

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(10)S
Sales Tax
February 28, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990121C

On January 21, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Japan Airlines Co., LTD., 655 Fifth Avenue, New York, New York 10022. Petitioner, Japan Airlines Co., LTD., submitted additional information on March 15, 1999, and subsequently on October 20, 1999.

The issue raised by Petitioner is whether guard services and the Boarding Security Program provided to it by the Port Authority of New York & New Jersey are subject to sales and compensating use tax.

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

Petitioner utilizes the International Arrivals Building ("IAB") as a passenger terminal at John F. Kennedy International Airport ("JFK"). Technically the IAB is a central building to which is attached two additional buildings referred to as "wing buildings." One wing building is the East Wing Building and the other is called the West Wing Building.

Until May 13, 1997, the IAB and the wing buildings were under the control of the Port Authority of New York and New Jersey ("PA") which leased space in the wing buildings to various airlines, including Petitioner. On May 13, 1997, the PA turned control of the IAB and the wing buildings over to a private group, JFK International Air Terminal LLC (hereinafter IAT) which took over the duties and responsibilities of operating these facilities from the PA. Both wing buildings are virtually the same; the front of each building is rented to various airlines. This space is referred to as "exclusive space." This exclusive space contains the check-in facilities, as well as offices, lounges and other space under the exclusive control of the various airline tenants. Airlines that rent this exclusive space often sublease part of it to other airlines. This Advisory Opinion only addresses the services described below that were provided by the PA prior to May 13, 1997, when the PA controlled the IAB and wing buildings.

Petitioner was a direct tenant in the East Wing Building, i.e., it leased exclusive space directly from the PA, and in turn subleased a portion of the space to other airlines. Petitioner was responsible for the repair and upkeep of its exclusive space. The PA was responsible for all repairs and services in the common areas of the IAB and acted as the landlord.

The primary use of Petitioner's exclusive space was to furnish facilities for handling its passengers and those of its sub-tenants, who would be departing on international flights. The exclusive space was also used to house various administrative airline functions, passengers, lounges,

etc. Other than miscellaneous rentals to some concessionaires (duty free shops, restaurants, etc.) the entire rear portion of the wing buildings, as well as the entire IAB, consist solely of common areas and were solely controlled by the PA prior to May 13, 1997.

Passengers flying on Petitioner's aircraft entered Petitioner's exclusive space in the East Wing Building, passed through security provided by Petitioner to the check-in counter where all the paperwork necessary to board the aircraft would be completed. Some passengers would also have spent time in Petitioner's lounges, provided for passengers of both Petitioner and its sub-tenants, before leaving Petitioner's exclusive space.

In order to board the aircraft, passengers left Petitioner's exclusive space, entered the East Wing Building common space (rear of the building) and went to the appropriate gate. Many passengers will have availed themselves of some of the facilities (lavatories, restaurants, duty free and souvenir shops, etc.) located in the common area controlled by the PA. The PA provided general security in the common area. All facilities in the common area were under the control and responsibility of the PA. Petitioner had nothing to do with the maintenance or security of the common area.

The IAB itself was also under the sole control of the PA. The IAB receives passengers on in bound (primarily international) flights to the U.S. On arrival at the IAB, passengers go through Customs, Immigration, etc. As with the East Wing Building's common space, Petitioner had no control over this facility.

The agreement whereby airlines such as Petitioner paid for the utilization of the common space in both the wing buildings and the IAB provided for the PA to estimate the cost of the various services which were tentatively allocated on a per passenger or per aircraft basis. Thus, for December 1993, Petitioner paid forty-five (.45) cents per passenger and forty (.40) cents per passenger, respectively, for guard service and Boarding Security Program (BSP). These services included general security provided by the PA in the common areas of the wing buildings and the IAB, which were performed by a security contractor hired by the PA, and airport security services provided by Port Authority Police pursuant to Part 107 of the Federal Aviation Regulations ("FAR"). Such Part 107 requires airport operators to have law enforcement officers available to respond to a summons from a security screening point upon the discovery of a weapon or explosive device or the occurrence of another type of incident during the boarding process. These charges had nothing to do with the operation or security of the exclusive space rented by Petitioner. These amounts were estimates and were adjusted annually to reflect the actual cost of the PA in furnishing these various services.

Petitioner's lease with the PA provides, in part:

Section 7. Other Charges

* * *

(n) The Lessee shall pay to the Port Authority its pro rata share of the cost to the Port Authority of providing the guard service as set forth in paragraph 41(j) hereof. The Lessee's pro rata share of the cost to the Port Authority of providing such guard service shall be that portion of said costs as the number of passengers on the Lessee's outbound aircraft bears to the total number of passengers on all outbound aircraft of all lessees of the East and West Wing Buildings.

* * *

Section 10. Use of Premises and Areas A-1, A-2, A-3 and A-4

* * *

II. (a) Area A-1: Public Circulation Areas and Passenger Lounges

. . The Port Authority shall operate and maintain the departure information and television monitoring systems as part of Area A-1. The Port Authority shall from time to time establish and segregate certain portions of area A-1 which shall be called "Departure Hold Areas." The Lessee shall have the right to use Area A-1 as passageways and circulation areas and as passenger lounges in common with the other lessees of the East and West Wing buildings for the accommodation of both the lessee's and such other lessee's employees, passengers, guests and patrons, it being understood however that the Departure Hold Areas shall be used only by the Lessee's employees and departing passengers and by the employees and departing passengers of other lessees of the East and West Wing buildings. Area A-1 may also be used by other persons when such use is authorized by the Port Authority (except as provided in paragraph (j) of Section 41, the Port Authority shall, however, have no obligation to police Area A-1).

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Section 41. Other Services by the Port Authority

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(j)(1) The Port Authority shall provide a guard service (hereinafter called "the guard service") to serve such portions of Area A-1 as may be designated from time to time by the Port Authority.

* * *

(3) The Lessee shall pay to the Port Authority as hereinbefore provided in Section 7(n) its pro rata share of the cost to the Port Authority of providing the guard service.

Applicable Law

Section 1105(c)(8) of the Tax Law imposes a tax upon:

Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

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

Section 529.2(c)(2) of the Sales and Use Tax Regulations provides, in part:

Sales by New York State governmental entities of tangible personal property or services of a kind which are ordinarily sold by private persons, except trash removal services as described in paragraph (3) of this subdivision, are subject to the sales and use tax. . . .

Section 107.15(a) of the Federal Aviation Regulations provides:

Each airport operator shall provide law enforcement officers in the number and in a manner adequate to support—

- (1) Its security program; and
- (2) Each passenger screening system required by part 108 or § 129.25 of this chapter.

[Part 108 and Section 129.25 of the Federal Aviation Regulations require domestic and foreign airlines, respectively, to screen passengers before boarding aircraft.]

Section 107.17 of the Federal Aviation Regulations provides, in part:

(a) No airport operator may use, or arrange for response by, any person as a required law enforcement officer unless, while on duty on the airport, the officer—

- (1) Has the arrest, authority described in paragraph (b) of this section;
- (2) Is readily identifiable by uniform and displays or carries a badge or other indicia of authority;
- (3) Is armed with a firearm and authorized to use it; and
- (4) Has completed a training program that meets the requirements in paragraph (c) of this section.

(b) The law enforcement officer must, while on duty on the airport, have the authority to arrest, with or without a warrant, for the following violations of the criminal laws of the State and local jurisdictions in which the airport is located:

- (1) A crime committed in the officer's presence.
- (2) A felony, when the officer has reason to believe that the suspect has committed it.

(c) The training program required by paragraph (a)(4) of this section must provide training in the subjects specified in paragraph (d) of this section and either—

- (1) Meet the training standards, if any, prescribed by either the State or the local jurisdiction in which the airport is located, for law enforcement officers performing comparable functions; or

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(2) If the State and local jurisdictions in which the airport is located do not prescribe training standards for officers performing comparable functions, be acceptable to the Administrator.

Opinion

The PA is a governmental entity exempt from tax under Section 1116(a)(1) of the Tax Law. Sales by the PA of tangible personal property or services of a kind not ordinarily sold by private persons are not subject to sales tax. Sales by the PA of tangible personal property or services that are of a kind ordinarily sold by private persons may be subject to sales tax. See Section 529.2(c)(2) of the Sales and Use Tax Regulations. While the sales tax is imposed upon the receipts from the sale of tangible personal property and certain enumerated services, including protective services, it is not imposed on receipts from either the sale or rental of real property.

Technical Services Bureau Memorandum, TSB-M-84(9)S, dated May 7, 1984, entitled Charges by Shopping Mall Operators, provides, in part:

Lease agreements between shopping mall operators and tenants generally provide for a fixed rental charge plus additional rental charges. The additional rental charges may include a tenant's pro rata share of expenses for maintenance, utilities, snow plowing, landscaping, security, insurance, administration and overhead costs incurred by the mall owner in relation to the operation of the "common area" of the shopping mall. The "common area is the area within and outside of the mall (other than the fixed rental space) available to the tenants and their customers and necessary for access to the tenants' businesses.

To provide for an equitable rental charge, the lease agreement generally provides that common area expenses are to be billed to each tenant based on a share formula (i.e. leased square footage). The parties agree that the costs will be estimated at the beginning of each year, with the tenant paying his share in 12 monthly installments. At the end of the year the actual costs are determined and the tenant either pays an additional amount or receives a credit, if payments exceed actual costs.

Common area charges which are designated as "additional rent" or similarly provided for by specific provisions in the lease agreement are considered to be receipts from the rental of real property and are not subject to sales tax when billed to tenants. . . .

The agreement between Petitioner and the PA provides that Petitioner as well as other tenants will pay to the PA their pro rata share of certain expenses that are related to services (including security services) provided by the PA to the common areas of the leased property. Consequently,

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pro rata charges made to Petitioner for the security services described in this Advisory Opinion which were a part of the common area charges are considered to be charges for additional rent and not subject to sales and use tax. It should be noted that this conclusion does not apply to security services that may be provided directly to Petitioner's leased premises.

In addition to the common area security services, the PA provided boarding security services that were required under Part 107 of the Federal Aviation Regulations. Sections 107.15 and 107.17 of these regulations required the PA to use law enforcement officers to perform these services who had the power to make arrests, with or without a warrant, for a crime committed in an officer's presence, or for a felony when an officer has reason to believe that a suspect has committed it. The law enforcement officers providing the boarding security services were performing a police service of a kind not ordinarily sold by private persons. Therefore, under the facts of this Advisory Opinion, these services provided by the PA were exempt from sales and use tax under Section 1116(a)(1) of the Tax Law.

In conclusion, based upon the facts specified in the Petition for Advisory Opinion, the charges by the PA to Petitioner for the guard services and the Boarding Security Program were not subject to sales and use tax.

DATED: February 28, 2000

/s/
John W. Bartlett
Deputy Director
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.