

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RIFTON ENTERPRISES, LLC</b>	:	DECISION
	:	DTA NO. 818419
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, 1997 through August 31, 1997.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 2, 2003 with respect to the petition of Rifton Enterprises, LLC, 10 Hellbrook Lane, Ulster Park, New York 12487. Petitioner appeared by Urbach, Kahn & Werlin Advisors, Inc. (David L. Evans, CPA). The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on November 19, 2003 in Troy, New York.

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

***ISSUE***

Whether a fuel tank purchased by petitioner is exempt from sales and use taxes under Tax Law § 1115(a)(21) as property used by or purchased for the use of commercial aircraft for maintenance and repairs.<sup>1</sup>

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “2,” “5,” “6,” “8,” “9” and “12” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

Rifton Enterprises, LLC d/b/a Rifton Aviation Service (“petitioner”) is a fixed base operator located at the Stewart International Airport (“SIA”) in Newburgh, New York.<sup>2</sup> Petitioner is the sole provider of fuel at SIA and provides fuel and fueling services, primarily to airlines and commercial carriers, at the airport. Emery, Atlantic Southeast Airlines and Com Air are among the airlines and commercial carriers which are serviced by petitioner. Most of petitioner’s customers are airlines and commercial carriers which are engaged in interstate commerce. Petitioner neither owns nor operates any commercial aircraft.

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

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<sup>1</sup> An alternative argument was proffered by petitioner before the Administrative Law Judge, i.e., that a fuel tank purchased by petitioner is exempt from sales and use taxes under Tax Law § 1115(a)(12) as machinery or equipment used or consumed directly and predominantly in the production of tangible personal property for sale by processing. The Administrative Law Judge held that petitioner’s purchases were not exempt from sales and use tax under Tax Law § 1115(a)(12) and petitioner did not take exception to this conclusion.

<sup>2</sup> A “fixed base operator” is defined in Tax Law § 282(17) as meaning “any person, firm, association or corporation, who or which engages in the sale of kero-jet fuel or aviation gasoline, or both, for airplanes from a fixed and permanent place at an airport within the state.”

In 1997, petitioner purchased a 20,000 gallon fuel tank and Dike Jet-A [filtering] System (invoices totaled \$80,868.15). No sales tax was paid on the purchase of this tank. Petitioner reported the purchase of the tank and filtering system as a taxable purchase on its sales and use tax returns for the quarters ended May 31, 1997 and August 31, 1997 and remitted use tax in the amount of \$5,862.94. Subsequently, petitioner filed an application for a refund of this use tax (the application was received on February 18, 2000). The refund claim, citing to Technical Services Bureau Memorandum TSB-M-80(4)S, contended that the purchase of the tank and filtering system was exempt pursuant to Tax Law § 1115(a)(21) as it was used for the fueling of commercial aircraft.<sup>3</sup>

By letter dated April 17, 2000, the Division of Taxation (“Division”) denied petitioner’s refund claim. The letter stated, in pertinent part, as follows:

The exemption for maintenance services to aircraft can be tax exempt as described in TSB-M-80(4)S to which you refer to support your refund claim. However, the exemption applies to commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce. It does not apply to operators providing maintenance services to airlines.

Subsequently, in its petition filed with the Division of Tax Appeals, petitioner, in addition to contending that its purchase of the fuel tank was exempt from tax pursuant to Tax Law § 1115(a)(21), also maintained that, in the alternative, the purchase was exempt pursuant to Tax Law § 1115(a)(12) as equipment for use or consumption directly and predominantly in the processing of tangible personal property.

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

As previously noted, the Division, in its letter which denied petitioner’s claim for refund, stated that the exemption set forth in

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<sup>3</sup>We modified finding of fact “2” to more accurately reflect the record.

