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

TSB-A-88 (1) M
Highway Use
March 21, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. M871214A

On December 14, 1987, a Petition for Advisory Opinion was received from Pembroke Transportation Corporation, P.O. Box 451 Massena, New York 13662.

At issue is the status of the Petitioner as a lessee, carrier, or owner and its responsibility for payment of the truck mileage tax and fuel use tax imposed by Tax Law sections 503 and 503-a and the Regulations promulgated thereunder.

Petitioner states that it is a New York corporation in the trip lease business which contracts with independent haulers and/or individuals from other carrier companies to transport goods. Petitioner states that it has never had direct control of a motor vehicle or had an employer-employee relationship with the driver of the vehicle. Petitioner also states that it has never had a trip lease contract with any hauler for more than thirty days.

Section 503 of the Tax Law states, in part, that there shall be imposed

> a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both.

Section 503-a of the Tax Law states, in part, that there shall be imposed

> an additional tax on highway use [the fuel use tax] for the privilege of operating any vehicular unit...upon the public highways of this state .... Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both.

An application for a highway use permit should be made by the carrier for every motor vehicle operated or to be operated by him in this State. (20 NYCRR §473.7). A carrier is defined by statute as the owner or any other person having control of or the right to control the motor vehicle. (Tax Law §501(5)).

Every lessee having direct control of a motor vehicle is a carrier and may need to obtain a permit. A lessee is deemed to have direct control of a motor vehicle if he is actually in control of the operation of the vehicle. A lessee is generally in control of the operations where an employer-employee relationship exists between the lessee and the driver of the vehicle. (20 NYCRR §473.8(b),(d)).

The regulations also set forth tests for determining whether an employer-employee relationship exists. When making a determination one must look to whether:

1. The lessee has the right to hire and discharge the driver.

2. The lessee pays the driver's wages and further pays all State and Federal unemployment insurance taxes, old age pensions, social security taxes, and provides workers' compensation coverage.

3. The lessee has the right to supervise the driver and direct the manner of his operation of the motor vehicle. (20 NYCRR 473.8(e)).

Such supervision and direction over the driver exists where the lessee has the right to control the driver in some or all of the following respects:

1. requiring physical examination of the driver;

2. requiring the driver to keep logs and file daily reports;

3. requiring the driver to submit explanations of delay and details of expense;

4. requiring the driver to observe the statutes and regulations of the various commissions, such as the Interstate Commerce Commission and the State Department of Transportation;

5. supervision over the hours of work;

6. inspection and maintenance of equipment;

7. supervision over the methods of handling shipments, if any;

8. checking the time of the driver; and/or

9. prescribing schedules and routes to be followed and the speed at which the motor vehicle is to be driven. (20 NYCRR 473.8(f)).

It must be emphasized that an employer-employee relationship may exist where the lessee has the right to exercise supervision and direction over the driver of the motor vehicle, even though he may not exercise that right. (20 NYCRR §473.8(h)). The agreement between the parties should be examined to determine what rights are legally vested in the parties. Matter of Concrete Delivery v. State Tax Commission, 71A.D.2d 330, 423 N.Y.S. 2d 293 (1979). An examination of the standard trip lease contract supplied by Petitioner reveals a number of provisions which indicate that Petitioner retains "exclusive possession, control, use and responsibility for the operation of the equipment" and that Petitioner retains the right to exercise supervision and direction over the driver of the motor vehicle. Petitioner submitted no additional information, other than conclusions

regarding the ultimate questions here at issue, which would indicate that Petitioner does not retain the right of control over the motor vehicle and the driver of the motor vehicle.

Accordingly, in the absence of any facts indicating that Petitioner did not have control of the motor vehicle and its driver, it is concluded that Petitioner is a carrier within the meaning of sections 503 and 503-a of the Tax Law and shares joint and several liability with its independent haulers and/or individuals from other carrier companies.

Parenthetically, it is noted that sections 503 and 503-a of the Tax Law imposes joint and several liability on the owner of a vehicle and upon the carrier. Where Petitioner is found to be a carrier with respect to a motor vehicle, it cannot avoid liability for tax under such sections merely by means of a provision in the standard trip lease contract requiring payment of the tax by the owner. Both remain liable for the tax until it is paid.

DATED: March 21, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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