rule, such hours are included in the total hours operated in this State.