

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

TSB-A-91 (52)S
Sales Tax
July 26, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910502A

On May 2, 1991, a Petition for Advisory Opinion was received from The New York Susquehanna and Western Railway Corporation, 1 Railroad Avenue, Cooperstown, New York 13326.

The issues raised by Petitioner, The New York Susquehanna and Western Railway Corporation, are:

1. Whether receipts from the sale of tickets for passenger charter excursions which include the cost of rail transportation and the cost of entry to events, (e.g. sporting events, musical performances, etc.) are subject to sales tax.
2. What is the appropriate local sales tax rate for souvenirs sold from a fixed location and from a moving train.
3. What is the appropriate local sales tax rate for the sale of food sold on a moving train.

Petitioner will operate a passenger charter excursion business on its rail lines which pass through various localities in New York State. Certain excursions will include charges for transportation to an event and the event itself. Petitioner will secure tickets to events, such as sporting events and musical performances. Charges for the transportation and the events will be separately stated on the tickets. In addition Petitioner will sell souvenirs from a gift shop located in Oneida County, as well as on the train to and from the events. Petitioner will also sell food on the train to and from the events.

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property.

Section 1105(c) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of certain enumerated services. The providing of transportation by a railroad for its passengers is not a service enumerated under Section 1105(c) of the Tax Law.

Section 1105(f)(1) of the Tax Law imposes sales tax upon:

Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as

bowling alleys and swimming pools. For any person having the permanent use of possession of a box or seat or a lease or a license, other than a season ticket, for the use of a box or seat at a place of amusement, the tax shall be upon the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by the holder, licensee or lessee, and shall be paid by the holder, licensee or lessee.

Section 527.8 of the Sales and Use Tax Regulations provides, in part, as follows:

(a) Imposition. Sales tax is imposed on the receipts, including any cover, minimum, entertainment or other charge, from every sale of beer, wine or other alcoholic beverages and food or drink of any nature sold in or by restaurants, taverns or other establishments in this State or by caterers:

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the sale is for consumption off the premises and the vendor (or someone acting on behalf of the vendor) after delivery either serves or assists in serving, cooks, heats or provides services with respect to the food or drink; and

(3) in those instances where the sale is for consumption off the premises of the vendor all sandwiches and other food or drink unless the food or drink is sold in:

(i) an unheated state; and

(ii) the same form and condition, quantities and packaging commonly used by food stores not principally engaged in selling foods prepared and ready to be eaten.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides as follows:

The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

Accordingly in issue "1", pursuant to Section 1105(c) of the Tax Law the providing of transportation by railroad for Petitioner's passengers is not an enumerated service which is subject to sales tax. Therefore, the sale of tickets by Petitioner to transport passengers on the charter excursions will not be subject to sales tax. Furthermore pursuant to Section 1105(f)(1) of the Tax Law and Section 527.10 of the Sales and Use Tax Regulations, Petitioner must pay the sales tax due,

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if any, upon its purchase of taxable event tickets since there is no provision in the Tax Law allowing admission charges to be purchased for resale without the payment of sales tax. Petitioner will not be required to collect sales tax on its resales of said tickets to its passengers.

Concerning issue "2", pursuant to Section 1105(a) of the Tax Law and Section 525.2(a)(3) of the Sales and Use Tax Regulations sales tax is imposed upon the receipts from every retail sale of tangible personal property at the point of delivery or point at which possession is transferred by the vendor to the purchaser. Therefore, receipts from souvenirs sold by Petitioner through a fixed location will be subject to sales tax at the applicable rate for the locality in which the souvenirs are delivered or possession is transferred. Petitioner must collect sales tax on sales made on the moving train while traveling through New York State at the rate imposed by the locality where possession is transferred to the purchaser.

Regarding issue "3", pursuant to Sections 525.2(a)(3) and 527.8 of the Sales and Use Tax Regulations sales tax is imposed on the receipts from every sale of beer, wine, or other alcoholic beverage and food and drink of any nature sold at the point in which possession of the alcoholic beverage, food and drink is transferred to the purchaser. Therefore, Petitioner must collect sales tax on sales of alcoholic beverages, food and drinks made on the moving train while in New York State at the rate imposed by the locality where possession is transferred to the purchaser. Possession will be considered to be transferred to the purchaser at the train's location at the time the check for the food or drink is presented to the purchaser.

DATED: July 26, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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