

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(50)S
Sales Tax
November 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080317B

On March 17, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from South Ferry Inc., P.O. Box 2024, 135 S. Ferry Rd., Shelter Island, New York 11964.

The issue raised by Petitioner, South Ferry Inc., is whether Petitioner qualifies for a refund or credit of sales and use taxes relating to vessels used in local transit service pursuant to section 1119(b) of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a private, family-owned and operated vehicle passenger ferry boat company on Eastern Long Island. Annually, it transports more than one million passengers and over 725,000 vehicles between the town of Shelter Island and North Haven (Southampton Township). It has been operated by the same family since the late 1700s.

The route over the waters of the Shelter Island Sound is a fixed and chartered route authorized under a 5-year, renewable franchise from the Suffolk County Legislature, pursuant to Article 8 of the Navigation Law and section 71 of the Transportation Corporations Law.

The route is unique in that it physically connects two portions of New York State Route 114. New York State has a right-of-way through Petitioner's property on both sides of the channel. Petitioner maintains more than a quarter mile of the New York State highway system but gets no financial assistance from town, county, State, or federal funds. Without Petitioner, Route 114 from East Hampton would end at North Haven.

Petitioner operates solely as a public service, providing a vital service to Shelter Island and the east end of Long Island. It offers the only direct route on and off Shelter Island for workers, students, shoppers, and tourists who need to get to Long Island's South Fork. In 2007 alone, Petitioner provided local transit service to approximately 730,000 cars, trucks, or buses and 1.25 million passengers. Petitioner operates 5 ferry boats ranging from 65-feet to 101-feet in length, with passenger capacities from 97 to 150, depending on the vessel. It employs 37 individuals year round with additional staff during the summer months.

Petitioner's rate structure is regulated by New York State Highway Law, section 131-g. Its vessels are documented by the Department of Homeland Security, and are inspected for safety annually by the United States Coast Guard. Petitioner is a private company that currently receives no public funding for any aspect of its operation. It depends solely on revenues from

rate payers for all dock, vessel, and facility construction/upkeep, all fuel costs, all payroll and benefits, and all dredging necessary to keep Route 114 open 365 days a year. Petitioner is subject to county, State, and federal taxes. It receives neither tax subsidies nor government grants of any kind for maintaining a quarter-mile of New York State Route 114.

Petitioner is an integral part of the Suffolk County and Shelter Island Emergency Evacuation Routes. Both levels of government rely on Petitioner as an essential piece of all evacuation plans, be it a nuclear leak from the Millstone Power Plant in Connecticut, a deadly hurricane, or a fire. During the Westhampton fires in the 1990s, Petitioner was asked to remain open all night to transport local firefighters and support teams to and from Westhampton. More routinely, when the local fire department is engaged in fighting a fire, Petitioner is often called to bring over Sag Harbor equipment and firemen to back them. Petitioner is also the only means of transportation for expectant mothers from Shelter Island to Southampton Hospital, and must transport expectant mothers about to give birth off Shelter Island at any time – often after the normal hours of operation.

Applicable law and regulations

Section 1101(b)(16) of the Tax Law defines the term *commercial vessel* for purposes of Article 28, and provides:

Commercial vessel. A vessel used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the vessel to transport such person’s tangible personal property in the conduct of such person’s business, or (iii) for both such purposes.

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(8) Commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship).

* * *

(43) Ferry boats used directly and predominantly to provide ferry service for vehicles and passengers within a county or counties by a ferry company whose rates for

that ferry service are regulated by the county or counties in which that service is provided under section one hundred thirty-one-g of the highway law and property used by or purchased for the use of those exempt ferry boats for fuel, provisions, supplies, maintenance and repairs.

[Paragraph (43) was enacted by Chapter 580 of the Laws of 2008, effective September 1, 2008.]

Section 1119(b) of the Tax Law provides, in part:

a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) and paragraph three of subdivision (c) of section eleven hundred five, or section eleven hundred ten of this article and any tax imposed pursuant to the authority of article twenty-nine of this chapter on the sale to or use by an omnibus carrier described in this subdivision of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing or repair purchased and used in the operation of any such omnibus by such carrier or on the sale to or use by a vessel operator described in this subdivision of a vessel with a seating capacity of more than twenty passengers used for the transportation on water of passengers for hire, and of parts, equipment, lubricants, diesel motor fuel, maintenance, servicing or repair purchased and used in the operation of any such vessel by such operator. Any such omnibus carrier or vessel operator must provide local transit service in this state and operate pursuant to a certificate of public convenience and necessity issued by the commissioner of transportation of this state or by a like officer or agency of the United States or pursuant to the contract, franchise or consent between such carrier or operator and a city having a population of more than one million inhabitants, or any agency of such city... .

Section 3 of Chapter 580 of the Laws of 2008 provides, in part:

a person who or which paid sales or compensating use tax imposed by or pursuant to the authority of article 28 or 29 of the tax law on the purchase made or first use occurring during the period January 1, 2008, through August 31, 2008, of a ferry boat used directly and predominantly to provide ferry service for vehicles and passengers within a county or counties by a ferry company whose rates for the service are regulated by the county or counties in which the service is provided under section 131-g of the highway law shall be authorized to apply for a refund or credit of the amount of the sales or compensating use tax paid on receipts from the sale or first use of that ferry boat . . . An application for refund or credit under this section shall be made by December 31, 2009, and shall apply only to tax paid on the purchase or use of the ferry boat and not on the purchase or use of any other property.

Section 528.9 of the Sales and Use Tax Regulations provides, in part:

(a) Definitions. The definitions in this section shall apply only for the purpose of the exclusions and the exemptions provided by Tax Law, sections 1105(c)(3)(iv) and 1115(a)(8) with respect to commercial vessels.

* * *

(3) Commercial vessel. A *Commercial vessel* is any vessel used or engaged in the transportation for hire of persons or property on water. Any vessel used or engaged for other purposes on more than an occasional basis is not a commercial vessel.

(4) Commercial vessel primarily engaged in interstate or foreign commerce. A commercial vessel is primarily engaged in interstate or foreign commerce when 50 percent or more of the receipts from the vessel's activities are derived from interstate or foreign commerce.

(5) Interstate or foreign commerce. *Interstate or foreign commerce* means the transportation of persons or property between states or countries.

Section 534.10(a)(1) of the Sales and Use Tax Regulations provides:

Vessel operator. For purposes of this section, a *vessel operator* is a person that operates a vessel used to provide local transit service in this State and that operates pursuant to a certificate of public convenience and necessity issued by the Commissioner of Transportation of this State or by a like officer or agency of the United States or pursuant to a contract, franchise, or consent between such a person and a city in this State having a population of more than one million inhabitants, or any agency of such city.

Opinion

Petitioner operates a vehicle passenger ferry boat service between North Haven, New York and Shelter Island, New York. The ferry boat service travels over Shelter Island Sound under a renewable franchise from the Suffolk County Legislature pursuant to Article 8 of the Navigation Law and section 71 of the Transportation Corporations Law.

The refund provisions under section 1119(b) of the Tax Law apply to passenger vessels engaged in local transit, as well as parts, supplies, maintenance, and repair services purchased and used in the operation of such vessels. It will be presumed for purposes of this Opinion that Petitioner's ferry boats constitute vessels used for the transportation of *passengers* for hire in local transit service as intended by section 1119(b) of the Tax Law without making a determination as to whether Petitioner's ferry boats actually constitute such vessels. Regardless, section 1119(b) provides that such passenger vessels must be operated pursuant to a certificate of public convenience and necessity issued by the Commissioner of Transportation of this State or

by a like officer or agency of the United States, or pursuant to a contract, franchise, or consent between the vessel operator and a city in this State having a population of more than one million inhabitants, or any agency of such city, in order to qualify for a refund or credit of tax under section 1119(b). Petitioner does not possess, or operate pursuant to, a certificate of public convenience and necessity issued by the New York State Department of Transportation or by a similar agency of the United States. Nor does Petitioner possess, or operate pursuant to, a contract, franchise, or consent with a city in the State having a population of more than one million inhabitants. Neither Suffolk County's approval of Petitioner's rate structure under the County Law, the documentation of Petitioner's vessels by the U.S. Department of Homeland Security, nor annual Coast Guard inspections of its vessels satisfy the requirements of section 1119(b). Thus, even if the vessels used by Petitioner are passenger vessels for purposes of section 1119(b), Petitioner does not meet the qualifications for a vessel operator described in section 1119(b) to qualify for a refund or credit of any sales or use taxes paid relating to the vessels, supplies, and services used in local transit services in this State.

It should be noted that section 1115(a)(8) of the Tax Law provides for an exemption from sales tax on the purchase of a commercial vessel primarily used in interstate or foreign commerce, and property used by or purchased for the use of such vehicle. *Interstate or foreign commerce* is defined as the transportation of persons or property between states or countries. See section 528.9 of the Sales and Use Tax Regulations.

In the matter of *Circle Line – Statue of Liberty Ferry, Inc.*, State Tax Commission, August 21, 1980, TSB-H-80(164)S, the ferry was engaged in providing ferry service from Battery Park, New York to Liberty Island and back. It was determined that the ferry was not engaged in interstate or foreign commerce as the journey of the vessel began and ended in New York. In that case, though the vessel crossed state lines into New Jersey waterways, the vessel was not primarily engaged in interstate commerce as required by section 1115(a)(8) of the Tax Law. Since Petitioner's vessels are used to cross Shelter Island Sound between two locations in New York State, these vessels do not qualify for the exemption provided under section 1115(a)(8) as they do not meet the definition of a commercial vessel used in interstate commerce.

Chapter 580 of the Laws of 2008, effective September 1, 2008, enacted section 1115(a)(43) of the Tax Law, which provides an exemption for ferry boats used directly and predominantly to provide ferry service for vehicles and passengers within a county or counties by a ferry company whose rates for that ferry service are regulated by the county or counties in which that service is provided under section 131-g of the Highway Law. It appears, based on the facts in this Opinion, that ferry boats purchased by Petitioner on and after September 1, 2008, for use directly and predominantly in its ferry service qualify for the newly enacted exemption. Section 1115(a)(43) applies not only to State and local sales and use taxes imposed on the purchase of ferry boats but also to property used in conjunction with an exempt ferry boat for fuel, provisions, supplies, maintenance and repairs. Sales tax must be paid at the time of

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purchase on fuel used to operate an exempt ferry boat. However, the ferry boat company may apply for a refund of sales tax paid on purchases of fuel made on and after September 1, 2008, if the fuel is used to operate an exempt ferry boat. See sections 1115(j) and 1120 of the Tax Law.

In addition, as provided in section 3 of chapter 580 of the Laws of 2008, Petitioner may be eligible for a refund of sales and use tax imposed on the purchase or first use, occurring on or after January 1, 2008, and before September 1, 2008, of a ferry boat that would have qualified for exemption under section 1115(a)(43) of the Tax Law if purchased on or after September 1, 2008. The application for refund or credit must be made by December 31, 2009.

DATED: November 6, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.