

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

TSB-A-02(28)S
Sales Tax
July 12, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010510A

On May 10, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Deloitte & Touche, LLP, Two World Financial Center, 8th Floor, New York, New York, 10281.

The issues raised by Petitioner, Deloitte & Touche, LLP, are:

1) Whether receipts from the lease of equipment used to distribute fuel to commercial aircraft are exempt under Section 1115(a)(21) of the Tax Law.

2) Whether receipts from the lease of such equipment from the Port Authority of New York and New Jersey (Port Authority) are exempt as a result of the Port Authority's exempt status under Section 1116(a)(1) of the Tax Law.

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

Petitioner's client, Corporation X (X), is a for profit corporation doing business in New York. X has an exclusive agreement with the Port Authority allowing X to provide fuel receipt services, fuel storage services and fueling and defueling services to commercial airlines at certain New York airports. Additionally, X contracts with commercial airlines to perform certain maintenance services, including fueling and defueling services, related to the commercial aircraft of the airlines. X owns neither the fuel nor the property used to perform the above-mentioned services.

As part of the exclusive operating contract with the Port Authority, X must lease the necessary equipment from the Port Authority. The equipment includes hydrant carts, fuel tender trucks, etc. As additional equipment is needed, X requisitions the equipment from the Port Authority. X is not allowed to procure equipment on its own to perform the relevant services. Any equipment necessary must be leased from the Port Authority.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

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

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . whether or not the services are performed directly . . . or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article

Section 1115(a)(21) of the Tax Law exempts from the sales and compensating use tax:

Commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, machinery or equipment to be installed on such aircraft and property used by or purchased for the use of such aircraft for maintenance and repairs and flight simulators purchased by commercial airlines.

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 526.7(a) of the Sales and Use Tax Regulations provides, in part:

Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

Section 527.5(a)(3) of the Sales and Use Tax Regulations provides, in part:

Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

Section 528.10(b)(1) of the Sales and Use Tax Regulations provides the following definition of commercial airline:

(b) Airline defined. (1) An airline is:

(i) an air carrier of persons, property and mail operating under a certificate of public convenience and necessity issued by the Civil

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Aeronautics Board, or a foreign air carrier holding an equivalent certificate issued by the carrier's respective sovereign government;

(ii) an air carrier holding a certificate for all-cargo air service issued by the Civil Aeronautics Board; or

(iii) an air taxi operator, who is classified by the Civil Aeronautics Board as a commuter air carrier, or who (a) performs at least five round trips per week between two or more points, and publishes flight schedules which specify the times and days of the week and places between which such flights are performed, or (b) transports mail by air pursuant to contract with the United States Postal Service. This exemption shall extend to the purchase of fuel for use in such commuter flights.

Opinion

Petitioner asks whether receipts from the lease of equipment used to distribute fuel to commercial aircraft are exempt under Section 1115(a)(21) of the Tax Law.

X contracts with commercial airlines to perform certain maintenance services, including fueling and defueling services, related to the commercial aircraft of the airlines. X owns neither the fuel nor the property used to perform the above-mentioned services nor is X in the business of selling tangible personal property including fuel. In the Matter of Aero Instruments & Avionics, Inc., Dec Tax App Trib, October 5, 1995, TSB-D-95(43)S, the Tax Tribunal determined that, except for flight simulators, purchases and leases of machinery and equipment used to repair and maintain commercial aircraft are exempt from sales tax pursuant to Section 1115(a)(21) of the Tax Law even though the purchaser or lessee of such machinery or equipment is not the owner of the commercial aircraft upon which the services are performed.

The services of fueling and defueling commercial aircraft are activities that relate to keeping commercial aircraft in a condition of fitness, efficiency, readiness or safety and the charges for such services are exempt from sales tax under Section 1105(c)(3)(v) of the Tax Law. See Technical Service Bureau Memorandum, *Exemptions for Commercial Aircraft*, May 15, 1980, TSB-M-80(4)S. Under the facts submitted by Petitioner which indicate that X does not sell fuel to the airlines but provides fueling and defueling services, purchases or leases of the equipment used to perform such services by X from the Port Authority are exempt from the sales and use tax. See Section 1115(a)(21) of the Tax Law. X should provide the Port Authority with an *Exempt Use Certificate* (Form ST-121), in order to relieve the Port Authority of any obligation to collect the tax.

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With respect to Issue 2, it is noted that governmental entities are generally responsible for the collection of tax on their sales of tangible personal property which is of a kind ordinarily sold by private persons. However, since the rental of equipment by X for use in fueling and defueling commercial aircraft is exempt pursuant to Section 1115(a)(21) of the Tax Law, Issue 2 is moot.

DATED: July 12, 2002

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