STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AERO INSTRUMENTS & AVIONICS, INC.	:	DECISION DTA No. 811564
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1988 through August 31, 1991.	:	

Petitioner Aero Instruments & Avionics, Inc., 7290 Nash Road, North Tonawanda, New York 14120, filed an exception to the determination of the Administrative Law Judge issued on January 19, 1995. Petitioner appeared by Albrecht, Maguire, Heffern & Gregg, P.C. (Gary J. Gleba, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner's reply brief was received on May 8, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether petitioner's purchase and/or lease of machinery and equipment used to repair and maintain commercial aircraft is exempt from sales and use taxes pursuant to Tax Law § 1115(a)(21).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Aero Instruments & Avionics, Inc. ("Aero"), was engaged in the business of overhauling and repairing primarily commercial aircraft instruments and components during the period September 1, 1988 through August 31, 1991. The parts/instruments were sent to it for repair/testing, and Aero would then return the parts to the customer. Aero did no installation work.

In performing these services, Aero purchases or rents/leases various testing equipment, instruments and other items for use in the maintenance and repair of aircraft.

Aero does not own the aircraft but contracts for its repair and maintenance services primarily with commercial carriers.

The Division of Taxation ("Division") performed a field audit of Aero's books and records during the latter half of 1991 and the first half of 1992. The sales and purchase records were found to be adequate. Sales and asset acquisitions were examined in detail. Purchase records, although adequate, were tested pursuant to a duly executed audit election method agreement.

Aero maintained a sales tax accrual account which revealed that all recorded tax was properly reported. Likewise, Aero maintained a withholding tax accrual account which revealed that all recorded tax was properly reported.

The detailed audit of Aero's sales records indicated additional taxable sales of $2,523.72 and resulted in additional sales tax due of $190.78. This amount is not included in the notices in issue.

The detailed audit of asset acquisitions yielded $405,980.80 in purchases of assets on which $28,418.72 in additional tax was found due.

Finally, the Division performed a one-year test of expense purchases, utilizing the year 1990. The one-year test resulted in tax of $12,836.82. This was divided by the total expenses tested yielding an error rate which was applied to account totals for the entire audit period. Additional tax was determined to be $34,223.50.

Total additional tax determined to be due on audit was $62,833.00 and was assessed by two notices of determination and demands for payment of sales and use taxes due, to wit, notice numbers L-005712238-6 and L-005712239-5, both dated May 28, 1992. Assessment number L-005712239-5 asserted additional tax of $10,602.58, together with penalty and interest. This tax arose from the test period audit of purchases which the Division believed were taxable beyond dispute because they were not related to repair and maintenance of commercial aircraft in any way. The workpapers indicated that the items in this category included those not related to instrument repairs, like manuals, air conditioner filters, building maintenance, gestetner toner, lighting fixtures, painting and patching work, erection system and dust caps, protective caps, shoeboxes and sweater boxes, towels, toilet tissue, kimwipes, printer, portable inkjet and paper, scanner, holiday cards, ribbons, window cleaning, exhaust parts, video card, diskettes, platform scale, hard drive and other miscellaneous computer equipment.

Assessment number L-005712238-6 asserted additional tax of $44,653.29 plus interest which was the sum of tax on purchases/expenses considered to be related to commercial aircraft ($23,620.92) and the tax determined to be due on assets related to commercial aircraft ($21,032.37). Items deemed taxable for the test period analysis included paint brushes, repair of deadweight testers, service bulletins, manuals, calibrated stopwatches, micrometer, level, dial caliper calibrator, torque wrench calibration, kellstrom digital protractor/calibrator, wire wheels, taps and an installation tool, instruction books and equipment rentals.

The latter part of the assessment attributable to tax on assets related to commercial aircraft included items such as testing equipment, digital pressure gauges, manometers, attentuators, oscilloscopes, tektronics accessories, wave analyzers, filters and an altos computer.

Not in issue, but worth noting for the record, was $7,386.35 in additional tax determined to be due on assets not related to commercial aircraft which Aero paid together with the penalty and interest imposed.

Penalties were assessed pursuant to Tax Law § 1145(a)(1)(i) and (vi) on assessment number L-005712239-5. These penalties were assessed on the purchases of items (primarily manuals) which the Division determined were not related to the repair or maintenance of commercial aircraft and therefore the Division believed there to be no reason for Aero's failure to pay the tax.

Aero was the subject of a prior audit by the Division for the period 1974 to 1977, but no audit history now exists which would reveal the details of the audit and no witnesses had personal knowledge of the audit or recalled the specifics of the records kept concerning the audit.

Subsequent to the assessment, Aero requested a conciliation conference which was held on October 29, 1992. A Conciliation Order sustaining the statutory notices was issued on January 8, 1993.

OPINION

We deal only with assessment number L-005712238-6 which asserted tax of $44,653.29 plus interest which was the sum of tax on purchases/expenses considered to be related to commercial aircraft ($23,620.92) and the tax determined to be due on assets related to commercial aircraft ($21,032.37) since that is the only assessment to which petitioner has taken exception (Exception, pp. 1-2).

Tax Law § 1105(c) provides that sales tax shall be imposed on the receipts from every sale of the services of maintaining, servicing or repairing tangible personal property except those 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" (Tax Law § 1105[c][3][v]).

Tax Law § 1115(a) provides for exemption from the sales tax imposed by Tax Law

§ 1105(a) on certain receipts, including:

> "(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" (Tax Law § 1115[a][21]).[1]

The issue is whether this language limits the exemption to equipment purchased only by commercial airlines for repair and maintenance of commercial aircraft, the position argued by the Division, or whether the exemption applies to equipment purchased by others who service equipment on commercial aircraft, the position argued by petitioner.

The Administrative Law Judge determined that the exemption applied to equipment purchased only by commercial airlines. He based his determination on the principle that exemption statutes should be narrowly construed against the taxpayer (citing Matter of Airlift Intl. v. State Tax Comm., 52 AD2d 688, 382 NYS2d 572 and Matter of Moran Towing & Transp. Co. v. New York State Tax Commn., 72 NY2d 166, 531 NYS2d 885); on his finding that the language of the statute was ambiguous with regard to who must purchase the property to be eligible for the exemption thus making it appropriate to refer to the legislative intent to interpret the language of the statute (citing Matter of American Communications Technology v. State of New York Tax Appeals Tribunal, 185 AD2d 79, 592 NYS2d 147, affd 83 NY2d 773, 611 NYS2d 125); and on the policy memorandum (TSB-M-80[4]S) issued by the Division which the Administrative Law Judge interpreted as defining the term commercial aircraft as used in section 1115(a)(21) to refer to commercial aircraft owned by an airline, and that "[p]roperty purchased for the use of such aircraft for maintenance and repair refers to property purchased by an airline for the maintenance and repairs of its aircraft" (Determination, conclusion of law "A").

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[1] The Division has not promulgated regulations implementing section 1115(a)(21). It has issued a policy memorandum which links the construction of the language in section 1115(a)(21) to that in the Division's regulations dealing with commercial aircraft (20 NYCRR 528.9[a][4] and [5]; 20 NYCRR 528.10[b]).

The Administrative Law Judge rejected petitioner's construction of the language stating that:

> "[t]he subsection also provides for three other exemptions which specifically apply only to commercial airlines, i.e., receipts from the purchase of commercial aircraft, machinery or equipment to be installed on commercial aircraft and the purchase of flight simulators. Therefore, petitioner contends that one of four exemptions in subsection (21) should be read more broadly than the other three. This construction does not survive the
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> scrutiny of a literal reading of the statute or a review of the legislative history" (Determination, conclusion of law "A").

The Administrative Law Judge found that:

> "[s]ince the case can be determined from a reading of the statute and the legislative history, the analogies drawn by the parties to the cases of Todd Shipyards Corp. v. State Tax Commn. (52 AD2d 126, 383 NYS2d 93) and Matter of Brewer Dry Dock Company (State Tax Commn., May 6, 1983) need not be addressed, except to note that the decisions in those matters are consistent with the conclusion reached herein" (Determination, conclusion of law "A").

On exception, petitioner argues that the language of the section is not ambiguous but that it specifically and expressly exempts property used by or purchased for the use of commercial aircraft for maintenance and repair. The word "such" refers to commercial aircraft, not to commercial airlines. The statute was specific in exempting:

> "(a) Commercial aircraft primarily engaged in the intrastate and interstate or foreign commerce;
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> "(b) Machinery or equipment to be installed on such aircraft;
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> "(c) Properties used by or purchased for the use of such aircraft for maintenance and repairs; and
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> "(d) Flight simulators purchased by commercial airlines.
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> "The facts establish that Petitioner's purchases in question were 'used' to repair and maintain 'commercial aircraft.' (Conclusion of Law 6.) Nevertheless, the ALJ purports to read §1115(a)(21) as though it only exempted purchases of:
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> property used by a commercial airline or purchased by a commercial airline for the use by a commercial airline for maintenance and

repairs of its commercial aircraft.

> "If the statute actually said the above, the ALJ's decision would be right. However, the statute does not state what the ALJ contends. The ALJ rationalizes his tortured construction of the statute by a misplaced reliance on legislative history" (Petitioner's reply brief, p. 1).

Petitioner asserts that the policy memorandum of the Division imparts a meaning to the exemption which is contrary to the plain meaning of the words.

In its brief on exception, the Division asserts the Administrative Law Judge was correct in his determination. The Division asserts that Matter of Todd Shipyards Corp. v. State Tax Commn. (supra), is dispositive of the issue in this case.

We reverse the determination of the Administrative Law Judge.

First, we address the Division's assertion that Todd Shipyards is dispositive of the issues in this case. We do not agree. At issue in Todd Shipyards was Tax Law § 1115(a)(8) which provides an exemption for:

> "[c]ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship)."

While the pertinent language of this section is identical to that in section 1115(a)(21), the facts in Todd Shipyards distinguish it from this case.

In Todd Shipyards, the taxpayer was a New York corporation engaged in the business of construction conversion and repair of commercial vessels engaged in interstate and foreign commerce both within and without the State. Todd Shipyards had purchased "materials and services including safety equipment, tools, electrical supplies, stationery and similar supplies, all of which were used by [its] employees in working upon vessels owned by third parties or in the maintenance of [Todd Shipyard's] dry docks and shipyard facilities" (Matter of Todd Shipyards Corp. v. State Tax Commn., supra, 383 NYS2d 93, 94). Todd Shipyards contended that:

> "such materials, supplies and services used by it in furtherance of its business were not subject to taxation. After hearing, the [former State Tax Commission] determined that petitioner's purchases did not qualify as exemptions under section 1115 (subd. [a], par. 8) or exclusions under

> section 1105 (subd. [c], par. 3) of the Tax Law" (Matter of Todd Shipyards Corp. v. State Tax Commn., supra, 383 NYS2d 93, 94).

The Court affirmed, holding that:

> "[s]ince petitioner stipulated that none of the materials, supplies and services with respect to which the tax is in dispute were used directly for, nor did they become part of, a commercial vessel being repaired, converted or constructed, the determination under attack must be sustained. . . . Herein, the sections of the Tax Law relied upon by petitioner exempt (property) and except (services) from the subject tax only when such property and services are sold to an individual whose vessel is being repaired, or are physically incorporated as a component of a commercial vessel. To hold otherwise would be tantamount to immunizing all drydocks and shipyards from sales and use taxes in connection with all materials, supplies and services used by them in their business" (Matter of Todd Shipyards Corp. v. State Tax Commn., supra, 383 NYS2d 93, 94, emphasis added).

The critical factual differences are that: 1) in this case, the equipment at issue was used directly for the maintenance of commercial aircraft and 2) the services provided by petitioner were excepted from tax by the Division. By comparison, in Todd Shipyards the stipulated facts were that none of the materials, supplies and services were used directly for maintenance of commercial vessels. Thus, Todd Shipyards is not dispositive of the issue in this case.

Next, we address whether the language of section 1115(a)(21) limits the exemption to property purchased by commercial airlines. We agree with petitioner that it does not contain such limitation.

First, the gist of the Division's argument is that the phrase "purchased by commercial airlines" modifies the entirety of paragraph 21, and does not apply only to the purchase of flight simulators. In a strict grammatical sense, such construction requires a comma after the word simulators. There is no comma. Thus, purchased by commercial airlines refers only to flight simulators and not to other items of equipment in section 1115(a)(21). In stating this conclusion, we are cognizant of the general rule of statutory construction that "punctuation is subordinate to the text, and it is never allowed to control the plain meaning of the act" (McKinney's Con Laws of NY, Book 1, Statutes, § 253). On the other hand, the function of punctuation is "to make the writer's meaning clear." Hence, if such meaning is not clear the marks may be considered, and they frequently form a valuable aid in determining the legislative

intent (McKinney's Consolidated Law of NY, Book 1, Statutes, § 253). Here, the plain meaning of the language does not limit the exemption to purchases by commercial airlines. If the Legislature intended to limit the exemption only to property purchased by commercial airlines, it would have done so as it did for the flight simulators.

Second, we disagree with the Division and the Administrative Law Judge that the legislative history indicates an intent to limit the exemption only to purchases by commercial airlines. The goal was to encourage the retention and expansion of commercial aircraft maintenance jobs in New York. There is nothing to indicate that such goal is limited only to purchases by commercial airlines to the exclusion of others engaged in the services of maintaining commercial aircrafts such as petitioner.

Third, we agree with petitioner that the Administrative Law Judge's reliance on TSB-M-80(4)S is misplaced. That memorandum is entitled "Exemptions for Commercial Aircraft." Its focus is on the definition of commercial aircraft for purposes of the exemption.

It states that:

> "[a]lthough the term 'commercial aircraft' has not been defined in the Tax Law, Sales Tax Regulation 528.10(b) defines an airline to include an air taxi operator, described as follows:
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> > "'. . . classified by the Civil Aeronautics Board as a "commuter air carrier" or who (a) performs at least five scheduled 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.'
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> "Consequently, aircraft <u>used</u> by an 'airline' as defined above would constitute 'commercial aircraft' qualifying for sales tax exemption. <u>In addition</u>, aircraft purchased by air taxi operators and commercial operators of small aircraft holding Air Taxi Certificates issued by the Federal Aviation Agency, <u>although not qualified for 'airline' status, will qualify as commercial aircraft for purposes of sales tax exemption</u>" (TSB-M-80[4]S, emphasis added).

In short, the focus of TSB-M-80(4)S is on defining commercial aircraft for purposes of the exemption and nothing in that definition limits the exemption to aircraft owned or purchased by commercial airlines as argued by the Division and as concluded by the Administrative Law Judge. In fact, as the underscored language indicates, aircraft owned by

operators who are not qualified for airline status will qualify as commercial aircraft for purposes of the exemption.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Aero Instruments & Avionics, Inc. is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Aero Instruments & Avionics, Inc. is granted to the extent that Notice of Determination and Demand for Payment of Sales and Use Taxes Due, L-005712238-6, dated May 28, 1992, is cancelled, but is otherwise denied; and

4. Notice of Determination and Demand for Payment of Sales and Use Taxes Due, L-005712238-6, dated May 28, 1992, is cancelled and Notice of Determination and Demand for Payment of Sales and Use Taxes Due, L-005712239-5, also dated May 28, 1992, is sustained.

DATED: Troy, New York
October 5, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner