

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

TSB-H-81 (98) S
Sales Tax
May 15, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801124A

On November 24, 1980 a Petition for Advisory Opinion was received from Consolidated Rail Corporation, Six Penn Center Plaza, Philadelphia, Pennsylvania 19104.

Petitioner inquires as to the applicability of the sales and use taxes imposed under Article 28 of the Tax Law to various aspects of a proposed operation, as described below.

Petitioner, Consolidated Rail Corporation (hereinafter "Conrail"), is a corporation organized and operating under the General Business Corporation Law of the Commonwealth of Pennsylvania, pursuant to the Regional Rail Reorganization Act of 1973. Conrail is a common carrier subject to the jurisdiction of the Interstate Commerce Commission and is engaged in the railroad business in several states, including the State of New York.

GCL, Inc. (hereinafter "GCL") is a corporation organized and operating under the Business Corporation Law of the State of New York. GCL wishes to engage in the business of providing treated railroad ties to Conrail and other railroads. To this end, Conrail and GCL entered into an agreement on November 16, 1979 (hereinafter the "1979 agreement") under the terms of which GCL would sell, and Conrail would purchase, a minimum of 400,000 treated railroad cross ties per year for five years (and up to 15 per cent of Conrail's total tie requirements in each of such years).

The 1979 agreement provides, at paragraph 6, that the treated ties are to be delivered FOB GCL's plant in Bethlehem, New York. Upon taking delivery, Conrail will immediately transport approximately 60 per cent of the treated ties to points outside the State of New York for use outside the State of New York, while 7 per cent will be used to fulfill Conrail's contractual obligations with the New York State Department of Transportation (hereinafter "DOT") and the Metropolitan Transportation Authority (hereinafter "MTA") under the terms of which contracts ownership of the ties will reside in DOT or MTA, as the case may be. The remaining 33 per cent of the purchased cross ties are to be used in New York by Conrail on projects other than those funded by MTA and DOT.

Conrail and GCL propose to enter into a supplemental agreement under the terms of which Conrail would purchase from GCL the initial inventory requirements of green (untreated) railroad cross ties with a value of approximately \$1.1 million, to be stored at GCL's plant. The proposed supplemental agreement would provide that GCL may remove ties from Conrail's tie inventory for the sole purpose of treating the ties for sale to Conrail pursuant to the 1979 agreement. GCL would become the owner of the ties it removed upon placing an equal number of untreated ties in Conrail's tie inventory.

Conrail requests an Advisory Opinion to the effect that:

- (1) Conrail is not subject to sales tax with respect to those railroad cross ties used by Conrail outside of New York regardless of whether such railroad ties are acquired by Conrail pursuant to the 1979 agreement or the proposed supplemental agreement, and regardless of whether those ties are shipped by Conrail in its capacity as a common carrier or as the owner of the ties;

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR

- (2) Conrail is exempt from sales tax pursuant to Section 1116(a)(1) of the Tax Law with respect to those railroad cross ties which are used in New York pursuant to contracts with DOT and MTA, under the terms of which title to the railroad cross ties is to reside in DOT or MTA;
- (3) Conrail is subject to New York State sales tax at the time of delivery to it of treated railroad cross ties which are to be used in the State of New York on projects other than those under contracts with DOT and MTA;
- (4) Conrail is not subject to New York sales or compensating use taxes with respect to those untreated ties which are acquired pursuant to the proposed supplemental agreement.

Section 1105(a) of the Tax Law imposes the State sales tax on the "...receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

The term "retail sale" is defined in section 1101(b)(4)(i) of the Tax Law, in relevant part, as:

- "(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 subject 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. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed."

The term "sale" is defined in section 1101(b)(5) of the Tax Law, in relevant part, as "Any transfer of title or possession or both...for a consideration...." The Sales and Use Tax Regulations provide that:

"A sale is taxable at the place where the tangible personal property...is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee.

...

Example 4: A common carrier purchases tangible personal property in New York, takes delivery of it in New York and transports it out of State for use at its out of State location. The receipt from the sale is taxable in New York, as delivery occurred in the State, but the carrier may be eligible for a refund or credit under section 1119(a) of the Tax Law." 20 NYCRR 526.7(e)(1).

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Accordingly, where Conrail purchases cross ties, pursuant to the 1979 agreement, for shipment and use out of State, the receipts from such sales are subject to the tax imposed under section 1105(a) of the Tax Law. This is so irrespective of whether the ties are shipped by Conrail in its capacity as a common carrier or as the owner of the ties. However, section 1119(a)(2) of the Tax Law provides for a refund or credit of tax paid pursuant to section 1105(a) "...on the sale...of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser...within this state if that property is subsequently reshipped by such purchaser...to a point outside this state for use outside this state...." According to paragraph 6 of the 1979 agreement, "all ties loaded into railroad cars shall be loose loaded", while ties shipped by truck may be banded in a manner acceptable to Conrail. Conrail may therefore be said to purchase cross ties in bulk, thus satisfying the terms of the statutory refund provision. See Feldstein v. Fusco, 205 App Div 806 (1923).

Inasmuch as Conrail has been issued a Direct Payment Permit, as an alternative to making payment of tax to GCL and thereafter applying for a credit or refund, Conrail may issue a copy of its Permit to GCL, thereby relieving GCL of its responsibility to collect tax, and may thereafter make payment of tax directly to the Tax Commission solely with respect to taxable transactions to which no right to a refund or credit attaches; e.g., with respect to cross ties used in New York and not otherwise exempt from tax. Inasmuch as Conrail is not liable for tax on its purchase under the supplemental agreement, as discussed below, the question of destination does not arise with respect thereto.

Petitioner next inquires whether it is exempt from sales tax with respect to those cross ties used within New York in the performance of contracts between Conrail, on the one hand, and DOT and MTA on the other. These contracts are joint service agreements under which Conrail is to operate certain commuter lines. Such operations include the service of track repair, and the cross ties at issue herein are to be purchased for the purpose of making such repairs, being used to replace existing ties.

Section 1115(a)(16) of the Tax Law provides for an exemption from sales tax with respect to:

"(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property."

Subdivision one of section 1116(a) of the Tax Law, referred to in the foregoing quoted statutory provision, provides for an exemption from sales tax with respect to charges by or to:

"(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;"

Both DOT and MTA come with the ambit of the terms of section 1116(a) (1) of the Tax Law.

The cross ties in question are used to make repairs to property some of which is owned by MTA or DOT, and some of which is held by MTA or DOT under a 99 year lease. In the former case the ties are purchased by Conrail for use in "maintaining, servicing or repairing real property, property or land of an organization described in" section 1116(a) of the Tax Law, and such purchase is accordingly exempt from tax pursuant to section 1115(a) (16) of the Tax Law. See Real Property Tax Law, §102, subd. 12(c). Conrail may utilize either its Direct Payment Permit or a Contractor's Exempt Purchase Certificate to avoid the necessity of making an initial payment of tax and thereafter claiming a credit or refund. Where the property maintained, serviced or repaired is held by DOT or MTA under a lease, its interest therein constitutes personal property, and section 1115(a) (16) is not applicable. Matter of Earl Hamilton Manor V. Boyland, 4 N.Y. 2d 192; cf., Advisory Opinion of the State Tax Commission issued to Consolidated Rail Corporation on March 20, 1981 (Petition Number S801112E). Conrail must therefore pay tax on the cross ties to be so used. However, Conrail may thereafter claim a credit or refund under section 1119(c) of the Tax Law, which provides, in relevant part, that:

- "(c) A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraphs (1), (2), (3) or (5) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one."

Section 1105(c) (3) of the Tax Law, referred to in the foregoing, imposes a tax on receipts from the service of "installing tangible personal property, or maintaining, servicing or repairing tangible personal property not held for sale in the regular course of business...."

As an alternative to making payment of tax and thereafter claiming a refund or credit, Conrail may use its Direct Payment Permit to avoid the necessity of making an initial payment of tax and thereafter claiming a refund or credit.

It should be noted that Conrail, in purchasing cross ties to be used on DOT and MTA projects, may not be said to make such purchases as agent for DOT and MTA, and thus does not itself become clothed with their exempt status. This conclusion derives from the terms of the agreements between Conrail and DOT and MTA. Under such contracts Conrail is to purchase the cross ties with its own funds. Conrail is required to submit quarterly income statements to MTA in one case, and to MTA and the Connecticut Transportation Authority in the other, and to remit net income, if any, to such other party or parties, or to receive reimbursement for net losses, if any. Title to the cross ties so used is said by Petitioner to vest in MTA and DOT. It may fairly be concluded from the foregoing that Conrail, in purchasing the cross ties in question, does not purchase them

as agent for MTA or DOT. It purchases them from GCL, from which it receives title, and thereafter uses the cross ties in fulfillment of its contractual obligations pursuant to which it subsequently transfers title to the cross ties to MTA and DOT. Significant in this regard is the fact that nowhere in the agreements in question is there any express authorization for Conrail to act as agent for either MTA or DOT in making purchases of tangible personal property.

Petitioner next inquires as to its sales tax liabilities with respect to cross ties purchased for use, within New York, on projects other than those for MTA and DOT. Inasmuch as such ties are used in maintaining, servicing or repairing either tangible personal property or real property, property or land, services the receipts for which are subject to tax under either section 1105(c)(3) or (5) of the Tax Law, respectively (which tax must be collected by Conrail), Conrail must pay sales tax on the purchase of the cross ties to be so used and may subsequently claim a credit or refund pursuant to section 1119(c) of the Tax Law. Alternatively, Conrail may utilize its Direct Payment Permit, as described above.

Finally, Petitioner inquires as to whether it is subject to sales or compensating use tax with respect to the untreated ties acquired pursuant to the supplemental agreement.

Under the supplemental agreement Conrail is to purchase from GCL approximately 133,000 untreated, green ties, to be stored at GCL's location in a fenced-in Conrail Inventory Yard. It is anticipated that GCL will thereafter remove ties from inventory for the purpose of treating them so as to render them saleable, to Conrail, under the 1979 agreement. Untreated ties in an amount equal to those so removed will be thereafter placed in Conrail's inventory, at which point the ties so removed become the property of GCL. GCL, upon treating such ties, is to sell them to Conrail. During the last 7 months of the 5 year contract term GCL is obligated to purchase the tie inventory from Conrail, pursuant to a schedule set forth in the supplemental agreement. According to Petitioner, the purpose of the supplemental agreement is to enable Conrail to assist GCL in satisfying its initial financing requirements.

It is here concluded that Conrail is not required to pay sales tax on its purchase of the untreated cross ties from GCL pursuant to the supplemental agreement. Under section 1105(a) of the Tax Law, only retail sales of tangible personal property are subject to tax. Pursuant to section 1101(b)(4)(i) of the Tax Law, sales for resale do not constitute retail sales. Receipts from sales for resale are therefore not subject to the sales tax. The Sales and Use Tax Regulations define the term "purchase for resale" as follows:

"Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell,...the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer." 20 NYCRR 526.6(c)(1)

The supplemental agreement provides that GCL may remove untreated ties from Conrail's inventory in order to fulfill GCL's obligations under the 1979 agreement. Title to the untreated ties so removed will be transferred to GCL from Conrail when GCL replenishes the ties in Conrail's inventory. Conrail thus acquires untreated ties from GCL with the intention of conveying possession of, and title to, these ties to GCL. Conrail's initial acquisition of untreated ties is therefore a purchase for resale and not subject to the sales tax.

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The sale of the untreated ties back to GCL is also not subject to the sales tax. GCL acquires the untreated ties with the intention of treating them and selling them to Conrail pursuant to the 1979 agreement. GCL's acquisition of the untreated ties from Conrail is thus a purchase for resale. Such acquisition is therefore exempt from sales tax.

Conrail must give a properly completed resale certificate to GCL upon its acquisition of untreated ties from GCL if it is to avoid the necessity of paying sales tax on such acquisition. Similarly, GCL must similarly present a resale certificate to Conrail when title to the untreated ties is transferred back to GCL, in order to avoid the necessity of paying sales tax on such transfer. 20 NYCRR 526.6(c)(2).

Finally, Conrail is not subject to the compensating use tax with respect to the cross ties stored on GCL's property. Mere storage of property acquired for the purpose of resale does not constitute a use subject to the compensating use tax imposed under section 1110 of the Tax Law.

DATED: April 30, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau