

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (47)S
Sales Tax
July 23, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S951025A

On October 25, 1995, a Petition for Advisory Opinion was received from CNY Equipment Rental & Sales Corp., 415 E. Taft Road, North Syracuse, NY 13212.

The issue raised by Petitioner, CNY Equipment Rental & Sales Corp., is whether an aircraft which it leases to another person (hereinafter the "lessee") qualifies as a commercial aircraft under Section 1115(a)(21) of the Tax Law.

Petitioner presents the following facts. Petitioner, as lessor, leases an aircraft to the lessee. The lessee operates as an air taxi operator and uses the aircraft in its charter operation. The lessee is classified by the Civil Aeronautics Board as a "commuter air carrier." When the aircraft is not being used for its charter operation, the lessee makes the aircraft available to Petitioner for transportation of Petitioner's company personnel for business purposes. Petitioner has multiple locations and attends out of town meetings regularly as part of participation on industry advisory committees.

Whether the aircraft is being used by the lessee in its charter operation or by Petitioner for company business, reservations for aircraft usage must be made in advance through the lessee. The lessee controls physical access to the aircraft and is responsible for maintenance of flight logs and other related books and records. Charter use, by the lessee, at all times has priority over Petitioner's use.

Petitioner is not billed for its usage of the aircraft. Petitioner's owner and active president operates the aircraft for Petitioner's own use.

As part of its Petition for Advisory Opinion, Petitioner furnished a copy of the lease agreement entered into with the lessee and a schedule of the aircraft usage and revenue since the beginning of the lease term. The lease began on December 8, 1987. The lease provides that on December 15 of each year, it shall be renewed for one year unless terminated by either party. Monthly lease payments are made, based on the hours of use for the preceding month and established hourly rates for use of the aircraft. The lease agreement requires Petitioner to provide and pay for all fuel consumed as a result of aircraft use by the lessee. The schedule of aircraft usage indicates that for the calendar years 1989-1994, the aircraft was used 50 percent or more of the time for charter flights by the lessee in five of the six years. Although complete figures were not available for calendar year 1988, the months for which figures were available show that the aircraft was used more than 50 percent of the time in charter flights.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.---...there is hereby imposed and there shall be paid a tax ... upon:

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

* * *

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment 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) of the Tax Law provides, in part:

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

* * *

(21) 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.

The term "commercial aircraft" is not defined by the Tax Law or Sales and Use Tax Regulations. However, Section 528.10(b)(1) of the Sales and Use Tax Regulation does provide the following definition:

(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 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.

Aircraft used by an "airline" as defined above, constitutes commercial aircraft qualifying for sales tax exemption. See TSB-M-80(4)S. In this case, the lessee is an air taxi operator that is classified by the Civil Aeronautics Board as a "commuter air carrier." The lessee is an airline under Section 528.10(b)(1)(iii) of the Sales and Use Tax Regulations. Therefore, the lease of the aircraft by the lessee qualifies as the lease of commercial aircraft under Section 1115(a)(21) of the Tax Law. (It should be noted that the exemption for commercial aircraft is not limited to aircraft owned or purchased by commercial airlines. See Matter of Aero Instruments & Avionics, Inc., Dec Tax App Trib, October 5, 1995, TSB-D-95(43)S.) Lease payments for the aircraft qualify for the exemption from sales tax provided under Section 1115(a)(21) of the Tax Law.

Receipts from the sale of 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, as well as maintenance and repair services performed on this aircraft, machinery and equipment and property, qualify for the exemption from sales tax provided under Sections 1115(a)(21) and 1105(c)(3)(v) of the Tax Law.

Petitioner must pay tax on its purchases of fuel for the aircraft. Although some of the fuel is deemed to be resold to the lessee pursuant to the lease agreement, the exclusion from sales tax for purchases for resale does not apply to purchases of motor fuel or diesel motor fuel. See Matter of Kathleen Goode, C.P.A., P.C., Adv Op Comm of T & F, November 2, 1992, TSB-A-92(75)S and Section 1101(b)(4)(ii) of the Tax Law. Petitioner may claim a refund or credit of tax paid on the fuel provided to the lessee pursuant to the lease. See Section 1120 of the Tax Law.

DATED: July 23, 1996

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

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