STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

ALUMINUM COMPANY OF AMERICA

DECISION

for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1971 through February 29, 1984.

Petitioner, Aluminum Company of America, 1501 Alcoa Building, Pittsburgh, Pennsylvania 15219, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1971 through February 29, 1984 (File Nos. 24128, 33706 and 55511).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on June 20, 1985 at 9:15 A.M., with all briefs received by December 18, 1985. Petitioner appeared by Mark R. Gilmour, Esq., Tax Attorney, and Edward J. Woodall, Sales and Use Tax Administrator, Aluminum Company of America, and by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau and Mark S. Klein, Esqs., of counsel), The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether railroad hopper cars purchased and leased by petitioner outside the state and used to transport raw material to petitioner's aluminum smelting plant in New York State are subject to the state sales and use tax imposed pursuant to Article 28 of the Tax Law.

II. Whether such railroad hopper cars, if subject to the state sales and use tax, are principally garaged or used in New York State so as to be subject to local sales and use taxes imposed pursuant to Article 29 of the Tax Law.

III. Whether receipts from repairs to such railroad hopper cars performed outside of New York State are subject to the state and local sales and use tax.

IV. Whether receipts from emergency repairs to such railroad hopper cars performed in New York State are subject to the state and local sales and use tax.

FINDINGS OF FACT

On June 20, 1985, petitioner's representatives and the representatives of the Audit Division of the Department of Taxation and Finance entered into a stipulation of facts (jointly offered Hearing Exhibit marked petitioner's Exhibit "1" and Department's Exhibit "A"). The stipulated facts[1] (1 through 29, infra) are as follows:

1. Petitioner, Aluminum Company of American ("Alcoa"), is a Pennsylvania corporation with its principal office and place of business at 1501 Alcoa Building, Pittsburgh, Pennsylvania 15219.

2. Alcoa is a publicly-traded corporation which manufactures aluminum and aluminum products.

3. Alcoa conducts its manufacturing activities and transacts business in several states, including New York State.

4. Alcoa owns and operates an aluminum smelting plant in Massena, New York. The Massena plant is a part of Alcoa's smelting and refining

1 The stipulated facts, as shown in this decision, have been edited to delete references to exhibits which were attached to the stipulation of facts, but which are not attached hereto.

division ("Division"), and is not a subsidiary, a division or a separate legal entity.

5. Alcoa also owns and operates aluminum smelting plants in North Carolina, Tennessee, Indiana and other states.

6. During the period beginning September, 1971 and ending February, 1984, Alcoa leased and purchased railroad hopper cars ("Railroad Cars").

7. Although Alcoa's Pittsburgh office paid for the Railroad Cars, for cost accounting purposes the Pittsburgh office allocated a portion of the cost to the Massena plant to reflect the cost of operating the plant. This cost was reflected on Massena's general ledger as well as the ledger of the Division.

8. All of the leases and purchases of Railroad Cars occurred outside New York State. The Railroad Cars were used to transport Alcoa's raw material along a route which originated at Paradise Point, Virginia or Mobile, Alabama, and traveled through several states to Massena, New York, where the Railroad Cars were unloaded. The common carrier railroads then returned the empty Railroad Cars to Paradise Point, Virginia or Mobile, Alabama. On occasion, the Railroad Cars were used to transport raw material from Paradise Point to other Alcoa smelting plants in North Carolina and Tennessee.

9. During the audit period, the Railroad Cars were used exclusively and continuously for this purpose.

10. The Railroad Cars were based in Paradise Point, Virginia or Mobile, Alabama.

11. The Railroad Cars were not stored or garaged in New York.

12. The Railroad Cars were repaired from time to time during the audit period. After repair bills were reviewed for accuracy by the accounting department of the Massena plant, Alcoa's Pittsburgh office paid for or reimbursed others for all of the repairs. The charge for the repairs is reflected on the Massena general ledger, as well as the Division's general ledger for cost accounting purposes.

13. All of the repairs at issue were performed outside New York State, except as noted in paragraph 24, below.

14. Consolidated Rail Corporation, Massena Terminal Railroad, Norfolk & Western Railway Company, and Southern Railway Company and other railroads throughout the United States (collectively referred to as the "Carriers") are common carrier railroads. Massena Terminal Railroad, a New York corporation, is a wholly-owned subsidiary of Alcoa.

15. Alcoa is not a common carrier railroad.

16. During the audit period, the Railroad Cars were used to transport raw material over rails owned by the Carriers.

17. Under applicable laws and regulations, Alcoa did not have the legal authority to transport its raw material over the rails of the Carriers.

18. Alcoa entered into agreements (the tariffs and bills of lading) with the Carriers in order to obtain the transportation services described in paragraph 8, above.

19. The agreements were contained in and governed by applicable railroad laws and regulations, particularly Interstate Commerce Commission Tariffs and bills of lading.

20. Alcoa transferred exclusive and continuous possession and control of the Railroad Cars to the Carriers.

21. In accordance with the agreements, the Carriers then transported Alcoa's raw material from Paradise Point, Virginia or Mobile, Alabama to Massena, and returned the empty Railroad Cars to Paradise Point, Virginia or Mobile, Alabama. When the Railroad Cars originated in Paradise Point, Virginia, or Mobile, Alabama, Alcoa contacted the originating carrier and requested transportation services. At the transfer station, Alcoa transferred possession of the Railroad Cars to one of the Carriers (Norfolk and Southern in Paradise Point, one of four Carriers in Mobile) under the terms of bills **of** lading and Interstate Commerce Commission Tariffs which obligated the Carriers to deliver the loaded Railroad Cars to Massena and return the empty Railroad Cars to Paradise Point or Mobile. The Railroad Cars were brought to the Massena area by Consolidated Rail Corporation ("Conrail"), where custody was transferred to Massena Terminal Railroad ("MTRR"). MTRR operated under the bills of lading and Interstate Commerce Commission tariffs. MTRR engines then took the Railroad Cars along MTRR tracks to the Massena plant. The MTRR engines took 12 Railroad Cars at a time to the entrance of an unloading shed on the Massena plant grounds which had two tracks, and could discharge the raw material from one car per track at a time. The Railroad Cars were placed in the shed and removed to the exit of the shed by means of a small vehicle owned by Alcoa. At the exit, the Railroad Cars were picked up by MTRR. Immediately after the unloading, the MTRR took the unloaded cars from the exit of the unloading shed to Conrail for return to Paradise Point, Virginia or

Mobile, Alabama. Under the agreements, the Railroad Cars could not be used for any other purpose.

22. In providing this transportation service, the Carriers utilized their own employees, set their own timetables, and controlled every phase of the transportation operation.

23. Alcoa paid the Carriers specified transportation charges in accordance with published Interstate Commerce Commission tariff schedules.

24. While the Railroad Cars were in New York State in the possession or control of the Carriers, the Carriers performed emergency repairs in New York State (the "Emergency Repairs").

25. Alcoa's Pittsburgh Office reimbursed the Carriers for the Emergency Repairs which occurred during the audit period.

26. Reimbursements for Emergency Repairs which occurred during the audit period totaled *$114,592.87.*

27. Following the Emergency Repairs, the Carriers continued use, possession and control of the Railroad Cars.

28. On January *5, 1970,* Don S. Hoy, Alcoa's Sales and Excise Tax Administrator, prepared a memorandum ("Hoy memorandum") to the file of a phone conversation with Mr. Frederick W. Tierney, Director and Deputy Tax Commissioner of the Sales and Use Tax Division, concerning the taxability of Railroad Cars purchased outside New York State. The memorandum is admissible as a business record.

29. Penalties are **not** asserted and interest is reduced to the minimum rate permissible by law.

Findings of Fact "30" through "41", infra, are based upon the exhibits attached to the stipulation of facts, stipulations entered on the record at the

hearing and documents submitted by the parties after the hearing (pursuant to leave so granted). The submissions were each reviewed by and agreed and consented to by the representatives of both petitioner and the Audit Division.

30. As a result of an audit of its books and records, petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed (Form ST-580) with respect to the periods ending November 30, 1971 through May 31, 1974 in the amount of $34,591.84, which represented $30,196.32 in tax concerning purchase, rental and repairs to the railroad cars and $4,395.52 of interest which amounts petitioner paid on or about January 21, 1975.

