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

TSB-A-83(47)S
Sales Tax
November 29, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S820201A

On February 1, 1982 a Petition for Advisory Opinion was received from Lake Steel, Inc., 3370 Broadway, DePew, New York 14043.

The issues raised are: (1) whether Petitioner's payments to its subsidiary, for equipment which Petitioner rents to its own customers, are subject to State and local sales tax, and (2) whether Petitioner's gasoline and maintenance expenses which are allocable to its rental of equipment to customers are subject to State and local sales tax.

Petitioner is an operating company which rents construction cranes and related equipment, with or without operators, to various customers in western New York State. Where operators are supplied they are placed under customer control as to hours and activities. Petitioner also acts as a contractor and uses cranes and related equipment in performing jobs for customers. Petitioner does not own any cranes or equipment. Instead, Petitioner rents the cranes and equipment from its wholly owned subsidiary, Lake Steel Equipment Rental, Inc. (Rental). Rental rents its cranes and equipment solely to Petitioner.

Where Rental leases its equipment to Petitioner for re-rental, Petitioner pays Rental a fee equal to 75% of the rent paid by Petitioner's customer. Equipment rented by Petitioner under such circumstances is used exclusively for rental to customers. To perform its own contracting work, Petitioner obtains equipment from Rental without paying rent. Petitioner states, in this regard, that in those instances where equipment is furnished to Petitioner by Rental for use by Petitioner in contracting jobs, the "only consideration paid by [Petitioner] for the use of rental equipment is an oral agreement to maintain the equipment and follow the same provisions as are in a Lake-customer rental agreement . . . " Petitioner provides gasoline and maintenance service for all the equipment owned by Rental. Indeed, Petitioner is responsible for providing all necessary maintenance and repair to the equipment during the life of such equipment. This involves not only ordinary day-to-day maintenance, but all extraordinary repairs and part replacements which became necessary. The elements of such repair and maintenance are not specifically attributable either to self-use or rental to customers by Petitioner. In almost all cases Petitioner's employees perform the maintenance work.

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from the retail sale of tangible personal property. The term retail sale (which includes rentals) is defined, in relevant part, as follows:

> (4) Retail sales. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services to tax under paragraphs (1), (2), (3)

> and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Tax Law, 1101(b)(4).

When Petitioner rents equipment from Rental for rental in turn to its customers, the equipment is used solely by Petitioner for purposes of rental to its customers. For purposes of the Tax Law, Petitioner has purchased the equipment in these instances for "resale as such". Petitioner, therefore, is not required to pay state or local sales taxes upon the rental of equipment from Rental under these circumstances. Petitioner should in such instances present Rental with a properly completed Resale Certificiate (ST-120), pursuant to section 1132(c) of the Tax Law. Resale Certificates should be similarly used in those transactions described below as not being subject to tax because constituting purchases for resale or for use in providing a taxable service.

The gasoline purchased by Petitioner to be used in connection with equipment rented to Petitioner's customers was similarly purchased exclusively for resale. The amount paid by Petitioner for this gasoline was thus not subject to State or local sales taxes. However, it is to be noted that as of September 1, 1982, such resale exclusion became no longer applicable with respect to gasoline, by virtue of the enactment of Chapter 454 of the Laws of 1982. See Technical Services Bureau Memorandum TSB-M-82(28)S.

Where Petitioner rents the cranes and related equipment for its own use, such transfer constitutes a sale. Such sale is in the nature of a barter transaction, the consideration given for the use of the cranes and equipment being Petitioner's undertaking to provide maintenance and repairs beyond such ordinary and incidental maintenance and repair which a bailee for hire is ordinarily required to provide. See 8 C.J.S., Bailments § 24. Petitioner's obligation to provide such extraordinary repair and maintenance services is hereafter referred to as its "contractual obligation." (In the usual instance of a rental of a vehicle with a concomitant obligation to provide only ordinary repair and maintenance, such repair and maintenance would not constitute an element of the consideration given for the use of the vehicle).

In a barter transaction, sales tax is due from each party, measured by the value of the property given. 20 NYCRR 526.7(d). However, special rules apply in the case of transactions'between related corporations, as follows:

> The sale of property by one related corporation to another related corporation is a retail sale, and taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred.

> Example 11: On February 1, 1976, Corporation A transfers to its subsidiary, Corporation B, ten 1975 trucks for a total of $40,000. The fair market value of the trucks is $100,000. Corporation A has made a taxable retail sale to Corporation B in the amount of $100,000. 20 NYCRR 526.6(d) (8) (i).

In the present instance, then, tax would thus be due with respect to each use of the vehicles by Petitioner for its own purposes, based on the fair market value of the rental, assuming that the fair market value of the consideration (viz., the services performed pursuant to the "contractual obligation") being given is smaller than the fair market value of the rental.

Viewing the transaction from the other side, Rental is "purchasing" the service of repair and maintenance of tangible personal property, with respect to those elements of repair and maintenance performed pursuant to Petitioner's "contractual obligation". Section 1105(c)(3) cf the Tax Law imposes a tax on the receipts from the sale of the service, except for resale, of ". . . maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business." Since the cranes and equipment are in fact held for sale in the regular course of business by Rental, the party purchasing the service, the tax imposed under such provision is not applicable to the sale to Rental by Petitioner of such services constituting consideration. Insofar as Petitioner has occasion to purchase a service in order to satisfy its "contractual obligation" to maintain, service and repair the cranes and equipment in question the purchase of such service would be "for resale," and thus not subject to tax, and Petitioner's sale of such service to Rental would not be subject to tax by virtue of the exclusion contained in section 1105(c)(3) of the Tax Law, quoted supra.

Finally, where Petitioner purchases parts and other tangible personal property to be used in fulfilling its "contractual obligation" to maintain, service and repair Rental's equipment, it is using such property in the performance of a service subject to tax under section 1105(c)(3) of the Tax Law, within the meaning of section 1101(b)(4)(1)(B) of the Tax Law, quoted above. Accordingly, no tax is due on Petitioner's purchases of such parts and other tangible personal property, where the same is "actually transferred to" Rental in conjunction with the performance of the service, because such purchases are excluded from the definition of retail sale by section 1101(b)(4)(i)(B) of the Tax Law, quoted supra.

It is to be noted that, in accordance with the foregoing, Petitioner's purchases of services and parts with respect to ordinary repairs and maintenance would be subject to tax under Section 1105(c)(3) of the Tax Law.

DATED: November 2, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau