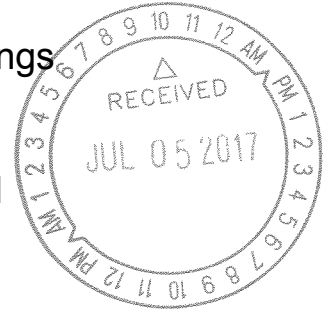




KAPLAN KIRSCH ROCKWELL

ENTERED
Office of Proceedings
July 5, 2017
Part of
Public Record
July 3, 2017

**VIA OVERNIGHT COURIER**

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20323-0001

Re: *Los Angeles County Metropolitan Transportation Authority,*
Verified Petition for Declaratory Order, STB Finance Docket No. 36112

Dear Ms. Brown:

On June 26, 2017, the Los Angeles County Metropolitan Transportation Authority's ("LACMTA") filed a Verified Petition for Declaratory Order in this proceeding. The document filed with the Board on June 26 included a photocopy of the original verification page. In order to complete the record herein, I am enclosing a copy of that Verified Petition with the original of the verification page attached (and with the amended Certificate of Service that we filed with the Board on June 28, 2017).

Please return a date stamped copy of this letter in the attached postage prepaid envelope.

Please do not hesitate to contact me if you have any questions. Thank you very much for your assistance in this matter.

Sincerely,

Charles A. Spitulnik

*Counsel for the Los Angeles County
Metropolitan Transportation Authority*

Enclosure

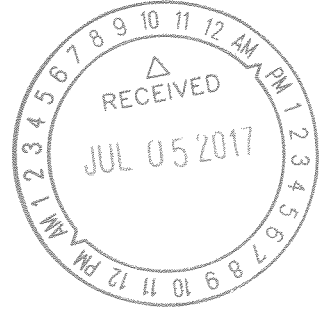
Cc: David Gau, Executive Director, California State Board of Equalization
Ronald Stamm, Esq., Los Angeles County Metropolitan Transportation Authority

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36112

**LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY**

VERIFIED PETITION FOR A DECLARATORY ORDER



Communications with respect to this document should be addressed to:

Charles A. Spitulnik
Steven L. Osit
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1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
Email: cspitulnik@kaplankirsch.com
sosit@kaplankirsch.com

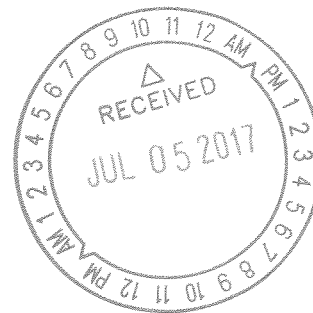
*Counsel for the Los Angeles County
Metropolitan Transportation Authority*

Dated: June 26, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36112

**LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY**



VERIFIED PETITION FOR A DECLARATORY ORDER

Pursuant to the authority vested in the Surface Transportation Board (the “Board”) under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), the Los Angeles County Metropolitan Transportation Authority (“LACMTA”) files this Verified Petition for Declaratory Order to confirm its continuing status as a “rail carrier providing transportation subject to the jurisdiction of the Board.” LACMTA seeks such an order in light of recent correspondence from the California State Board of Equalization (“SBOE”), in which the SBOE improperly concluded that LACMTA is *not* a rail carrier providing transportation subject to the jurisdiction of the Board.

BACKGROUND

In 1990 and 1992, LACMTA’s predecessor agency, the Los Angeles County Transportation Commission (“LACTC”), acquired the real property and track structure associated with several railroad lines of the Southern Pacific Transportation Company (“SP”) and the Atchison Topeka and Santa Fe Railway Company (“ATSF”), respectively.¹

The Interstate Commerce Commission (“ICC”) concluded that LACTC became a common carrier subject to its jurisdiction as a result of these acquisitions.² Specifically, the ICC

¹ See *S. Pac. Transp. Co. – Abandonment Exemption, L.A. Cty.*, 8 I.C.C. 2d 495, 498 n.7 (1992); *Los Angeles Cty. Transp. Comm’n – Acquisition Exemption – The Atchinson, Topeka and Santa Fe Railway Co.*, ICC Finance Docket No. 32172 (Service Date Dec. 2, 1992).

² *Id.*; see also *S. Pac. Transp. Co. – Abandonment Exemption, L.A. Cty.*, 9 I.C.C. 2d 385 (1993); *Orange Cty. Transp. Auth. – Acquis. Exemption – The Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 78 (1994).

held that the rights retained by SP and ATSF were “too circumscribed to permit [them] to carry out the obligations [they] purport[ed] to retain, and the corresponding rights which LACTC ha[d] acquired [were] so extensive that . . . LACTC necessarily incur[red] an obligation to exercise these rights as a common carrier, unless it acquires abandonment or exemption authority”³ On LACTC’s Petition for Reconsideration of this determination, the ICC reaffirmed that LACTC became a common carrier as a result of the acquisition.⁴

At the same time, the ICC exempted LACTC from attendant regulation under 49 U.S.C. Subtitle IV. The ICC explained that LACTC’s “residual status as a freight common carrier would make it subject to various provisions of 49 U.S.C. Subtitle IV.”⁵ These obligations could interfere with LACTC’s mission of providing mass transit passenger service.⁶ Thus, in order to “help LACTC to fulfill its mission” and “reduce a barrier to LACTC’s exit from the rail freight industry,” the ICC issued an exemption from 49 U.S.C. Subtitle IV.⁷ However, the ICC retained jurisdiction over LACTC to ensure that it did not interfere with the underlying freight carriers’ obligation to provide common carrier service, and to impose labor protections if LACTC abandoned all freight service on the lines.⁸

On April 1, 1993, LACTC merged with the Southern California Rapid Transit District to form LACMTA. LACMTA acquired the physical assets of the railroad lines, as well as LACTC’s residual common carrier obligation when it succeeded to LACTC’s interest.⁹

³ 8 I.C.C. 2d at 508.

⁴ 9 I.C.C. 2d at 389.

⁵ 8 I.C.C. 2d at 512.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 513.

⁹ See *Los Angeles to Pasadena Blue Line Construction Authority – Acquisition Exemption – L.A. Cty. Metro. Transp. Auth.*, STB Finance Docket No. 34076, *slip op.* at 1 (Aug. 28, 2003) (holding that “LACMTA will continue to have all of the common carrier rights and obligations it initially acquired” from its predecessors in interest).

The Board has since clarified the scope of LACMTA's exemption from Subtitle IV, but has never altered its holding that LACTC became a rail carrier subject to the Board's jurisdiction when it acquired the lines from ATSF and SP. In *Orange County Transportation Authority*, the Board explained that LACTC's designation as a rail carrier was intended to assure that it would not unduly interfere with the provision of common carrier freight service by carriers on the underlying rights-of-way.¹⁰ In subsequent proceedings, the Board determined that LACMTA would also not be required to seek formal abandonment authority if the underlying freight carriers discontinue service on an acquired line.¹¹ Rather, to fully extinguish its "residual common carrier obligation" on a line segment where all freight service has been discontinued, LACMTA must submit:

- (1) a commitment by LACMTA to adopt the environmental and historic conditions the Board imposed on the abandoning railroad;
- (2) an explanation of why there are no changed circumstances that would warrant imposing additional measures; and
- (3) an explanation that the required level of labor protection that is necessary to safeguard the line's employees has been imposed.¹²

Currently, LACMTA retains its residual common carrier obligation with respect to the following lines of railroad with active freight service (**Exhibit A**):

- By BNSF Railway, the Pasadena Subdivision, the Harbor Subdivision, the San Bernardino Subdivision, and the West Bank, originally acquired from ATSF¹³;

¹⁰ *Orange Cty. Transp. Auth.*, STB Finance Docket No. 32173 (Service Date Mar. 12, 1997).

¹¹ *L.A. Cty. Metro. Transp. Auth. – Abandonment Exemption – In Los Angeles County, Ca.*, STB Docket No. AB-409 (Sub-No. 5X) (Service Date July 17, 2008) ("LACMTA I"); *L.A. Cty. Metro. Transp. Auth. – Abandonment Exemption – In Los Angeles County, Ca.*, STB Docket No. AB-409 (Sub-No. 6X) (Service Date Feb. 8, 2012) ("LACMTA II").

¹² *LACMTA II*, slip op. at 3.

¹³ See *Los Angeles Cty. Transp. Comm'n – Acquisition Exemption – The Atchinson, Topeka and Santa Fe Railway Co.*, ICC Finance Docket No. 32172 (Service Date Dec. 2, 1992).

- By the Union Pacific Railroad, the Azusa Branch, the Ventura Coast Line, the East Bank, and the Saugus Line, originally acquired from SP¹⁴; and
- By both the Union Pacific and BNSF, the State Street Branch, Yuma Main Line, and the Baldwin Park Branch, originally acquired from SP¹⁵.

Because of its residual common carrier obligation with respect to these lines, LACMTA has been afforded protection from imposition of sales tax on certain purchases because of the requirements of Section 306 of the Federal Railroad Revitalization and Regulatory Reform Act of 1976 (“4R Act”), as amended.¹⁶ By letter dated August 16, 2016, the SBOE advised LACMTA that it had changed its position with respect to LACMTA’s status, and determined that LACMTA’s purchase of rail passenger cars and associated parts would henceforth be subject to sales tax (**Exhibit B**). The SBOE’s determination was based on the premise that LACMTA provides only mass transportation services, and that such transportation is not “subject to the jurisdiction of the Board.”¹⁷

ARGUMENT

LACMTA requests that the Board issue a declaratory order confirming that it is “a rail carrier providing transportation subject to the jurisdiction of the Board” for as long as it retains the residual common carrier obligation its predecessor acquired from the purchase of the lines from ATSF and SP. Such an order is consistent with the Board’s express position for over twenty years. Nothing has changed that would cause the Board to come to a conclusion that is different from the ICC’s original determination of LACTC’s fundamental legal status.

¹⁴ See *S. Pac. Transp. Co.*, 8 I.C.C. at 495, 498 n.7 (1992).

¹⁵ See *id.*

¹⁶ Pub. L. No. 94-210, § 306 (Feb. 5, 1976) (codified as amended at 49 U.S.C. § 11501). In pertinent part, the statute prohibits a State or authority thereof from imposing a “tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board” 49 U.S.C. § 11501.

¹⁷ Exhibit A, at 1.

**A. LACMTA IS A RAIL CARRIER PROVIDING TRANSPORTATION
SUBJECT TO THE JURISDICTION OF THE BOARD**

Section 11501 prohibits, *inter alia*, the imposition of a “tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” LACMTA qualifies for this protection, because it is a rail carrier and it is providing transportation subject to the jurisdiction of the Board.

LACMTA’s predecessor in interest acquired that status when it purchased the lines from SP and ATSF. As the ICC explained, under the terms of its then-shared use agreement, LACTC could “effectively force SP to curtail its freight service as passenger service expands, and freight shippers would have no recourse against LACTC if LACTC were found *not* to acquire a common carrier obligation.”¹⁸ The terms of the shared use agreement also assigned SP “neither the right nor the obligation to make repairs so that freight service will not deteriorate”¹⁹ The ICC therefore designated LACTC a “rail carrier” in order to ensure it “did not unduly interfere with the provision of common carrier freight service by carriers.”²⁰

The Board has repeatedly recognized LACTC’s, and then LACMTA’s, status as a “rail carrier.” In connection with LACTC’s acquisition of the lines from ATSF, the ICC noted that LACTC had become a rail carrier through its acquisition of the SP lines.²¹ Pursuant to LACMTA’s 2003 transfer of the Pasadena Subdivision (initially acquired by LACTC from ATSF) to the Los Angeles to Pasadena Metro Construction Authority, the Board determined that LACMTA still retained its common carrier rights and obligations.²² And most recently, the Board clarified the procedure that LACMTA must complete in order to abandon its “residual

¹⁸ 9 I.C.C. 2d at 388 (emphasis added).

¹⁹ *Id.*

²⁰ *Orange County*, *slip op.* at 4.

²¹ *Los Angeles Cty. Transp. Comm’n – Acquisition Exemption – The Atchinson, Topeka and Santa Fe Railway Co.*, ICC Finance Docket No. 32172, *slip op.* 1 n.1 (Service Date Dec. 2, 1992).

²² *Id.* at 2–3.

common carrier obligation . . . over a line of railroad subject to the blanket exemption” from Subtitle IV.²³ This line of decisions confirms that LACMTA remains a “rail carrier” by virtue of its ownership of the former SP and ATSF lines, and the rights it acquired when it bought them.

LACMTA also “provides transportation subject to the jurisdiction of the Board.” The term “transportation” is defined by statute to include facilities related to the movement of passengers or property, or both, by rail, as well as services related to that movement (*i.e.*, dispatch services).²⁴ LACMTA, as the owner of the former SP and ATSF lines, provides tracks upon which the freight railroads and Amtrak presently operate. This freight service is, of course, subject to the Board’s jurisdiction. Similarly, LACMTA, through its arrangement with the Southern California Regional Rail Authority (“SCRRA”), provides dispatching services to the freight railroads over these lines. Both are within the statutory definition of “transportation” and subject to the Board’s jurisdiction.

Because LACMTA retains a common carrier obligation over the lines, and provides “transportation” subject to the Board’s jurisdiction, it is clearly “a rail carrier providing transportation subject to the jurisdiction of the Board” under Section 11501.

B. LACMTA’S EXEMPTION FROM SUBTITLE IV DOES NOT AFFECT ITS UNDERLYING STATUS AS A RAIL CARRIER

LACMTA’s exemption from Subpart IV does not affect LACMTA’s legal status as a rail carrier providing transportation subject to the jurisdiction of the Board.

The ICC granted this exemption in recognition of the unnecessary regulatory burden Subtitle IV would otherwise place on LACMTA’s predecessor.²⁵ But this exemption did not alter LACTC’s fundamental legal status. The ICC expressly reserved its jurisdiction over

²³ *LACMTA II*, *slip op.* at 3.

²⁴ See 49 U.S.C. § 10102(9).

²⁵ 8 I.C.C. 2d at 512–13.

LACTC (now LACMTA) in order to ensure it did not interfere with the underlying freight carriers' service obligations. As the Board has explained, this arrangement preserves the Board's jurisdiction to "take whatever remedial action is necessary to ensure continuation of adequate freight service for shippers" if LACMTA were to unduly interfere with freight operations, and removes only the regulatory compliance mandate that typically accompanies that status.²⁶ The ICC also expressly retained jurisdiction over LACTC to impose labor protections if any of the acquired lines were abandoned. If the Board has no jurisdiction over LACMTA as a result of the exemption, these measures would not be legally permissible.

Moreover, like any exemption issued by the Board pursuant to its statutory authority, LACMTA's blanket exemption from Subtitle IV may be revoked if it is necessary to carry out the Board's rail transportation policy.²⁷ Indeed, the abandonment procedures established by the Board with respect to the acquired lines acknowledge this: LACMTA is required to certify to the Board there are no changed circumstances that would warrant imposing additional measures when it seeks to abandon its residual common carrier obligation over a line no longer served by the freight railroads *notwithstanding* the exemption.²⁸ The exemption is essentially a provisional commitment from the Board not to enforce the provisions of Subtitle IV, and not an abdication of its jurisdiction over LACMTA and the transportation it provides.

Because the Board retains jurisdiction over LACMTA notwithstanding the exemption from Subtitle IV, the exemption does not alter LACMTA's fundamental legal status.

²⁶ *Orange County*, slip op. at 4 n.12.

²⁷ See 49 U.S.C. § 10502(d).

²⁸ *LACMTA II*, slip op. at 3.

**C. LACMTA’S OPERATION OF EXCLUSIVELY MASS
TRANSPORTATION SERVICE DOES NOT AFFECT ITS
FUNDAMENTAL STATUS AS A RAIL CARRIER**

Finally, the fact that LACMTA operates *only* mass transportation service does not mean it is not a “rail carrier providing transportation subject to the jurisdiction of the Board.” As discussed above, LACMTA’s status results from its ownership of the lines acquired from ATSF and SP and its provision thereof to freight common carriers, as well as related services.

The ICC recognized that LACMTA’s ownership of the lines – not its planned mass transportation service – rendered it a rail carrier. As the ICC explained in granting the exemption from regulation under Subtitle IV, “Although LACTC’s mass transit operation may by itself be exempt from our jurisdiction even without an exemption . . . its residual status as a freight common carrier would make it subject to various provisions of 49 U.S.C. Subtitle IV.”²⁹ Similarly, the ICC held that LACTC became a common carrier even though it was “not holding itself out to perform common carrier rail service and lack[ed] the ability to do so.”³⁰

In view of the Board’s clear and consistent statements on this subject, the SBOE was incorrect in determining that LACMTA does not provide transportation subject to the jurisdiction of the Board. In fact, LACMTA owns the physical track used in interstate commerce and provides it for use by interstate freight railroads. It was and remains subject to the Board’s jurisdiction.

²⁹ 8 I.C.C. 2d at 512.

³⁰ 9 I.C.C. 2d at 387.

CONCLUSION

For the foregoing reasons, LACMTA respectfully requests that the Board issue an order confirming that LACMTA is presently a “rail carrier providing transportation subject to the jurisdiction of the Board,” and remains so until such time that (1) the Board has authorized the abandonment by any and all freight carriers providing service on the acquired lines, and (2) LACMTA has submitted a letter to the Board that complies with the procedures established in *LACMTA II* with respect to each of the acquired lines.

Respectfully submitted,



Charles A. Spitulnik

Steven L. Osit

Kaplan Kirsch & Rockwell LLP

1001 Connecticut Avenue, NW, Suite 800

Washington, DC 20036

(202) 955-5600

Email: cspitulnik@kaplankirsch.com

sosit@kaplankirsch.com

*Counsel for the Los Angeles County
Metropolitan Transportation Authority*

Dated: June 26, 2017

VERIFICATION

I, Jesse Soto, verify under penalty of perjury that the factual statements made in the foregoing Petition for Declaratory Order are true and correct, to the best of my knowledge, information and belief.

Further, I certify that I am qualified and authorized to file this verification.

Executed on June 22, 2017.

Los Angeles County Metropolitan
Transportation Authority

By: Jesse Soto

Jesse Soto, Executive Officer, Finance

Sworn to and subscribed before me

this _____ day of June, 2017.

Notary Public

My commission expires: _____

CALIFORNIA JURAT WITH AFFIANT STATEMENT**GOVERNMENT CODE § 8202**

- ☐ See Attached Document (Notary to cross out lines 1-6 below)
☐ See Statement Below (Lines 1-6 to be completed only by document signer[s], *not* Notary)

1
2
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5
6

Signature of Document Signer No. 1

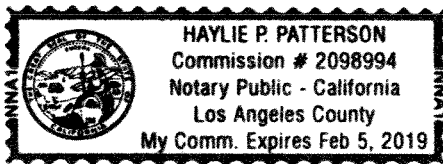
Signature of Document Signer No. 2 (if any)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of Los Angeles

Subscribed and sworn to (or affirmed) before me

on this 22 day of June, 2017,
by Date Month Year(1) Jesse Soto(and (2) _____),
Name(s) of Signer(s)proved to me on the basis of satisfactory evidence
to be the person(s) who appeared before me.Signature Haylie Patterson
Signature of Notary Public

Seal
Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or
fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2017, I have caused a copy of the foregoing Verified Petition of the Los Angeles County Metropolitan Transportation Authority for a Declaratory Order to be served upon the following individuals via first class mail, postage prepaid:

Randy Ferris, Chief Counsel
California State Board of Equalization
50 N Street, P.O. Box 942879
Sacramento, CA 94279-0082

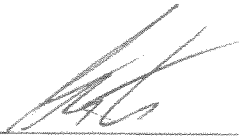

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com

Dated: June 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2017, I have caused a copy of the Verified Petition of the Los Angeles County Metropolitan Transportation Authority for a Declaratory Order filed with the Surface Transportation Board on June 26, 2017, to be served upon the following individuals via first class mail, postage prepaid:

David Gau, Executive Director
California State Board of Equalization
450 N Street, MIC: 73
Sacramento, CA 95814-0073



Steven L. Osit
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
(202) 955-5600
sosit@kaplankirsch.com

Dated: June 28, 2017

EXHIBIT A

Metro-Owned Rail Lines with Freight Operations

As of 4/19/17

#	METRO Line	Original Line Name	Freight Operator*
1	Azusa Branch	Azusa Branch	UPRR
2	Coast Line	Ventura Coast Line	UPRR
3	East Bank	East Bank	UPRR
4	Harbor Subdivision	Harbor Subdivision	BNSF
5	Pasadena Subdivision	Pasadena Subdivision	BNSF
6	San Bernardino Subdivision	San Bernardino Subdivision	BNSF
7	San Gabriel Subdivision Los Angeles (SGSLA)	Portions of line were called: - State Street Branch - Yuma Main Line - Baldwin Park Branch	UPRR and BNSF
8	Valley Line	Saugus Line	UPRR
9	West Bank	West Bank	BNSF

* Operating on all or portions of the lines

EXHIBIT B

STATE BOARD OF EQUALIZATION

NORWALK DISTRICT OFFICE
12440 E. IMPERIAL HIGHWAY, SUITE 200, NORWALK, CA
P.O. BOX 408, NORWALK, CA 90851-0408
(562) 412-2824 * FAX (562) 488-1688
www.sbe.ca.gov



SEN. GEORGE RUNNER (RET.)
First District, Lancaster

FIONA MA, CPA
Second District, San Francisco

JEROME E. HORTON
Third District, Los Angeles County

DIANE L. HARKEY
Fourth District, Orange County

BETTY T. YEE
State Controller

DAVID J. GAU
Executive Director

August 16, 2016

Los Angeles County Metropolitan Transportation Authority
1 Gateway Plaza, Floor 20
Los Angeles, CA 90012-2952
Attn: Ms. Josie Nicasio-Controller

Re: SR AA 099-434404



Dear Ms. Nicasio:

This letter serves to provide the Los Angeles County Metropolitan Transportation Authority (LACMTA) with constructive notice regarding the correct application of the Sales and Use Tax law to sales and purchases of rail passenger cars and their corresponding replacement parts. Additionally, effective with the date of this correspondence, this letter serves to formally rescind any and all previously provided erroneous written or prior audit advice as it relates to sales and purchases of rail passenger cars and their corresponding replacement parts.

As background, in the most recently completed audit of your account (Audit Case ID 516426) covering the period of January 1, 2007 to December 31, 2009, as well as in other prior audits, the audit staff provided LACMTA with erroneous advice regarding purchases of rail passenger cars and related parts. Based on LACMA's representations and the Board's interpretation of its Memorandum Opinion concerning Bombardier Inc., the Board concluded that various untaxed purchases made by LACMA of passenger rail cars and their related repair parts qualified for exemption under Revenue and Taxation Code Section 6352, under the premise that LACMTA was providing transportation services subject to the jurisdiction of the Surface Transportation Board (STB).

At the request of the Board's Field of Operations Division, the Board of Equalization's legal department looked into the issue of whether LACMTA, in fact, falls under the jurisdiction of the STB and, by extension, the corresponding tax implication with regards to LACMA's purchases of passenger rail cars and related parts. The Board's legal department issued a Memorandum dated July 12, 2016, providing further interpretation and clarification regarding this matter and the proper application of tax to the sales and purchases of rail passenger cars and repair parts as it pertains to LACMTA; copy enclosed for your reference.

In summary, the Board's legal department concluded that LACMTA is not providing "transportation" services subject to the jurisdiction of STB because it does not provide any mass transportation services until *after* the rail lines at issue are officially abandoned with STB, and repurposed by LACMTA for mass commuter transportation, and the provision of such mass transportation is not otherwise subject to the jurisdiction of STB. Therefore, LACMTA is not a person protected by the federal provision, which provides that a State cannot impose a "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the STB." (49 USC § 11501(b)(4).) Consequently, the tax applies to sales and purchases of passenger rail cars and repair parts to LACMTA for use on its mass transportation network, unless otherwise exempt or excluded from tax.

August 16, 2016

If you should have any questions, please do not hesitate to call me at the above listed phone number or email me at ann.vonstietz@boe.ca.gov.

Sincerely,

A handwritten signature in cursive script that reads "Ann von Stietz". The signature is written in dark ink and is positioned above the printed name and title.

Ann von Stietz
Senior Tax Auditor

Memorandum

To: Chief
Tax Policy Division (MIC:92)

Date: July 12, 2016

From: Andrew Kwee
Tax Counsel III, Specialist
Tax and Fee Programs Division (MIC:82)

Subject: Passenger Rail Cars and Repair Parts
Assignment No. 15-167

This is in response to your memorandum dated March 12, 2015, requesting a legal opinion regarding the application of tax to sales of rail passenger cars and repair parts to certain local government authorities providing commuter light rail services. You explain that the Board's Memorandum Opinion in re: *Bombardier Inc.* (9/1/99) concluded that sales of rail passenger cars to the North San Diego County Transit Development Board (NCTD), a public agency, are exempt from tax on the basis that federal law prohibits state taxation of a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation Board (STB). You ask if the Board's decision in *Bombardier* was superseded by a July 24, 2014, decision issued by the STB, which you believe provides that:

STB does not have jurisdiction over a local government authority that provides mass transportation regardless of whether STB has jurisdiction over the line on which the mass transportation occurs. As such, the [Department] believes that the Board's ruling in *Bombardier [Inc.]*, may no longer be relied upon to determine the application of tax to rail cars and repair parts. Therefore, we request your legal opinion on whether STB's decision regarding [(a local government authority in New Jersey)] applies to taxpayers in California and that the sales of passenger rail cars and repair parts to local government authorities would be subject to tax.

You also attached a copy of the July 24, 2014, STB decision, and explain that a number of refund claims are currently being held in abeyance pending the Legal Department's opinion on this matter. As will be discussed below, STB does not have authority over mass transportation provided by a local government authority and, since the Los Angeles County Metropolitan Transportation Authority (LACMTA) is not providing any other transportation services subject to the jurisdiction of STB, we conclude that tax applies to sales of rail-passenger cars and repair parts to LACMTA.

Background Information

I will start by summarizing the pertinent background facts, as I understand them based on the various supporting documents that you provided. As relevant, LACMTA is a public agency providing mass transportation for the County of Los Angeles. LACMTA owns six fully enclosed commuter rail lines operating entirely within the State of California. No other rail

carrier can get on this commuter rail system, and the tracks are not connected to an interstate rail network via switch or track. The lines are used exclusively for mass transportation (no freight line services). There are six different commuter rail lines currently in service on this commuter rail network. LACMTA has plans for future commuter rail service development.

In addition to the fully enclosed commuter rail lines noted above, LACMTA also owns right-of-way for other tracks which are connected to interstate rail lines, some of which are used by third party rail carriers for rail freight services. These interstate rail lines are not connected, either via switch or via direct rail line, to the commuter rail lines described above. We understand that LACMTA does not at any time provide any transportation, whether rail, freight, or otherwise, over these other lines. Instead, LACMTA owns right of way for these tracks which are connected to interstate rail lines but LACMTA does not itself, and will not, actually operate as a rail carrier or otherwise on these lines.

For example, in a decision issued to LACMTA by the STB on February 8, 2012, the STB summarized the pertinent facts, with respect to LACMTA's operations, as follows:

LACMTA explained that it did not intend to operate any rail lines as a freight rail common carrier and did not intend to hold itself out to provide freight rail service on the rail lines it had acquired from [the seller] . . . To make way for a passenger rail project, LACMTA now seeks an exemption to terminate whatever residual common carrier obligation it may have retained on the line. (STB Decision No. AB 409 (2/8/12).)

In a different decision issued to LACMTA and various county transportation agencies, the STB explained the pertinent facts, with respect to LACMTA's operations, as follows:

[LACMTA and the other county agencies] are not going to be operating as rail freight common carriers and do not hold themselves out to provide service over those lines. . . Moreover . . . [LACMTA and the other agencies] are providing no "service" that we regulate; they have merely been given the obligation not to interfere unduly with the provision of rail freight service by the carrier that retains the obligation to do so.
(STB Decision No. 32173 (2/28/97).)

In summary, LACMTA acquires these interstate rail lines and right-of-way from rail carriers for purposes *other* than to provide transportation over them. At no point does LACMTA provide transportation over these interstate rail lines. Instead, after holding onto the rail lines for a period of time without itself providing any transportation over the lines, LACMTA files a notice of abandonment or discontinuance of service to terminate whatever residual or common carrier obligation it may have obtained on the rail line. At such time, LACMTA certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines.¹ Subsequently, *after* any future use of the tracks as interstate rail lines has been officially abandoned for purposes of regulation and jurisdiction by STB, LACMTA will then repurpose these rights of way for the purpose of expanding LACMTA's own commuter rail service over the areas previously covered by those lines, which then become a part of

¹ As relevant, federal law provides that: "An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines. . ." See 49 CFR 1152.50(b).

LACMTA's commuter rail network, and are solely and exclusively for use by LACMTA's commuter rail service.

DISCUSSION

The Federal Railroad Revitalization and Regulatory Reform Act of 1976, also referred to as the "4-R Act"² (Pub.L. No. 94-210 (Feb. 5, 1976) 90 Stat. 31), enacted a federal statute (former 49 USC § 26c.) restricting state and local taxation of certain rail carriers. That statutory provision of the 4-R Act relating to tax discrimination against rail transportation property is no longer operative. Instead, the ICC Termination Act of 1995 (Pub.L. No. 104-88 (Dec. 29, 1995) 109 Stat. 804) (ICC Termination Act) recodified, with slightly altered language, this statutory language originating with the 4-R Act as it pertains to state taxation of certain rail carriers, operative January 1, 1996.³ (49 USC § 11501.)

The pertinent federal provision, in its current form, provides that a State cannot impose a "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board [(STB)⁴] under this part."⁵ (49 USC § 11501(b)(4).) As an exception, the ICC Termination Act of 1995, effective January 1, 1996, provides that STB does not have jurisdiction over mass transportation provided by a local government authority. (49 USCS § 10501(c)(2)(A).) Pursuant to this exclusion from jurisdiction, the STB issued formal decisions determining that mass transportation provided by certain local government entities, including Massachusetts Bay Commuter Railroad Company LLC, Transit Solutions Group LLC, and New Jersey Transit Corporation, is not subject to the jurisdiction of STB. (See STB Decision Nos. FD 34332 (6/4/03), FD 34832 (3/2/06) & FD 35745 (7/25/14). [Provision of mass transportation not subject to jurisdiction of STB when provided by local government entity (discussed in detail under Section II, below)].)

For sales and use tax purposes, Revenue and Taxation Code section 6352 provides for an exemption from sales and use tax when this state is prohibited from imposing tax under the laws of the United States. Therefore, in order for the Section 6352 exemption to apply in this context, there are several elements that must be met, and I will discuss each in turn. For Section 6352 to apply to exempt the transaction from sales and use tax: (I) the tax must be discriminatory; and (II) the rail carrier claiming the exemption must be providing transportation subject to the jurisdiction of STB, other than mass transportation provided by a local government authority that is not subject to the jurisdiction of STB.

I. Whether applying the tax would discriminate against rail carriers

A. Rail Passenger Cars

In *Bombardier* the Board cited the case of *Nat. R. R. Pass. Corp. v. SBE* (1986) 652 F.Supp. 923, and determined that California's sales and use tax law discriminates against rail carriers

² The Act prohibited States and localities from engaging in four forms of discriminatory taxation, one form of which is relevant for purposes of this opinion.

³ The language contained in this provision was originally enacted by Section 306 of the 4-R Act. (49 USC § 26c.) In 1978, Congress recodified this provision with slightly altered language but no substantive changes. (See 49 USC § 11503). In 1995, Congress again recodified the provision without substantive changes. (See 49 USC § 11501.)

⁴ "In this part (1) 'Board' means the Surface Transportation Board." (49 USC § 10102(1).)

⁵ 49 USCS §§ 10101, et seq.

purchasing rail *passenger* cars,⁶ when compared to differing modes of transportation, because a sales or use tax is not imposed on certain purchases of passenger aircraft and passenger watercraft by common carriers. (See, e.g., Rev. & Tax. Code, §§ 6366, 6366.1, 6368, 6368.1.) The Board further noted, however, that the United States Supreme Court had not yet opined on whether differing modes of transportation is the proper comparison class for sales and use taxes. More recently, the United States Supreme Court interpreted the “another tax” language in 49 USC 11501(b)(4) (operative 1/1/96), to specifically prohibit imposition of a state tax scheme that imposes a sales or use tax on purchases by rail carriers providing transportation subject to the jurisdiction of the STB, but exempts purchases by their competitors who offer different modes of transportation, such as exemptions for interstate motor and water transportation carriers. (*CSX Transp. v. Ala. Dep’t of Revenue* (2011) 562 US 277 [131 S. Ct. 1101, 1120].) Since the United States Supreme Court applied the same “differing modes of transportation” analysis as the Board applied in *Bombardier* to the 4-R Act provision at issue today (49 USC 11501(b)(4)),⁷ we continue to believe that *Bombardier* reached the correct conclusion that applying the sales and use tax law discriminates against rail carriers providing transportation subject to the jurisdiction of STB, in favor of other carriers providing differing modes of transportation, which would be prohibited under federal law. Therefore, sales of rail passenger cars to rail carriers providing transportation subject to the jurisdiction of the STB are exempt under Section 6352.

B. Repair Parts and Spare Parts

You also ask about purchases of repair parts. In *Bombardier*, the Board determined that the exemption provided in Section 6352 does not apply to purchases of spare parts for rail passenger cars. Similarly, the exemption provided in Section 6368.5 (see footnote 6) does not apply to purchase of repair or other spare parts. (Rev. & Tax. Code, § 6368.5, see, e.g., Sales and Use Tax Annotation (Annot.) 325.0100.500 (8/30/96) [tax applies to purchases of repair parts in California].)⁸ Nevertheless, the audit period at issue in *Bombardier* was October 1, 1994, through June 30, 1995. As noted in *Bombardier*, the pertinent test is differing modes of transportation; thus, purchases of repair parts are exempt under Section 6352 if there is a similar exemption for repair parts when comparing differing modes of transportation. Subsequent to the period at issue in *Bombardier*, the sales and use tax law was amended to provide that on and after October 1, 1996, purchases of component aircraft parts also qualify for the exemption provided for in Section 6366, pertaining to sales and purchases of aircraft by common carriers. (Rev. & Tax. Code, § 6366, subd. (a)(3); Reg. 1593, subd. (b)(2).) Under these facts, we believe that sales of component railcar repair parts generally qualify for exemption under Section 6352, provided the sale of the underlying rail car to the purchaser would be exempt under Section 6352. We now turn to the second requirement for the exemption to apply to sales and purchases of railcars and repair parts.

⁶ As relevant, purchases of rail *freight* cars for use in interstate or foreign commerce are exempt under Section 6368.5.

⁷ The Board quotes 49 USC 11501(b) in the *Bombardier* memorandum opinion, and also references the predecessor provision (49 USC 11503). The close of the audit period at issue in *Bombardier* predated the January 1, 1996, operative date of 49 USC 11501(b). Nevertheless, the pertinent language in the predecessor provision (49 USC 11503) is substantially similar to the language in current provision at issue here (49 USC 11501).

⁸ Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the Sales and Use Tax Law with respect to specific factual situations. (Reg. 5700, subds. (a)(1), (c)(2).)

II. Transportation subject to the Surface Transportation Board

Regarding the question of whether the purchasing rail carrier is providing transportation subject to the jurisdiction of the Surface Transportation Board (STB), the law provides in pertinent part that:

[STB] has jurisdiction over transportation by rail carrier that is . . . by railroad . . . between a place in . . . a State and a place in the same or another State as part of the interstate rail network. . .

(49 USCS § 10501(a)(1)-(2).) In other words, in order to be providing transportation subject to STB's jurisdiction, the rail carrier must be operating on a portion of the interstate rail system that is subject to the jurisdiction of STB. STB has authority to exempt transportation that is provided by a rail carrier from regulation by STB under limited circumstances where regulation is not necessary to carry out the rail transportation policy of the STB (see, e.g., 49 USCS § 10101); however, such an exemption may be revoked by the STB at any time if the STB finds that the circumstances no longer warrant an exemption. (49 USCS § 10502(a),(d).) Furthermore, the ICC Termination Act of 1995, effective on and after January 1, 1996, creates an exclusion from being subject to the jurisdiction of STB, which provides that:

[T]he Board does not have jurisdiction under this part over- (A) mass transportation provided by a local government authority;

(49 USCS § 10501(c)(2)(A).) As relevant, a local government authority includes a political subdivision of a State; a public corporation, board, or commission, an Indian tribe, and a person that contracts with a local governmental authority to provide transportation services. (49 USCS §§ 10501(c)(1)(A), 5302(10).⁹) Mass transportation means transportation services provided by rail, including public transportation, which means regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income. (49 USCS § 10501(c)(1)(B); 5302(14)(A).¹⁰) STB Decision Nos. FD 34832 (3/2/06) & FD 35746 (7/24/14).) Thus, for example, STB has issued decisions determining that Massachusetts Bay Commuter Railroad Company LLC's operations as a rail carrier are not subject to the jurisdiction of STB because it is providing mass transportation services under contract for a local government authority (STB Decision No. FD 34332 (6/4/03).); and similarly that commuter rail transportation provided by the New Jersey Transit Corporation is not subject to STB jurisdiction because the corporation is a public corporation formed under statute and is providing transportation that is part of regularly scheduled *interstate* commuter rail operations between points in New Jersey and New York City or Philadelphia (STB Decision No. FD 35745 (7/25/14).) The STB has also found it lacks jurisdiction with respect to mass transportation where the mass transportation services are operated entirely within one state (intrastate). (See STB Decision No. FD 34832 (3/2/06).)

⁹ Title 49 United States Code section 10501(c)(1)(A)(i) incorporates by reference the definition of "local government authority" in section 5302(a); however, this section was renumbered to 5302(10), effective October 1, 2012.

¹⁰ Title 49 United States Code section 10501(c)(1)(B) incorporates by reference the definition of transportation in section 5302(a); however, this section was renumbered to 5302(14)(A), effective October 1, 2012. Prior to that date, it read: "'mass transportation' means 'transportation by a conveyance that provides regular and continuing general or special transportation to the public.'"

Here, LACMTA is chartered under the laws of the state of California as a regional transportation planning agency, and is the public transportation agency for the County of Los Angeles. As such, LACMTA is a "local government authority" within the meaning of the federal provision. (49 USCS §§ 10501(c)(1)(A), 5302(10); see also, STB Decision No. FD 35745 (7/25/14).) Further, LACMTA is providing "mass transportation" because the transportation provided by LACMTA is regularly scheduled operations provided by rail and which are open to the general public. The mass transportation services are operated entirely within California. Therefore, the transportation services provided by LACMTA are mass transportation services and as such are not subject to the jurisdiction of the STB.

As noted, LACMTA also owns rights of way over interstate rail lines, the provision of transportation services over which *would be* subject to the jurisdiction of STB, if LACMTA actually provided transportation services over these lines prior to abandoning them. However, as represented by LACMTA to STB, LACMTA does not in fact provide any transportation services over these rail lines. Furthermore, according to STB, LACMTA does not even provide any services, whatsoever, that STB regulates. (STB Decision No. 32173 (2/28/97).) Instead, as noted, LACMTA acquires these lines and then initiates proceedings to officially abandon and discontinue service, terminate whatever "residual or common carrier obligation it may have obtained on the line", and certify that "no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines." After the lines have been officially abandoned and all third party rail carrier services terminated, and after conclusion of the proceedings such that these lines are no longer subject to the jurisdiction of the STB, then LACMTA will proceed to expand and develop its commuter rail service onto these newly acquired areas. As discussed, the commuter rail service provided by LACMTA constitutes mass transportation excluded from jurisdiction of STB and, as such, outside the scope of the federal tax exemption (and, as such, outside the scope of the sales and use tax exemption provided in Section 6352).

In summary, LACMTA is not providing "transportation" services subject to the jurisdiction of STB because it does not provide any mass transportation services until *after* the rail lines at issue are officially abandoned with STB, and repurposed by LACMTA for mass commuter transportation, and the provision of such mass transportation is not otherwise subject to the jurisdiction of STB. Therefore, LACMTA is not a person protected by the federal provision, which provides that a State cannot impose a "tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the STB." (49 USC § 11501(b)(4).) As such, we conclude that tax generally applies to sales and purchases of passenger rail cars and repair parts to LACMTA for use on its mass transportation network, unless otherwise exempt or excluded from tax.

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