31. As a result of an audit of its books and records, petitioner signed a Consent to Fixing of Tax Not Previously Determined and Assessed (Form ST-580) with respect to the periods ending November 30, 1971 through May 31, 1974 in the amount of $4,245.46 which represented $3,782.80 in tax concerning cafeteria management fees and $462.66 in interest which amounts petitioner paid on or about January 21, 1975.

32. Petitioner filed a claim for refund or credit for the amount of $38,837.30 for the periods ending November 30, 1971 through May 31, 1974 which claim is for the amounts petitioner paid pursuant to consents to fix tax (Findings of Fact "30" and "31") for said period. The refund claim was denied by the Audit Division and the petitioner timely protested said denial.

33. Petitioner conceded the issue of the taxes and interest paid with respect to the cafeteria management fees and no longer seeks a refund in respect thereof.

34. Pursuant to an audit of petitioner's books and records, petitioner signed a Consent to Fixing Tax (Form **AU-3)** for the periods ending August 31, 1974 through August 31, 1977 in the amount of $49,842.07 which amount represents $41,209.86 in tax concerning purchases, rental and repairs to the railroad cars

and $8,632.21 in interest which amounts petitioner paid on or about July 14, 1978.

35. Petitioner filed a claim for refund or credit of taxes for the periods ending August 31, 1974 through August 31, 1977 in the amount of $48,842.07 which claim is for the monies petitioner paid pursuant to the consent to fixing tax (Finding of Fact "34") for said period. The refund claim was denied by the Audit Division and petitioner timely protested said denial.

36. On March 20, 1981, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ending November 30, 1977 through February 29, 1980 asserting additional tax of $110,317.62 plus interest accrued to the date of the notice. Petitioner filed a timely protest to said notice. The tax asserted due in the notice relates to the purchase, rental and repair of the railroad cars.

37. On July 9, 1984, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ending November 30, 1980 through February 29, 1984 asserting additional tax due of $141,330.48 plus interest accrued to the date of the notice. Petitioner filed a timely protest to the notice. The tax asserted due in the notice relates to the purchase, rental and repair of the railroad cars.

38. The taxes in issue herein relate to receipts from purchases as follows:

Audit Period	Repairs	Purchases and Rentals
1971 - 1974	$ 339,176.00	$ 97,200.00
1974 - 1977	$ 445,518.86	$143,197.33
1977 - 1980	$ 955,115.85	$110,885.00 (rentals) $509,925.00 (purchases)
1980 - 1984	$1,432,912.41	$586,094.32

Tax on the above was computed using both state and local tax rates.

39. The petitioner paid the carriers pursuant to federally regulated tariffs. Pursuant to said tariffs, petitioner was likewise entitled to be recompensed a mileage allowance by the carriers for the use of petitioner's railroad cars by the carriers in transporting petitioner's raw materials. In lieu of individual payments, petitioner netted the mileage allowance to which it was entitled against the tariffs it pays to the carriers. Petitioner is thus recompensed by the carriers for the use of its owned or leased railroad cars by the carriers in transporting raw materials for petitioner in the nature of reduced tariffs in lieu of outright cash payments to petitioner in respect thereof.

40. Both petitioner and the Audit Division rely upon the Opinion of Counsel to the Department of Taxation and Finance dated February 2, 1966 concerning the taxability of vehicles used to transport persons or property for hire in interstate commerce.

41. On January 5, 1970, petitioner had contacted the Audit Division for advice concerning the taxability of its purchases and rentals of railroad cars and the repairs thereto. Petitioner was orally informed that it was the Audit Division's interpretation that, pursuant to Counsel's February 2, 1966 opinion, its railroad cars appeared to be used in interstate commerce to transport property and that they would not be subject to tax if continually so engaged.

CONCLUSIONS OF LAW

A. That section 900.3 of the Tax Commission's Rules and Regulations (20 NYCRR §900.3), in pertinent part, provides:

> "900.3 Opinions of counsel. (a) General. From time to time, the counsel of the Department of Taxation and Finance will promulgate official opinions interpreting the applicability of the Tax Law or other laws or regulations to a general situation, circumstance or set of facts.

* * *

(c) Force and effect. All bureaus of the Department of Taxation and Finance, except the Tax Appeals Bureau, must follow such opinions where the factual situations are the same. While the Tax Appeals Bureau and the State Tax Commission will give weight to such opinions, such opinions will not be binding on them."

B. That on February 2, 1966, Counsel to the Department of Taxation and Finance issued an opinion which, in pertinent part, provides:

"The following general rules shall apply with respect to the application of the New York State and local sales or compensating use taxes to vehicles purchased to transport persons or property for hire in interstate or foreign commerce, to parts for such vehicles, to the repair, maintenance or servicing of such vehicles and to leases governing such vehicles:

* * *

2. Where the vehicle is delivered outside of New York State: Where such vehicle is purchased and delivery is made by the seller or by common carrier to the purchaser at a point outside New York State, liability for the State and local compensating use taxes will depend upon subsequent use of the item as follows:

* * *

c. Where the vehicle enters this State in use in interstate or foreign commerce and then is continuously used in interstate or foreign commerce, no tax will apply.

d. Where the vehicle's entry into this State in interstate or foreign commerce is not followed by continuous use in interstate or foreign commerce, the tax will apply if the vehicle is then used in this State in intrastate commerce or in any other localized use. Where the vehicle's entry into this State in interstate or foreign commerce is not followed by continuous use in interstate or foreign commerce, use in intrastate commerce in this State to any degree or in any manner shall constitute use in intrastate commerce in this State which will subject such vehicle to the tax.

* * *

As used in this opinion, the phrase 'enters this State in use in interstate or foreign commerce' means that at the time the vehicle first enters New York State it is actually being used in a bona fide manner to transport persons or property for hire into this State.

* * *

4. Installation, repairs, maintenance and servicing: The State and local sales taxes will apply to the charges for having tangible personal property installed on vehicles or for repairs, maintenance and servicing of vehicles where such services are performed within New York State by an independent contractor. The tax is imposed upon both the charges for labor and materials. If the services are performed in New York State but the vehicle is delivered to the purchaser outside this State by a common carrier or by the one performing the taxable services for use outside this State, the total charge for installation, repairs, maintenance or servicing will not be subject to tax.

5. Rental of vehicles: Where **a** lease is entered into either in or outside of New York State for a vehicle to be used to transport persons or property for hire and such vehicle is delivered to the lessee in New York State, even though the vehicle will be used in interstate or foreign commerce, the rentals will be subject to the State and local sales taxes... In the case of long-term rentals, the tax rate shall be the combined State and local rates applicable at the point in this State where the vehicle is regularly garaged, kept or stored, except in unusual circumstances where practically all of the use **of** the vehicle occurs in another jurisdiction.

Where a lease for such a vehicle **is** entered into either in or outside ***of*** New York State and the vehicle is delivered to the lessee outside New York State, if the vehicle enters this State while in use in interstate or foreign commerce and thereafter is continually used in interstate or foreign commerce, no tax will apply." [New York State Tax Bulletin, No. 1966-1, p. 71-73 (1966 NYTB-V.l p. 71).]

C. That the Commission has issued regulations (20 NYCRR 528.9) interpreting the term "engaged in interstate or foreign commerce'' in the context of the exemption from the sales and use tax for commercial vessels primarily engaged in interstate or foreign commerce [Tax Law §1115(a)(8)]. However, the court in Airlift International, Inc. v. State Tax Commission, 52 A.D.2d 688 (Third Dept., 1976) held that such provisions relate only to "watercraft" and are inapplicable to aircraft, and we are therefore unwilling to apply such provisions to railroad hopper cars.

D. That there is no specific provision in the New York State and Local Sales and Compensating Use Tax Laws (Articles 28 and *29* **of** the Tax Law) providing

exemption from tax for vehicles and/or railroad hopper cars engaged in interstate commerce. Any such exemption accorded such property by the Department is grounded in the Commerce Clause of the Constitution of the United States (U.S. Constitution, Article **I** Section **8** Clause 3) which literally grants to the Congress of the United States the exclusive power to "regulate commerce...among the several States...". This provision has been generally interpreted by the Supreme Court of the United States to mean that the states may not lay a direct tax burden upon instrumentalities of interstate commerce unless some local state activity, a so-called "taxable moment", or a removal of such item from the stream of interstate commerce has occurred [Minnesota v. Blasius, 290 U.S. *1* (1933); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1938); Henneford v. Silas Mason **Co.**, 300 **U.S.** 577 (1937)] which interpretation has been likewise adopted by the courts of this State [see Niagara Junction Railway Company v. Creogh, (Fourth Dept. 1956) 2 A.D.2d 299; Matter of International Telephone & Telegraph Corporation v. State Tax Commission, (Third Dept. 1979) 70 A.D.2d 700; Matter of Atlantic Gulf & Pacific Co. v. Gerosa, 16 N.Y.2d 1].

E. That it could be argued that the railroad hopper cars are used in this state by the common carrier railroads in providing the service of "transporting for hire" petitioner's property and that the railroad hopper cars are thus *so* used within the meaning of the February 2, 1966 Counsel opinion. While nominally under the direction and control of the common carrier railroads, said railroad hopper cars are actually dedicated to petitioner's use. The railroads may not divert said cars to carry property of other shippers. In reality, it is petitioner which is making use of the railroad cars in transporting its property in this state. In return for using its own transport vehicles, petitioner received a reduction in the cost (tariff) of having its property

transported by railroad carriers (said reduced tariff in fact netting the cost of the transportation against a charge back to petitioner by the railroad for the use by the railroad of petitioner's vehicles to transport petitioner's property). Thus, it cannot truly be said that the railroad hopper cars are used in "transporting for hire" petitioner's property within the meaning and intent of the Counsel's opinion.

F. That the railroad cars entered New York State while engaged in an interstate journey between Paradise Point, Virginia or Mobile, Alabama and Massena, New York. Removal from said interstate journey for the purpose of loading, or in this case unloading, of such railroad cars is not such a stoppage in such journey to constitute a taxable moment (see Consolidation Coal Co. v. Porterfield, 25 Ohio St. 2d *154).* Likewise, the removal of such cars from service for the purpose of effectuating emergency repairs with the railroad cars placed again into service upon completion of such repairs is not considered a taxable moment with respect to the receipts from the purchase or rental of such vehicles [see TSB-M-78-(12)S discussing emergency repair of aircraft].

G. That there being no localized uses nor any taxable moments or events and the use of such railroad hopper cars in this state limited to being continuously in service as part of an interstate journey, the receipts from the purchase and rental of the railroad hopper cars are not subject to the New York State sales and use taxes imposed by Article 28 of the Tax Law. Not being subject to the state sales and use taxes, said receipts are not subject to the local sales and use taxes imposed pursuant to the authority of Article 29 of the Tax Law.

H. That in accordance with Conclusion of Law "G", the receipts from the repairs performed outside of New York State are likewise not subject to state and local sales and use taxes.

I. That while engaged in service in New York State, said railroad cars are occasionally removed from service for the performance of emergency repairs, which repairs are performed in New York State, and said railroad cars are again placed back into service in New York State. These emergency repairs are a localized service, initiated, performed and delivered wholly within the state and are therefore properly subject to New York State and local sales and use taxes.

J. That in accordance with Conclusion of Law **"I",** the tax imposed upon emergency repairs, which repairs totalled *$114,592.87* for the audit period, is sustained, together with such interest as by law allowed.

K. That petitioner has conceded the issue of cafeteria management fees and its request for refund in the amount of *$3,782.80* in tax and *$462.66* in interest paid in respect thereof for the period September *1, 1971* through May *31, 1974* is denied.

L. That the claims for refund are denied to the extent noted in Conclusions of Law "J" and "K" and the petitions for redetermination of the denials of the refunds are in all other respects granted, together with such interest as by law allowed.

M. That the notices of determination and demand for payment of sales and use taxes due are sustained to the extent noted in Conclusion of Law "J",

together with such interest as by law allowed, and the petitions for redetermination are, except as so noted, in all other respects granted.

DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

COMMISSIONER

COMMISSIONER