Tax Law § 1115(a)(21) applies to commercial aircraft engaged in intrastate, interstate and foreign commerce and does not apply to operators providing maintenance services to airlines. The Division's witness, Frank Susi, testified that after issuing his letter of denial, he had become aware of "other opinions issued" where the Department of Taxation and Finance did not require services to have been provided to a commercial aircraft to be eligible for the exemption (Tr., pp. 12, 22). There is no indication what kind of "opinions" he was referring to, e.g., those of the Technical Services Bureau, Office of Counsel, etc.

In any event, Mr. Susi testified that it remained his interpretation of the statute that petitioner was not entitled to this exemption from tax because the fuel tank is not directly involved with the maintenance of an aircraft.<sup>4</sup>

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

Simon Wipf, who is employed by petitioner as a quality assurance manager, is responsible for receiving and dispensing aviation fuels and for maintaining the records for these operations. Petitioner's aviation fuel storage facility at SIA consists of two 20,000 gallon tanks each with dispensing and receiving equipment. The tanks are fully separated and are readily transportable. The filtering system lies adjacent to the fuel tank and is attached to the tank by pipes. The filtering system filters, circulates and screens the fuel through a specifically designed pump and channel system for contaminants (Exhibit "9," § 1-4, pp. 1-3; Exhibits "12" and "18").<sup>5</sup> Petitioner views this filtering system as an integral part of the tank, since aviation fuel could not be dispensed from it without the filtering system.

Every airline serviced by petitioner refers to Standards for Jet Fuel Quality Control at Airports, Specification 103 ("Spec 103"), as the fuel quality standard which must be utilized by

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<sup>4</sup>We have modified finding of fact "5" to more accurately reflect the testimony of Mr. Susi. The Administrative Law Judge's finding that the witness had become "aware of recent case law which held that one does not need to be a commercial airline" is not an accurate reflection of his testimony.

<sup>5</sup>Mr. Wipf's testimony was that the filter was inside the tank, but that appears contrary to petitioner's exhibits in evidence.

petitioner, and these airlines audit petitioner annually to ensure that the standards set forth in Spec 103 are being met. The contracts between the various airlines and commercial carriers and petitioner specifically state that petitioner shall comply fully with Spec 103 regarding fuel storage and delivery facilities. Section 1-4 of Spec 103 sets forth the requirements which must be met by fuel storage facilities. These requirements contain a list of equipment which must be included on fuel storage tanks. This equipment is part of the fuel tank purchased by petitioner which is at issue in this matter.<sup>6</sup>

Petitioner receives fuel (Exxon brand) from a terminal in Newburgh which is operated by Coastal Fuel. When the fuel tanker arrives at SIA, it must first be checked by security before it is permitted to enter the airport grounds. A fuel tanker may be admitted to the airport only through petitioner; it can never deliver fuel directly to airplanes.

Once the fuel tanker enters petitioner's jet fuel storage facility, there are a number of checks, set forth in Spec 103, which must be performed. Section 1-4 of Spec 103 specifically refers to fuel storage and sets forth guidelines on how petitioner is to receive and distribute fuel. Form 103.02, contained within Spec 103, lists the checks which must be performed. The form requires checking the delivery site and confirming that the tanker is carrying Jet-A fuel and is intended for petitioner at SIA.

Spec 103 then requires that certain tests be performed on the fuel. A sample is taken to verify that the fuel is clean which is done by means of a visual test performed by an employee of petitioner. A gallon of the fuel is drained from the tanker into a white porcelain bucket (this is referred to as a "white bucket test"); a rating is given for both color and water content. An API gravity test is then performed by pouring a specified amount of fuel into a beaker and inserting a

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<sup>6</sup>We modified finding of fact "6" to more accurately reflect the record.

slide instrument to measure the density of the fuel. The density level must measure that which is set forth on the bill of receipt.

Using a hydro kit, a water test is then performed by an employee of petitioner. A hydro kit is a jar with a vial containing a white powder. The vial is filled with fuel and is shaken for three minutes. The white powder will turn pink if the proper water content is present. The vial is kept on premises for each load of fuel received by petitioner. Fuel cannot be dispensed into an airplane if it contains more than 25 parts per million of water.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

If the fuel passes the aforementioned tests, it is then pumped into petitioner's fuel storage tanks. Spec 103 sets forth the size, type of metal and type of internal components necessary for the proper storage of fuel.

Differential pressure is measured to ensure that the filters are operating properly. The fuel is monitored to be sure that the tank will not overflow, that there are no leaks and that the hoses are in working order. When the fuel is emptied, an employee of petitioner must physically verify that the tanker is indeed empty. After the fuel has been received, two additional checks are performed. From the sump located at the bottom of the fuel tank, fuel is withdrawn by an employee of petitioner and checked, by means of a white bucket test, for the presence of water. If there is water in the tank, it will be found on the bottom of the tank. If the fuel does not pass the sump test, i.e., it contains more water or impurities than permissible, the whole system must be put out of service. Pursuant to Spec 103, petitioner is allowed to draw a certain number of additional samples to ascertain if the fuel will pass subsequent tests. Occasionally, the fuel will have to be recirculated numerous times through the filtration equipment to remove the water or impurities and allow the fuel to pass the required tests. At no time during the employ of petitioner's Quality Assurance Manager, Mr. Wipf, who has held the position since November 1997, has petitioner had to reject a load of fuel and send it back to its supplier.

After the load of fuel is filtered into petitioner's tank, Spec 103 requires a minimum settling time to permit water to separate from the fuel and particles time to settle to the bottom of the tank.<sup>7</sup>

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

Fuel from a fuel tanker cannot be dispensed into an airplane without first being filtered and tested per Spec 103. The types of tanks and equipment used by petitioner are what is required by Spec 103. Inside the fuel tank are pipes, chambers and a sump.<sup>8</sup> The pump, filter and filter sump are adjacent to the fuel tank. A "floating suction" which floats at the top of the fuel tank draws fuel from the cleanest part of the fuel load.<sup>9</sup>

Each day, a set of checks is performed by an employee of petitioner to ensure that the fuel quality is maintained. The fuel must be pumped through the pumping system, the system must be pressurized and the filter vessel must be checked. A sump rating determined from the performance of a white bucket test is recorded as is the filter differential pressure.

In addition to the daily checks, certain monthly tests must be performed. They include a more detailed filtration test which is performed on the tank with specialized equipment. Fuel is forced through a membrane, the membrane gets color-coded on a chart and an alphanumeric rating is given. The ground which prevents electric sparks is tested; the static charge is equalized and is given a rating. The dispensing nozzle, called a "single point" is opened and the fine string which is inside the single point is checked and cleaned if necessary. Petitioner's

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<sup>7</sup>We modified finding of fact "8" to more accurately reflect the record.

<sup>8</sup>Petitioner's witness claimed that the filter and pump were inside the tank, while petitioner's exhibits "9", "12" and "18", taken together, show an external filtering system lying adjacent to the fuel tank connected by pipes.

<sup>9</sup>We modified finding of fact "9" to more accurately reflect the record.

fueling facility must be “black carded,” i.e., the emergency shut-off and fire extinguisher must be inspected.

We modify finding of fact “12” of the Administrative Law Judge’s determination to read as follows:

When aviation fuel is delivered to petitioner, it goes through a number of tests. If these tests are met, it is pumped through the Jet-A filtering system into petitioner’s fuel storage tanks. To dispense the fuel into an aircraft, one of petitioner’s trucks goes into the fuel storage facility at which time certain pre-checks are performed on the truck. Once the pre-checks are completed, the fuel is again filtered as it is pumped into the truck to screen any impurities from the fuel. Once inside the tanker truck, the fuel must again sit for a specified time to allow the fuel to settle and to dissipate any electric charges. The fuel is then ready to be loaded into an aircraft by the tanker truck.<sup>10</sup>

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge pointed out that the exemption set forth in Tax Law § 1115(a)(21) is not limited to purchases *by* commercial aircraft, but also applies to property used by or purchased for use in maintenance and repairs of commercial aircraft (*citing, Matter of Aero Instruments & Avionics*, Tax Appeals Tribunal, October 5, 1995). Therefore, even though petitioner neither owns nor operates commercial aircraft, the Administrative Law Judge found that the fuel tank was used primarily in the fueling of commercial aircraft. If, the Administrative Law Judge observed, it is found that the fuel tank was purchased for the use of these commercial airlines and carriers for maintenance and repairs, the exemption set forth in Tax Law § 1115(a)(21) would be applicable.

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<sup>10</sup>We modified finding of fact “12” to more completely reflect the record.



The Division's regulations provide that "[m]aintaining, 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" (20 NYCRR 527.5[a][3]). The Division, citing TSB-M-80(4)S, admitted that items such as parts and accessories, oil, grease, de-icing, aircraft cleaning, engine preheat charges and removal of aircraft lavatory refuse are items used in maintenance and repairs.

The Administrative Law Judge found that to qualify for the exemption, it is not necessary that the fuel or the fuel tank be aircraft equipment; it is sufficient if the tank is "property used by or purchased for the use of such aircraft for maintenance and repairs" (Tax Law § 1115[a][21]).

The Administrative Law Judge rejected as without merit the Division's argument that even if the tank was found to be predominantly used to maintain aircraft, the tank purchase still does not qualify for the exemption, because it must be used *directly* in the maintenance and repair of commercial aircraft. The Administrative Law Judge found that utilization of a fuel truck, by petitioner, to deliver the fuel from the tank to the aircraft does not negate the function of the tank.

The Administrative Law Judge agreed with petitioner's interpretation that fuel is a component part of the aircraft. Further, the Administrative Law Judge found that the fuel which arrives at the airport is in a state which cannot be directly loaded into the aircraft, and it must first be tested and prepared by petitioner, by means of this fuel tank and the equipment contained therein. The fuel tank and related equipment maintain the integrity of the fuel.

The Administrative Law Judge noted that the Division's regulation (*see*, 20 NYCRR 527.5[a][3]) explains the term "maintaining" as referring to activities that relate to "keeping

personal property in a condition of fitness, efficiency, readiness or safety.” Without fuel, the Administrative Law Judge said, an aircraft cannot be in a condition of fitness or readiness. Clearly, the Administrative Law Judge stated, if the tank was used simply to store fuel which was immediately ready to be dispensed into an aircraft, the Division’s position that the tank was not used for maintenance of commercial aircraft would have merit. However, the Administrative Law Judge found that was not the case, since the evidence produced relating to the elaborate filtering, testing and circulating requirements which petitioner must comply with pursuant to Spec 103 indicates that the tank performs the function of keeping the Jet-A fuel in a condition of fitness, efficiency, readiness or safety which fuel, likewise, keeps the commercial aircraft in a similar condition. Therefore, the Administrative Law Judge concluded that the fuel tank and the equipment which is part of the tank qualified for the exemption from tax as provided in Tax Law § 1115(a)(21).

### ***ARGUMENTS ON EXCEPTION***

On exception, the Division continues to assert that fuel is not aircraft equipment and, therefore, the fuel tank is never used to maintain aircraft or aircraft equipment. The Division argues that the fuel tank purchased by petitioner is used in its fuel sale business to store its fuel. Petitioner, the Division urges, does not provide a maintenance and repair service to commercial aircraft when it sells its fuel to the airlines. Moreover, the Division states that even if the tank was found to be predominantly used to maintain aircraft, the tank purchase still does not qualify for the exemption, because it must be used *directly* in the maintenance and repair of commercial aircraft.

In opposition, petitioner urges that we affirm the determination of the Administrative Law Judge.

**OPINION**

In *Matter of Moran Towing and Transp. Co. v. New York State Tax Commn.* (72 NY2d 166, 531 NYS2d 885, 888-889), the Court noted the rules of construction:

that a statute creating a tax exemption must be construed against the taxpayer (*Matter of Alamo Assocs. v. Commissioner of Fin. of City of N.Y.*, 71 NY2d 340, 343, 525 NYS2d 823, 520 NE2d 542; *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 195-196, 371 NYS2d 715, 332 NE2d 886), that the taxpayer must establish that its interpretation of the statute is not only plausible, but also that it is the only reasonable construction (*Matter of Blue Spruce Farms v. New York State Tax Commn.*, 99 AD2d 867, 472 NYS2d 744; *affd for reasons stated below*, 64 NY2d 682, 485 NYS2d 526, 474 NE2d 1194), and that the taxpayer must show that the Tax Commission's interpretation of the exemption's scope is irrational or clearly erroneous (*Matter of Great Lakes Dredge & Dock Co. v. Department of Taxation & Fin.*, 39 NY2d 75, 79, 382 NYS2d 958, 346 NE2d 796, *cert denied*, 429 US 832, 97 S Ct 95, 50 L Ed2d 97, *supra*; *Matter of Young v. Bragalini*, 3 NY2d 602, 605-606, 170 NYS2d 805, 148 NE2d 143, *rearg denied*, 4 NY2d 879, 174 NYS2d 1027, 150 NE2d 704).

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 of this article (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:

[c]ommercial 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]).

We reverse the determination of the Administrative Law Judge.

Machinery or equipment must either be installed on commercial aircraft or property must be “used by or purchased for the use of such aircraft for maintenance and repairs” in order to qualify for exemption pursuant to section 1115(a)(21) of the Tax Law (*Matter of Hudson General Corp.*, Tax Appeals Tribunal, July 3, 2003). In *Hudson General*, we rejected petitioners’ position that the machinery or equipment for which exemption was sought is exempt regardless of the purpose of its use and despite whether such use is for the maintenance and repair of the aircraft.

In that case, we considered whether cargo container loaders were used in maintaining or repairing the aircraft. For the cargo loaders to be exempt, they must have been used to keep commercial aircraft “in a condition of fitness, efficiency, readiness or safety or restoring it to such condition” (20 NYCRR 527.5[a][3]). We found that the cargo container loaders were not engaged in such functions.

In *Hudson General*, the petitioners, like petitioner here, asked us to classify the function of the cargo container loaders based on the nature of what they transported. Air cargo containers, Hudson General argued, were owned by the airline and were employed by the airline, even when empty, to make the operation of the airplane safer and more efficient. We found that the loaders themselves were not used in maintaining or repairing the aircraft any more than is the apparatus that transports the containers to the loaders. Based on the facts in that case, we found

that the operation of the air cargo container loaders, raising air cargo containers from their ground transporters to the door of a commercial aircraft, was not an activity keeping the commercial aircraft in a condition of fitness, efficiency, readiness or safety or restoring it to such condition (*see, Matter of Hudson General Corp., supra*).

The Division claims herein that fuel is not aircraft equipment and, therefore, the fuel tank is never used to maintain aircraft or aircraft equipment. The Administrative Law Judge found that the items cited in the Technical Services Bureau memorandum such as fuel are not aircraft equipment, but are still used to maintain the aircraft or aircraft equipment. While fuel is included as an exempt item under the Technical Services Bureau memorandum, it is not exempt under Tax Law § 1115(a)(21), but under section 1115(a)(9) as fuel sold to an airline for use in its airplanes. The latter exemption does not extend to fuel storage tanks, which is the issue here.

The Administrative Law Judge accepted petitioner's view that fuel is a component part of the aircraft. The Administrative Law Judge found that the fuel tank and related equipment maintain the integrity of the fuel for commercial aircraft. Accepting, *arguendo*, that that is true, it does not change the fact that what is being maintained by the tank and filtering system is aviation fuel. The tank and filtering system are not components of an aircraft nor is aviation fuel.

Petitioner's evidence has established that its filtering system is an integral part of the fuel storage tank. Petitioner's evidence supports the conclusion that the fuel is filtered when being pumped into its tank by its supplier, Coastal Fuel, while it is being maintained in the tank, and when it is pumped from the tank into the tanker truck for ultimate sale/delivery to the aircraft. Clearly, the filtering system, whether it is inside the tank or adjacent to the tank, is essential to

maintaining the fuel in a condition of readiness for sale/delivery to petitioner's customers. The Administrative Law Judge's finding that the fuel tank is used primarily in the fueling of commercial aircraft is not supported by the record. The record shows that the fuel tank and filtering system are used primarily in the storage and maintenance of aviation fuel. However, maintaining the fuel in serviceable condition so that it can be provided to commercial airlines is not analogous to maintaining an aircraft in serviceable condition through maintenance and repair. What is being serviced and maintained by the tank and filtering system is aviation fuel, not aircraft. The fuel storage tank and related equipment are far removed from any involvement with the aircraft. The evidence shows that the fuel is pumped from the tank into a fuel truck (where it must remain until the electric charges contained in the fuel dissipate) prior to its being transported to the aircraft and dispensed.

The Division's regulation (*see*, 20 NYCRR 527.5[a][3]) explains that the term "maintaining" refers to activities that relate to keeping personal property in a condition of fitness, efficiency, readiness or safety. The Administrative Law Judge, while referring to the regulations, lost track of what is being maintained, i.e., the tank and filtering system maintain aviation fuel, not aircraft. The exemption set forth in Tax Law § 1115(a)(21) applies to machinery, equipment or property "used by [commercial aircraft] or purchased for the use of such aircraft for maintenance and repairs . . . ." The evidence does not support the conclusion that petitioner's tank and filtering system were used by or purchased for maintenance and repair of commercial aircraft. We have found that the clause, "purchased for the use of such [commercial aircraft] for maintenance and repairs" could relate to purchases by a company who owns no aircraft itself, but provides maintenance and repair services to commercial carriers (*cf.*,

*Matter of Aero Instruments & Avionics, supra*). In *Aero Instruments*, aircraft components were removed from the aircraft, sent to Aero, repaired and returned for use on the aircraft. In that case, we found that Aero's purchases of machinery and equipment used to repair and maintain commercial aircraft were exempt from sales and use tax under Tax Law § 1115(a)(21). That is not the case here. The fuel is a consumable propellant sold/delivered by a truck to an aircraft. We do not view the sale and delivery of aviation fuel (even fuel that is admittedly filtered and well maintained) in the same way as, for instance, machinery and equipment used to repair instruments that were removed, repaired and returned to the aircraft in *Aero Instruments* as part of that petitioner's repair and maintenance service. The tank and filtering system *maintained the fuel* in a condition of fitness, efficiency, and readiness for use; the tank did not maintain the aircraft in such condition.

Further, petitioner has failed to carry its burden to establish that its interpretation of the statute is the only reasonable construction (*Matter of Blue Spruce Farms v. New York State Tax Commn., supra*) or that the Division's interpretation of the exemption's scope is irrational or clearly erroneous (*Matter of Great Lakes Dredge & Dock Co. v. Department of Taxation & Fin., supra*).

The evidence produced relating to the elaborate filtering, testing and recirculating requirements which petitioner must perform on fuel in its tanks to conform to Spec 103 shows that the tank performs the function of maintaining the Jet-A fuel in a condition of fitness, efficiency, readiness and safety, but it does not change the nature and function of the tank as a storage device. Therefore, we conclude that the fuel tank and the related filter equipment do not qualify for the exemption from tax under Tax Law § 1115(a)(21).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Rifton Enterprises, LLC is denied; and
4. The letter of April 17, 2000 denying petitioner's refund claim is sustained.

DATED: Troy, New York  
May 13, 2004

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

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