

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

TSB-H-81 (74) S
Sales Tax
April 13, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801112E

On November 12, 1980 a Petition for Advisory Opinion was received from Consolidated Rail Corporation, Six Penn Center Plaza, Philadelphia, Pennsylvania 19104.

The issue raised is whether Petitioner is required to pay sales, use or other excise taxes on the purchase of materials used in the performance of certain improvement and maintenance work on properties leased by Owasco River Railroad Company, Inc. to the Metropolitan Transportation Authority.

The Consolidated Rail Corporation (hereinafter "Conrail"), pursuant to an agreement with the State of New York, dated July 15, 1980 (hereinafter "the Agreement"), is required to perform improvement and maintenance work on certain properties of the Owasco River Railroad Company, Inc. (hereinafter "Owasco"), a successor to the interests of the Penn Central Transportation Company. These properties, located between Croton and Poughkeepsie, New York, are leased to the Metropolitan Transportation Authority (hereinafter "MTA").

MTA is a public benefit corporation created under Title 11 of Article 5 of the Public Authorities Law for the purpose, among other things, of continuing and furthering the development and improvement of commuter transportation and other related services within the Metropolitan Commuter Transportation District. Conrail is a private, for-profit corporation created under the Regional Rail Reorganization Act of 1973 (P.L. 93-236), as successor to the Penn Central Transportation Company.

Section 2.3 of the Agreement provides for monthly reimbursement to Conrail, by the State, in the amount of "the cost of the work performed and of facilities and equipment provided" by Conrail. Section 2.4 provides that title to the materials purchased and used by Conrail for the agreed upon work is to vest in the owner, Owasco. Section 3.5 provides as follows: "The relationship of the Railroad viz., Conrail to the State is that of an independent contractor, and said Railroad, in accordance with its status as such contractor, covenants and agrees that it will conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer or employee of the State by reason hereof, and that it will not, by reason hereof, make any claim, demand or application to or for any right or privilege applicable to an officer or employee of the State, including but not limited to workmen's compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit."

Petitioner asserts that it is exempt from sales and use taxes, as well as other excise taxes, pursuant to section 1116(a)(1) of the Tax Law and section 1275 of the Public Authorities Law, with respect to purchases made in connection with the work done pursuant to the Agreement.

Section 1116(a)(1) of the Tax Law exempts from subsection to the sales and use taxes imposed under Article 28 of the Tax Law "The state of New York, or any of its agencies, instrumentalities, public corporations...or political subdivisions where it is the purchaser, user or consumer..." As indicated above, Conrail is a private, for-profit corporation and has been neither asserted nor demonstrated to be an agency, instrumentality, public corporation or political subdivision of the State of New York.

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

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Not only is Petitioner not itself an exempt governmental entity. it can not be said to make the purchases in question as an agent of the State. This view is supported by Section 3.5 of the Agreement, wherein it is stated that Conrail's relationship to the State is that of an independent contractor. Even apart from such contractual designation, the facts of the present matter compel the same conclusion. One important factor in determining whether an agency relationship exists is the degree of control that can be exercised over the performing party by the other party. If not only the result of the contract performance but the way in which the work is to be performed is subject to such control an agency relationship may be found to exist. Matter of Morton, 284 N.Y. 167. Such control is absent under the Agreement. Section 2.5 of the Agreement, entitled "Manner of Performing Work", provides that Conrail can either use its own labor and equipment in performing contract obligations or it can contract out the work. This section specifies the parties who may do the work, but not how it is to be done. Nowhere in the Agreement are there specific instructions given as to the manner in which the work is to be performed. It should be noted that the general right of inspection given the State by Section 2.6 of the Agreement does not constitute sufficient control over Conrail's activities to warrant a finding of an agency relationship. Wawrzonek v. Central Hudson Gas & Electric Corp., 276 N.Y. 412.

Section 3.8 of the Agreement obligates Conrail to indemnify and save the State harmless from any liability for injury or death to third parties and from damage or loss of equipment arising in connection with Conrail's performance under the contract. Conrail's assumption of this responsibility further indicates that it is an independent contractor and not an agent of the State. Uppington v. City of New York, 165 N.Y. 222.

Most significantly, section 2.4 of the Agreement provides that title to the property purchased by Conrail is acquired not by the State, nor even MTA, but by Owasco. Conrail, thus, cannot be said to purchase property as an agent of the State or one of its agencies or instrumentalities. Further, the Agreement provides that Conrail is to make purchases with its own funds and only subsequently to be reimbursed therefor by the State. This procedure is consistent with a finding that Conrail does not make its purchases as an agent of the State, and therefore is not clothed with the latter's exemption under the Tax Law.

Section 1115(a) (15) and (16) of the Tax Law, not cited by Petitioner, provide that purchases of personal property for use in improving or maintaining the real property of an exempt organization will be exempt from the sales and use taxes if the personal property is to become "an integral component part" of the real property of the exempt organization. These provisions are not applicable in the present case because the property to be improved and maintained by Conrail under the Agreement is leased, not owned, by the State. This property, thus, constitutes personal property of the State. Matter of Earl Hamilton Manor v. Boyland, 4 N.Y. 2d 192. Conrail therefore cannot be held to be using personal property to improve or maintain real property of an exempt organization, within the meaning and intent of section 1115(a) (15) and (16) of the Tax Law.

Finally, Petitioner asserts that it derives its exempt status with respect to sales and use taxes pursuant to section 1275 of the Public Authorities Law. It is there provided, with respect to MTA (referred to as "the authority" in the statutory provision), in relevant part, that "Without limiting the generality of the following provisions of this section, property owned by the authority, property leased by the authority and used for transportation purposes, and property used for transportation purposes by or for the benefit of the authority exclusively pursuant to the provisions of a joint service arrangement or of a joint facilities agreement or trackage rights agreement shall all be exempt from taxation and special ad valorem levies. The authority shall be required to pay no fees, taxes or assessments, whether state or local, including but not limited

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to fees, taxes or assessments on real estate, franchise taxes, sales taxes or other excise taxes, upon any of its property, or upon the use thereof, or upon its activities in the operation and maintenance of its facilities or any fares, tolls, rentals, rates, charges or other fees, revenues or other income received by the authority and the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for gift and estate taxes and taxes on transfers. This section shall constitute a covenant and agreement with the holders of all bonds issued by the authority. The terms 'taxation' and 'special ad valorem levies' shall have the same meanings as defined in section one hundred two of the real property tax law and the term 'transportation purposes' shall have the same meaning as used in titles two-a and two-b of article four of such law."

The first sentence of the quoted material exempts from "taxation and special ad valorem levies" property which is owned by or leased by MTA, and property used for specified purposes. The terms "taxation" and "special ad valorem levies" are explicitly stated to refer to real property taxation and not to any tax imposed under the Tax Law. The second sentence of the quoted material provides for an exemption from the payment of "sales taxes or other excise taxes", but this exemption is made applicable to MTA and to no other entity. Under section 1266.5 of the Public Authorities Law such exemption may also be made applicable to subsidiary corporations of MTA. Inasmuch as Conrail is neither agent nor subsidiary of MTA the exemption language of section 1275 of the Public Authorities Law is not applicable thereto,

Accordingly, Petitioner is required to pay sales and use taxes on tangible personal property purchased in connection with its operations performed pursuant to the Agreement described above. It is also similarly subject to all applicable excise taxes imposed under the Tax Law, based on the considerations set forth above.

DATED: March 20, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau