STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **BRITISH AIRWAYS, PLC** 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 March 1, 1994 through February 28, 1997.	:	
In the Matter of the Petition of **TERMINAL ONE GROUP ASSOCIATES, LLP** 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 June 1, 1998 through September 30, 1999.	:	DECISION DTA NOS. 818259 and 818429

Petitioner British Airways, PLC, Attn: Maureen Brady, Manager, 75-20 Astoria Boulevard, Jackson Heights, New York 11370, petitioner Terminal One Group Associates, LLP, Terminal One, JFK International Airport, Jamaica, New York 11430 and the Division of Taxation each filed exceptions to the determination of the Administrative Law Judge issued on February 6, 2003. Petitioners appeared by McDermott, Will & Emery (Peter L. Faber, Esq., and Arthur R. Rosen, Esq., of counsel) and by Lynn Edward Kenner, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in support of its exception and in opposition to the exception filed by petitioners. Petitioners filed a brief in opposition to the Division of Taxation's exception and a reply brief. Oral argument, at the request of all parties, was held on December 11, 2003 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners' purchases of heated and chilled water from the Port Authority of New York and New Jersey ("Port Authority") were purchases of refrigeration and steam services which are subject to tax pursuant to Tax Law § 1105(b)(1).

II. Whether petitioners' purchases of heated and chilled water are exempted from sales tax by Tax Law § 1116(a)(1).

III. Whether charges by the Port Authority to petitioners for heated and chilled water were identifiable sales transactions subject to sales tax pursuant to Tax Law § 1105(b)(1) or were part of petitioners' rent and thereby not subject to tax.

FINDINGS OF FACT

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

Petitioner British Airways, PLC ("British Airways") is a corporation organized under the laws of England which was, at all times relevant hereto, engaged in the business of operating an airport terminal at John F. Kennedy International Airport ("JFK") in Queens, New York.

Petitioner Terminal One Group Associates, LLP ("Terminal One") is a limited liability partnership organized under the laws of the State of New York which was, at all times relevant hereto, engaged in the business of operating an airport terminal at JFK in Queens, New York.

The terminals operated by petitioners are leased from the Port Authority. Under the terms of each lease, British Airways and Terminal One are required to purchase hot water and chilled water from the Port Authority to be used in the heating and cooling of the interior space of petitioners' terminals.

Section 18 of the lease agreement between the Port Authority and British Airways[1] is entitled "Additional Rent and Charges" and provides as follows:

> If the Port Authority is required or elects to pay the sum or sums or incurs any obligations or expense by reason of the failure, neglect or refusal of the Lessee to perform or fulfill any one or more of the conditions, covenants or agreements contained in this Agreement or as a result of an act or omission of the Lessee contrary to the said conditions, covenants and agreements, the Lessee agrees to pay the sum or sums so paid or the expense so incurred including all the interest, costs, damages and penalties, and the same may be added to any installment of rent thereafter due hereunder, and each every [sic] part of the same shall be and become additional rent, recoverable by the Port Authority in the same manner and with like remedies as if it were originally a part of the rent as set forth in Section 3.

Section 56(b)(iii) of the lease agreement between the Port Authority and Terminal One[2] provides as follows:

> It is agreed that during or subsequent to the expiration of this Agreement no charge to or payment by the Lessee with respect to hot Water, Chilled Water or Chilled Water distribution gallonage shall be

---

[1]A nearly identical provision is found in section 22 of the lease agreement between the Port Authority and Terminal One.

[2] A nearly identical provision is found in section 52(b)(iii) of Supplement No. 1 (dated May 4, 1993) of the lease agreement between the Port Authority and British Airways.

> included in, affect, or change in any way the calculation and determination of Port Authority costs or charges under any other agreement between the Lessee and the Port Authority at the Airport and any such Port Authority cost or charge shall be calculated and determined as if no charge to or payment by the Lessee with respect to Hot Water or Chilled Water had been incurred.

The Port Authority is a governmental body that is described in section 1116(a)(1) of the Tax Law of the State of New York.

The Port Authority and KIAC Partners ("KIAC"), a New York general partnership, entered into a series of three agreements consisting of an Energy Purchase Agreement, a Construction and Operations Agreement and an Agreement of Lease (each of the agreements was dated April 28, 1993) for the construction, installation and operation of a cogeneration facility at JFK.

The partners of KIAC are Airport Cogen Corp., a Delaware corporation, Aviation Funding Corp., a Delaware corporation and CEA KIA, Inc., a New York corporation. After the execution of the agreements with the Port Authority, KIAC was purchased by Calpine Corp. However, the partnership and the three agreements have never been terminated and are, therefore, still in effect.

The hot water used in the heating systems and the chilled water used in the cooling systems at the terminals operated by petitioners are supplied by KIAC to the Port Authority which, in turn, supplies it to petitioners. The chilled water and the hot water are produced from the waste heat that results when electricity is produced by the KIAC facility. Cogeneration captures the waste heat that results when electricity is produced by gas-fired turbines. That waste heat is used to generate hot water that is used to heat and chilled water that is used to cool the passenger terminals located in the Central Terminal Area at JFK.

Each petitioner can regulate the temperature of the air in its terminal but it cannot regulate the temperature of the hot water and chilled water that it receives from KIAC.

KIAC controls and maintains the pipes from the KIAC plant to and from and including the heat exchangers located in the mechanical equipment rooms in the airport terminals. The hot water is delivered in excess of 240 degrees Fahrenheit and at a pressure of 250 pounds per square inch ("psi"). British Airways and Terminal One control and maintain the hot water distribution and air handling systems on the terminal side of the heat exchangers. KIAC's hot water never gets commingled with the hot water of British Airways or Terminal One. KIAC maintains its portion of the system at no additional charge. Each petitioner maintains the pipes and other equipment in its terminal at its own expense. The Port Authority has no maintenance responsibility.

The heat exchanger is a large insulated box, as big as a large room, with compartments. The KIAC hot water enters the heat exchanger and flows through alternate compartments, flowing out of the heat exchanger after passing through each alternate compartment. The British Airways and Terminal One water, at a lower temperature, flows through a second set of alternate compartments through which the KIAC hot water in the adjacent compartments does not flow. Consequently, some of the heat, i.e., thermal energy from the KIAC hot water, is transferred to the British Airways and Terminal One water. This raises the temperature of the British Airways and Terminal One water. Ultimately, the KIAC water, at a lowered temperature, exits the heat exchangers and is returned to the KIAC facility. The British Airways and Terminal One water circulates around its terminal and returns to the heat exchanger at a lowered temperature.

When cooling of the terminal is required, KIAC delivers chilled water to the mechanical equipment room of the terminal in pipes controlled and maintained by KIAC. That water then flows into pipes controlled and maintained by British Airways or Terminal One for distribution to air handling equipment throughout its terminal. The water, at a raised temperature, is then returned to the mechanical equipment room in pipes controlled and maintained by the lessee (British Airways or Terminal One) for return to the KIAC plant through pipes controlled and maintained by KIAC. KIAC maintains its portion of the system at no additional charge. The terminal operator maintains its equipment at its own expense. On exiting the terminal for return to the KIAC facility, the temperature of the water is thus elevated. The Port Authority has no maintenance responsibility.

The lessee's (British Airways and Terminal One) chilled water and hot water requirements are supplied by the Port Authority. Both the chilled water and hot water charges by the Port Authority to British Airways and Terminal One are based on the thermal energy used as calculated by the increase in temperature and the volume of chilled water used or, alternatively, by the decrease in temperature and the volume of hot water used. The thermal energy used is converted into British Thermal Units ("BTUs"). The charge for this water by the Port Authority is a unit charge, different for hot and chilled water, multiplied by the number of BTUs. The Port Authority also charged British Airways and Terminal One for any loss of system water inside the terminal. Petitioners conceded that the amounts due from petitioners to the Port Authority for the heated and chilled water were separately stated and were based upon separately metered charges (tr., p.15).

British Airways filed a claim for refund of sales tax paid to the Port Authority on its purchases of the heated and chilled water for the period March 1, 1994 through February 28, 1997.[3] The amount of refund sought was $642,589.17, of which approximately $100,265.00 represented tax paid on purchases of heated water and $542,323.00 represented tax paid on chilled water purchases. On February 23, 2000, the Division denied, in full, the claim for refund.

Terminal One filed three claims for refund of sales tax paid to the Port Authority on its purchases of the heated and chilled water for the period June 1, 1998 through September 30, 1999. The first claim sought a refund in the amount of $269,367.76 ($28,014.33 attributable to heated water, $241,353.43 to chilled water), the second claim sought a refund of $77,592.71 (all attributable to tax paid on purchases of chilled water) and the third refund claim was in the amount of $84,852.09 (all attributable to tax paid on purchases of chilled water). By letters dated January 20, 2000, the Division denied, in full, each refund claim.

While the denial letter issued to British Airways indicated that the refund was based on tax paid on HVAC (heating, ventilation and cooling) services "as part of your monthly rental charges," it also indicated that "[r]eview of the books, records and documentation submitted fail to substantiate the basis of the amount of refund claimed."

With respect to the three claims for refund submitted by Terminal One, the Division issued letters denying the claims, each of which contained the following explanation:

> Tax Law section 1105(b) imposes a tax on the receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature. The words 'of whatever nature' indicate that a broad construction is to be given the terms describing the items to be taxed (Regulation section

[3] The claims for refund filed by British Airways and Terminal One are not part of the record herein. Accordingly, the exact date of their filing with the Division cannot be ascertained.

> 527.2(a)(2)). Regulation section 527.2(c) further defines refrigeration to include air conditioning.
>
> Utility charges imposed by a landlord to a tenant to real property, if not based on actual consumption, are considered to be additional rental charges and not subject to tax. For example, if the rental of property includes electricity service in the base rental charge or the building's electricity expenditures are prorated among the tenants based on square footage or some other method not based on actual usage, these charges would be considered additional rent. However, if the electricity is charged to the tenant based upon usage determined by separate meters, the charge is deemed to be a charge for electricity and is taxed.
>
> The charges by the Port Authority of New York and New Jersey to Terminal One Group Association, LLP ("TOGA") are metered charges for electricity measured in BTU's for heating and air conditioning of TOGA's passenger terminal at JFK International Airport. Since the charges are based on actual consumption, your refund application is denied in full.

Jerome Levine is a consulting engineer in the HVAC industry who began working in the industry in the early 1930s. He has been involved in the installation, service and design of heating, cooling and refrigeration systems and worked full-time in the business from 1947 through 1982. In the early 1950s, he founded Jerome G. Levine, Inc., an engineering consulting company whose clients included the Empire State Building, the Met Life Building and the Marriott Marquis hotel in New York City. Mr. Levine, who was qualified at the hearing as an expert witness, has testified in other matters, as an expert, with respect to HVAC systems.

Mr. Levine knows of no individuals or independently owned companies that sell heated or chilled water in New York State. His knowledge is obtained from his many years in the business as well as his attendance at meetings and seminars over the years. Cushman & Wakefield is a company which sells condensed water (an open system which is exposed to the atmosphere) through which premises are cooled through the use of compressors which compress Freon. The Freon leaves the compressor at a highly elevated temperature and is then delivered to a

condenser where the water is used to cool it. The condenser water picks up the BTUs or heat from the Freon and is circulated to a water tower on the roof of the building where it is recooled somewhat by the passage of circulating air and is then recirculated once more down to the condenser. The condenser water ends up evaporating somewhat so additional water must be added.

The chilled water system which is used by British Airways and Terminal One in its terminals at JFK Airport is a "closed system" and since the chilled water is never actually used, it is not necessary to add water.

The heating system utilized at petitioners' terminals begins with KIAC's manufacture of electricity at its cogeneration plant. A by-product of the cogeneration plant is heat which is used to heat the water to a temperature of between 240 and 280 degrees Fahrenheit. The water is delivered in a single loop at a pressure of 250 psi. Because the water is under this pressure, it does not boil despite its temperature. Since the water does not boil, there is no steam produced. In a steam system, the steam is delivered by underground pipes into buildings. It goes through a reducing valve because the pressure of the steam is very high. The steam then goes through radiators and subsequently becomes condensate which is discarded. The condensate is delivered into a sewer and is never returned to the company (Con Edison sells steam in New York City) which produced it. The steam is not returned to the supplier because it would be very difficult to do so, i.e., the condensate is a fluid under no pressure and an additional set of pipes would be needed to return it. The customer of a steam system actually uses the steam which is in the radiators. A larger piping system than the one utilized at JFK is needed; in a steam system, the pipes must be slanted or pitched so that condensate does not build up. In the 1930s, steam

systems were more prevalent; Mr. Levine has not installed a steam system in approximately 45 years. Steam systems are more difficult to install than hot water systems and are difficult to zone within a building. Hot water is more easily zoned, and since there is no condensate, there is no need to pitch or slant pipes.

In the system at issue in the present matter, the water leaves the Port Authority plant, goes underground in piping through all of the terminals and is returned in the same pipe. As it goes through the terminals, the water loses some of its heat so it is returned to the cogeneration plant where it is reheated.

As the water enters the terminals, it goes through a heat exchanger which transfers the heat from the water to the water in the terminal. Each terminal has its own separate loop where water circulates through the terminal by means of terminal-owned pumps and piping through air handlers. In the air handler, there is another heat exchanger. The heated water passes through the heat exchanger and, utilizing filters, delivers air with a fan over the heat exchanger where the air picks up heat. This heated air is then delivered to various spaces throughout the terminal. The water in the pipes from the cogeneration facility never gets into the possession or control of the terminal operator.

For purposes of the cooling system at issue herein, the chilled water is produced by using an absorption chiller (the water is chilled by absorption of a salt product). The end result is water at a temperature of approximately 45 degrees Fahrenheit. The chilled water is circulated underground in separate piping. From this piping, the water enters the terminals and is later returned to the cogeneration plant. The chilled water, upon its entry into the terminal, goes through a heat exchanger, draws air through a filter and fan and exits as chilled air which can be

delivered to individual portions of the terminal. Condensate drips off the coils and is collected in a condensate pan which is delivered to a safe discharge point.

Air conditioning requires filtering and cleaning the air and then moving the air. It involves a heat exchange so the air can be chilled and the humidity removed. If the fans do not operate, there can be no air conditioning; the cold air would simply fall to the floor as it exits the system. While there is always a need to clean the air, it is especially necessary at these airline terminals due to the exhaust from the airplanes.

Refrigeration is primarily used to preserve food and drugs. It aims for temperatures from 20 to 40 degrees Fahrenheit. Unlike an air conditioning system, there are no fans necessary for refrigeration. The refrigeration process is one which operates below the freezing point of water. The medium used has to be at a temperature of approximately 20 degrees below the temperature sought, i.e., if one wants to maintain a refrigeration unit at 40 degrees, the medium must be at a temperature of approximately 20 degrees. Water cannot be used as a medium for refrigeration at 45 degrees or below since to be so utilized, the water would have to be at a temperature of 25 degrees or below and water freezes at 32 degrees.

While ventilation is an important element of air conditioning, it is not so in refrigeration since people do not reside inside the refrigerating unit. There is, therefore, no need to filter the air, add fresh air or remove the humidity from the air. For refrigeration, the air must merely be cooled and contained in a closed environment. De-icing is very important in refrigeration, but not so in air conditioning.

The Division introduced, from Microsoft's Encarta Encyclopedia 2001, a definition of "refrigeration" which was defined as the "process of lowering the temperature and maintaining it

in a given space for the purpose of chilling foods, preserving certain substances, or providing an atmosphere conducive to bodily comfort."

From the same source, the Division introduced a definition of "air conditioning" which provides as follows:

> Theoretically, an air-conditioning system consists of centralized equipment that provides an atmosphere with controlled temperature, humidity, and purity at all times, regardless of weather conditions. In popular usage, however, the term *air conditioning* often is applied improperly to air cooling. Many so-called air-conditioning units consist merely of blower-equipped refrigerating units that provide only a flow of cool, filtered air.
>
> * * *
>
> Air-conditioning units are rated in terms of effective cooling capacity, which properly should be expressed in kilowatt units. Usage still supports the term *ton of refrigeration*, which implies the amount of heat that would have to be absorbed to melt a ton of water-ice in 24 hours . . . .

Morris A. Pierce, PhD, was qualified at the hearing as an expert in HVAC systems and district heating and cooling systems as well as in the history of technology. Dr. Pierce is employed by the University of Rochester (New York) as the university energy manager for the Facilities Department (he is responsible for the heating, cooling and ventilation of a 10 million square foot facility). He also holds a position in the History Department where he teaches the history of technology, American military technology and the history of the City of Rochester. The subject of Dr. Pierce's doctoral thesis was the historical origins of district heating. He worked as a consultant on a district heating and cooling system with the City of Buffalo and on large systems in Rochester, Albany, and Boston, as well as for the State of New York in Albany.

"District heating and cooling" is an application where energy for heating and cooling is provided from a central plant and is then distributed to individual buildings through underground pipes. "Thermal energy" is energy used to add heat or reject heat from a facility or building.

District heating is done either with steam or hot water; district cooling is done with chilled water. Historically, attempts were made to use hot or chilled air, but this did not work well.

In addition to the terminals at JFK Airport, there are a small number of systems in New York State that use hot water and chilled water, to wit: Nassau County, where the county purchases thermal energy from a privately-owned plant and then resells it to a number of consumers; the City of Jamestown; and the City of Buffalo. Dr. Pierce is aware of no other cases in the State where heated or chilled water is offered for sale; there are no nongovernmental entities which sell chilled or heated water in New York State. Dr. Pierce's conclusion is based upon his research in the history and application of district heating and cooling as well as his reading of reports and magazines on the subject. This conclusion is also the result of Dr. Pierce's activities as the historian for the International District Energy Association for which he has written several articles and maintained its web site and archives.

The district heating industry began in New York State in the City of Lockport in 1877. The patents from that original process were purchased by the New York Steam Company which installed the system in New York City. Shortly thereafter, a number of competing systems were established which used hot water. Some of these hot water systems were in Pennsylvania; most were in Ohio, Illinois, Indiana and other midwestern states. No hot water system was installed in New York State until after World War II.

In the early 1900s, there was a trend to regulate utilities at the state level. In New York State, the Public Service Law was adopted in the early 1900s. While steam was subject to regulation, hot water was not since there were no hot water companies.

Dr. Pierce described how hot water is used in a district heating system. The water is heated at a central facility and is distributed through underground pipes to customers' buildings. The customers' systems take the heat out of the water to heat the buildings and then send the water back to the facility to be reheated. In hot water systems, the water can be as hot as 400 degrees although, in most newer systems, the water is heated to between 180 and 200 degrees. Because of the pressure, the water never becomes steam even if heated to a temperature of more than 212 degrees Fahrenheit.

There are numerous differences between steam district heating systems and hot water district heating systems. Hot water systems generally use smaller pipes although two pipes are required since the hot water is returned to the central facility. The pipes in a hot water system do not move as much as in steam systems. Steam systems have extensive expansion joints and safety devices because, as Dr. Pierce described it, "steam is a very nasty gas at high pressures and the pipes move . . . " (Tr., p. 110). At petitioners' terminals, no steam is involved.

In 1983, the Cogeneration Development Corporation petitioned the New York State Public Service Commission ("PSC") for a ruling as to whether the PSC had jurisdiction over a hot water heating system which the corporation proposed to construct in the City of Rochester. The Declaratory Ruling, served on April 22, 1983, stated, in relevant part, as follows:

> The hot water district heating system, as described in the March 17, 1983 petition, does not constitute 'steam plant', within the meaning of § 2(21) of the Public Service Law and the corporation which owns, operates or manages the system is not a 'steam corporation' within the meaning of § 2(22) of Public Service Law.

Inside petitioners' terminals where refrigeration service must be provided for restaurants and other food services, this service is provided using stand-alone compressors. The services

purchased by petitioners from the Port Authority are not used at all in the refrigeration service. If petitioners were purchasing refrigeration, they could supply that refrigeration directly to their subtenants who are operating the food services.

Refrigeration is technically a thermodynamic process to reduce or reject heat through a mechanical process. The range of temperatures which is typically associated with refrigeration, for commercial application, is from 20 degrees below zero up to freezing (32 degrees) or slightly above in the case of storage of milk and other fluids. The medium delivering the thermal energy to cause a reduction in temperature has to be at least 20 degrees less than the desired temperature.

In the present matter, the plant where the water is chilled could be referred to as a refrigeration plant since a refrigerant is often used to produce the chilled water. Chilled water cannot be used for refrigeration because in order to cool to 45 degrees or below, the cooling medium would have to be at 25 degrees or below and chilled water would be frozen at these temperatures. Chilled water can be used for cooling and dehumidification.

Mechanical refrigeration began in the 19th century for industrial and food storage. It was widely used on ships to transport food. As electricity became available, smaller and smaller refrigerating machines were produced. Refrigeration is primarily the production of cold and is generally not concerned with the conditions inside the particular refrigerating unit.

In the early 20th century, there were district refrigeration companies in New York State. There were several such companies in New York City. Some of them used ammonia as a refrigerant while others used very cold brine. In the early 20th century, there were numerous attempts to adapt refrigeration for use in cooling areas to make people more comfortable. They

were generally unsatisfactory because they did not deal with the other factors involved in the air conditioning comfort cooling. In the early 1920s, if a business such as a movie theater was attempting to inform the public that it was cool inside its facility, it would use the word "refrigeration." In the 1920s, with the adoption of electricity, the heating and ventilation industry got involved in comfort cooling and this industry began to make small cooling units that they adapted to the heating and refrigeration units. By the end of the 1920s, the heating and ventilating industry won out over the refrigeration industry for the space cooling market. By the early 1930s, the term "refrigeration" reverted back to the industrial meaning which was simply the process of dealing with colder temperatures such as with food storage and industrial activities.

The term "air conditioning" was first used in a 1906 patent application. The earliest published definition of "air conditioning" occurred in 1908 to describe an air conditioning system in a textile factory and included temperature control (both heating and cooling), humidification, dehumidification and filtering of the air. After the 1930s, the term "refrigeration" was not used for what is presently known as air conditioning.

There are approximately 100 district cooling companies in the United States. There are "only a handful" of district hot water systems in the United States (the largest is in St. Paul, Minnesota) and even fewer in New York State which still has more steam systems (the Con Edison system which began in 1882 is the largest in the world).

In the 1890s and early 1900s, most of the large cities in the United States had at least one district refrigeration system. In New York City, Merchant's Refrigeration Company, which

began operation in 1906 or 1907, is still in business today. It supplies refrigeration service to a number of food storage facilities.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that Tax Law § 1105(b)(1) imposes a sales tax upon the receipts from every sale, other than a sale for resale of "refrigeration and steam . . . refrigeration and steam service of whatever nature." The Administrative Law Judge recited relevant case law and statutory directives concerning the interpretation and construction to be given to statutes which levy a tax.

The Administrative Law Judge pointed out that Tax Law § 1105(b) does not impose a tax upon the sale of hot or chilled water, but rather on refrigeration and steam services. He noted that the Division sought to have the statute construed broadly to include providing chilled water within the definition of refrigeration and to include providing hot water within the scope of steam services.

The Administrative Law Judge reviewed in detail the testimony of petitioners' expert witnesses, each of whom concluded that there are significant differences between the hot and chilled water services sold by the Port Authority to petitioners and refrigeration and steam services.

The Administrative Law Judge observed that the Division relied on a dictionary definition of "refrigeration," contending that because the Port Authority causes water which is chilled by a "refrigeration" unit owned by KIAC to circulate via pipes to petitioners' terminals, this constitutes a sale of a refrigeration service.

The Administrative Law Judge concluded that:

> [w]hen claiming an exemption from tax, it is not necessary for the party claiming such exemption to properly categorize the property or service for which exemption is claimed. It is quite sufficient for the claimant to merely prove that the subject property or service is not an enumerated service under the taxing statute, and these petitioners have sustained that burden of proof. Clearly, had the Legislature intended to impose a tax upon air conditioning services and any products which produce air conditioning, it could have done so, either at the time of the enactment of section 1105(b) or by subsequent amendment thereto. Accordingly, it is hereby determined that the sale of chilled water is not a sale of refrigeration or a refrigeration service and petitioners should not have been required to pay sales tax upon their purchases of the chilled water from the Port Authority (Determination, conclusion of law "C").

With respect to the sale of the hot water service, the Administrative Law Judge determined that despite the Division's claim that hot water and steam are identical with respect to their molecular or chemical composition, to subscribe to the Division's position would be to totally ignore the rules of statutory construction. The Administrative Law Judge held that both of petitioners' expert witnesses have clearly shown that there are marked differences between a steam system and the hot water system at issue herein. The Administrative Law Judge found that there was no vapor utilized in the service provided by the Port Authority to petitioners. While Tax Law § 1105(b) imposes a tax upon the sale of steam and steam service, there is no tax imposed on substances with similar molecular or chemical composition such as water or ice. The Administrative Law Judge determined, therefore, that the sale of the hot water service by the Port Authority to petitioners was not subject to tax.

The Administrative Law Judge rejected the Division's reliance on ***Debevoise & Plimpton v. New York State Dept. of Taxation and Fin.*** (149 Misc 2d 571, 565 NYS2d 973 ***affd*** 183 AD2d 521, 584 NYS2d 298, ***affd*** 30 NY2d 657, 593 NYS2d 974) and concluded that pursuant to that decision, Tax Law § 1105(b) does not impose a tax upon the sale of HVAC services as sales of steam and refrigeration services because the intent of the statute was not to tax the provision

of heat and air conditioning, but to tax the products that are used to produce them. The Administrative Law Judge held that not only are steam and refrigeration not major components of the services purchased by petitioners from the Port Authority, but steam and refrigeration are not components at all.

The Administrative Law Judge noted that Tax Law § 1116(a)(1) provides that a sale is not subject to sales and use tax if it is made by "[t]he state of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions where it is . . . a vendor of services or property of a kind not ordinarily sold by private persons." The Administrative Law Judge considered petitioners' argument that the purpose of imposing tax on sales by governmental entities on property and services ordinarily sold by private persons is to ensure that the governmental entities do not gain an unfair competitive advantage that would harm businesses operating in New York State. Therefore, petitioners maintained that it is irrelevant that there may be private persons selling these hot and chilled water services in states other than New York since such sales would not be causing any disadvantage for New York businesses.

The Administrative Law Judge concluded that the language of the statute does not provide that the exemption applies only if the services or property are of a kind not ordinarily sold by private persons in the State of New York. Rather, the Administrative Law Judge found that because there are other private companies, in other states, which sell similar services, the exemption provided by Tax Law § 1116(a)(1) was inapplicable to petitioners.

The Administrative Law Judge also held that the lease provisions between petitioners and the Port Authority do not treat petitioners' charges for the hot and chilled water services as additional rent. However, even though such services were furnished in an identifiable sales

transaction, the Administrative Law Judge noted that these services are not otherwise taxable as refrigeration or steam services. Accordingly, the Administrative Law Judge found that they were not subject to tax under Tax Law § 1105(b) because they were not enumerated services, e.g., they were not refrigeration or steam services.

ARGUMENTS ON EXCEPTION

On exception, the Division argues that petitioners' purchases of hot and cold water service were purchases of steam and refrigeration services, respectively, and were taxable as a utility service under Tax Law § 1105(b). The Division maintains that the use of the term in that statute "of whatever nature" justifies the broad interpretation given in the Division's regulations (20 NYCRR 527.2[a][2]). The Division asserts that the State sales tax was based on the sales tax enacted by New York City in 1934, which had historically granted a franchise for the provision of steam service and refrigeration service.

The Division believes that the cold water service furnished to petitioners is identical to that found to be a taxable refrigeration service in ***Matter of Merchants Refrig. Co. v. Taylor*** (275 NY 113). The Division maintains that refrigeration is simply the provision of the means to cool air or other substances and, as such, refrigeration is provided by the Port Authority to petitioners. The Division argues that the purpose of the refrigeration, whether to cool perishables or people, as well as the liquid utilized, is not relevant to determining its taxable status.

The Division asserts that the hot water service furnished to petitioners should be considered taxable as a steam service since hot water and steam have an identical molecular and chemical composition.

The Division maintains that the Administrative Law Judge correctly determined that petitioners are not entitled to exemption pursuant to Tax Law § 1116(a)(1). The Division urges that the language of the statute allows for consideration of sales of services in other states for purposes of determining whether services are of a kind "not ordinarily sold by private persons" (Tax Law § 1116[a][1]).

The Division also argues that the charges for hot and cold water services were not additional rent in that the services are metered by the Port Authority and are furnished in an identifiable sales transaction. Further, the Division points out that the leases involved prohibit these charges from being considered additional rent.

On exception, petitioners argue that Tax Law § 1105(b)(1), which imposes a tax on enumerated services, should be interpreted narrowly. Petitioners assert that the Administrative Law Judge correctly determined that the cold water service furnished to petitioners by the Port Authority is exempt from taxation because it is not a refrigeration service and the hot water service is likewise exempt because it is not a steam service. Petitioners reiterate the conclusions of the Administrative Law Judge and also argue that ***Matter of Merchant's Refrig. Co. (supra)*** does not support the Division's position as it did not hold that Merchant's was providing a taxable refrigeration service and, even if it had, the service provided differed from that provided by petitioners herein.

Petitioners argue that the Administrative Law Judge erred in concluding that the exemption provided by Tax Law § 1116(a)(1) does not apply if private companies ordinarily sell services similar to petitioners' purchases of heated and chilled water in states other than New

York. Further, petitioners argue that the payments made for their purchases of heated and chilled water were part of the rent paid for the real property leased from the Port Authority.

OPINION

We agree with the determination of the Administrative Law Judge that petitioners' purchases of heated and chilled water from the Port Authority were not purchases of refrigeration and steam services. As a result, the services are not subject to tax because they are not included among the enumerated taxable services in Tax Law § 1105(b)(1). We find that the Administrative Law Judge completely and adequately addressed this issue and correctly applied the relevant law to the facts of this case. No evidence offered at the hearing and no argument made on exception provides a basis for us to modify the determination in any respect. Thus, we affirm the conclusion of the Administrative Law Judge on this issue for the reasons set forth in his determination.

As a result of our decision, we need not consider the remaining issues raised by petitioners and the Division on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of British Airways, PLC is denied;
2. The exception of Terminal One Group Associates, LLP is denied;
3. The exception of the Division of Taxation is denied;
4. The determination of the Administrative Law Judge is sustained;
5. The petition of British Airways, PLC is granted; and

6. The petition of Terminal One Group Associates, LLP is granted.

DATED: Troy, New York
June 3, 2004

/s/ Donald C. Dewitt
Donald C. DeWitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner