STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLIED AVIATION SERVICE CO. OF N.Y., INC.	:	DETERMINATION
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 December 1, 1975 through November 30, 1980.	:	

Petitioner, Allied Aviation Service Co. of N.Y., Inc., 2 Pennsylvania Plaza, New York, New York 10121, filed a petition 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 December 1, 1975 through November 30, 1980 (File No. 800185).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on January 26, 1989 at 2:45 P.M., with all briefs submitted by July 24, 1989. Petitioner appeared by Graubard, Moskovitz, McGoldrick, Dannett & Horowitz (Allen Greenberg, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioner is liable for additional sales tax on sales of cleaning and maintenance services to various airlines during the audit period.

II. Whether petitioner is entitled to a refund of sales taxes paid given payment of use tax by its customers on the same transactions.

FINDINGS OF FACT

Petitioner, Allied Aviation Service Co. of N.Y., Inc. ("Allied"), a subsidiary of Allied Maintenance Corporation, was engaged in the business of providing building cleaning and maintenance services for certain airlines at their terminals at John F. Kennedy International Airport in New York City.

During the period in issue, December 1, 1975 through November 30, 1980, Allied did not charge sales tax on the sales of these services to various airlines under the mistaken belief that such services were exempt from tax pursuant to Tax Law § 1105(c)(5), which excluded from the taxgenerally imposed on maintaining, servicing and repairing real property "interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than 30 days."

The Division of Taxation performed a field audit of Allied for the period December 1,

1975 through November 30, 1980 which determined that said maintenance services were in fact taxable in the following respective amounts:

	Preventive Maintenance Sales	Sales Tax at 8%
Pan American	$20,846,656.57	$1,667,732.40
Trans Mediterranean Airways	$ 331,157.71	$ 26,492.62
Seaboard World Airways	$ 365,649.61	$ 29,251.97
Braniff International Airways	$ 113,644.88	$ 9,091.59
Delta Airlines	$ 225,506.74	$ 18,040.54
Total Disallowed Sales	$21,882,615.51	$1,750,609.26

On June 10, 1981, the Division issued to Allied two notices of determination and demands for payment of sales and use taxes due. The first was for the period December 1, 1975 through May 31, 1979 setting forth total tax due of $1,128,399.50 with interest of $327,354.21 for a total amount due of $1,455,753.71, and the second setting forth tax due of $622,209.76 and interest of $58,753.60 for a total amount due of $680,963.36 for the period June 1, 1979 through November 30, 1980. As set forth above, the aggregated amount due was $1,750,609.26, plus interest.

Allied timely petitioned these two notices, claiming that (1) the preventive maintenance services were not subject to sales tax and (2) that the tax had previously been paid by its customers on the same services.

With regard to the first ground, Allied was bound by two separate decisions of the New York State Supreme Court, Appellate Division. The first case, Matter of Allied New York Services, Inc. v. Tully (83 AD2d 727 [3d Dept 1981]) held that where the parties had not separated out taxable repair services, all nonjanitorial and preventive maintenance was taxable. In the second, Matter of Allied Maintenance Corporation v. New York State Tax Commn. (115 AD2d 143 [3d Dept 1985]) it was held that operating maintenance was taxable when performed by operators who received technical training and performed other than simple repairs. Following this second decision, Allied, by letter dated March 4, 1986, relinquished its first ground for relief.

The second ground asserted in its petition concerned the claim for credit based upon tax paid by its customers on the same services. Specifically, Allied claimed that tax had already been paid on services rendered to Seaboard World Airways and Pan American World Airways who were also audited by the Division of Taxation for many of the same periods within the instant audit period.

By letter dated March 12, 1982, Allied informed the former Tax Appeals Bureau that it was desirous of stopping the further accrual of interest on its assessments and of remitting certain amounts of the sales tax owed for the audit period in issue. However, Allied made it clear that it wished to retain its right to protest and obtain a refund of such taxes if it was ultimately determined that the services upon which the tax was assessed were found nontaxable. The check submitted was payable to the order of "New York State Sales Tax" in the sum of $1,866,491.00. This amount included $1,248,585.00 in tax for the audit period December 1, 1975 through November 30, 1980 and interest calculated to February 25, 1982 of $298,226.00. The check also included a post-assessment period tax of $295,172.00 and interest on that amount calculated to February 25, 1982 in the sum of $24,508.00.

Therefore, the unpaid portion for the audit period remained $502,024.26. Of this amount, Allied disputes $459,361.82 in Pan American sales and $16,169.87 in Seaboard World Airways

sales. Petitioner conceded the remaining $26,492.62 assessed on Trans Mediterranean transactions (see Finding of Fact "6"). The Division conceded at hearing that the tax owed on the transactions with Seaboard had been paid by Seaboard pursuant to a field audit and assessment which included the transactions with Allied. Subsequent to said assessment, Seaboard made full payment, thus extinguishing the tax liability on the transactions with Allied. Therefore, the amount in dispute was diminished by the amount of tax owing on the Seaboard transactions and left only $459,361.82 in issue.

Additionally, both parties agree that a certain amount of tax was due from Allied for a nine-month period, from December 1, 1976 through August 31, 1977 during which period there was no sales tax audit of Pan American. Allied's invoices to Pan American for preventive maintenance services during this period amounted to $2,697,121.74 on which sales tax was calculated to be $215,769.74. Additionally, there was no sales tax audit of Pan American for the last quarter of Allied's audit period, which included the months of September, October and November of 1980. For this period, the tax due on sales of services to Pan American totalled $92,967.30. Therefore, of the $459,361.82 left in dispute, $308,737.04 has been conceded by petitioner to be due and owing, leaving $150,624.78 in dispute.

It should be noted that Allied as part of its prepayment of $1,248,585.00 in 1982, paid the sales tax assessed for transactions with Delta and Braniff in full and part of the tax liability on sales to Seaboard and Pan Am. However, no tax was paid on transactions with Trans Mediterranean and therefore the $26,492.62 assessed on transactions with Trans Mediterranean remains unpaid and outstanding to date.

Pan American World Airways, Inc. was audited for the periods December 1, 1973 through November 30, 1976 and September 1, 1977 through August 31, 1980. During the first audit period it was determined that Pan American owed tax on recurring purchases of $48,786.61 and on the same category for the second audit period of $154,014.56. Presumably, these recurring purchases included the expense purchases of services from Allied.

The Pan American audits included an examination of purchases of services from Allied but said purchases, being voluminous, were not examined in their entirety but were estimated using an agreed upon test period from which error rates were developed and applied to the entire audit period. The ultimate amount of tax found due on said purchases was established after such a test was completed and several conferences held with petitioner.

No evidence was introduced which indicated that tax was paid on specific transactions between Allied and Pan American during the Allied audit period. However, due to the fact that the audit periods were overlapping, the Division at hearing and in its brief suggests that the $150,624.78 disputed amount left in controversy be subtracted from the original assessments issued against Allied. Allied, on the other hand, contends that it should be granted a 100% credit for its sales to Pan American, the adjustments stated above for the periods not covered by the Pan Am audits, because, as a result of the audits of Pan American, all tax due on its expense purchases was paid. At hearing, petitioner's representative made a motion to amend the pleadings to conform to the proof and requested a refund of all such taxes paid by Allied on behalf of the Pan Am transactions.

CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect tax" as "every vendor of tangible personal property or services". Further, every vendor of taxable services is generally required to collect the sales tax due on those services and to remit said sales tax collected when the required returns are filed, pursuant to Tax Law §§ 1136 and 1137. Since it was conceded

that the services petitioner provided to Pan American World Airways and Seaboard World Airways, among others, were taxable within the meaning and intent of 1105(c)(5) of the Tax Law, Allied was required to collect and remit sales tax on these services within the meaning and intent of Tax Law §§ 1133, 1136 and 1137.

Petitioner has not established that either it or its customers have paid these taxes. Since the burden of proof is upon the petitioner to establish that the assessments were erroneous or improper, it has failed to carry its burden (Tax Law § 1138[a]; Finserv Computer Corp. v. Tully, 94 AD2d 197, affd 61 NY2d 947). [1]

Therefore, it is found that petitioner is liable for the full amount of the tax stated on the notices issued to it on June 10, 1981 in the sum of $1,750,609.26 plus interest, with the sole reductions being the prepayment, the $16,169.87 in tax paid by Seaboard World Airways and the $150,624.78[2] conceded by the Division of Taxation at hearing as tax

paid by Pan American World Airways on its purchases from Allied.

B. Since the notices of determination are sustained by this determination the issue with regard to petitioner's claim for refund is rendered moot.

C. The petition of Allied Aviation Service Co. of N.Y., Inc., is denied and the notices of determination and demands for payment of sales and use taxes due issued on June 10, 1981 are sustained except as modified in Conclusion of Law "A" above, together with such additional interest as may be lawfully owing.

DATED: Troy, New York
February 8, 1990

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

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[1]It is noteworthy that Allied seeks credit for tax paid by Pan American far in excess of the recurring expenses assessed on Pan American's audits. (See Finding of Fact "7" above.)

[2]The Division incorrectly calculated the amount of tax paid by Pan American to be $145,823.97. The error was made in its calculation of the final quarter ended November 30, 1980 in which it included sales not only to Pan American but also to Trans Mediterranean, Seaboard, Braniff and Delta. When those airlines, other than Pan American, are subtracted from the quarterly sales figures, the proper sales tax paid on behalf of Pan American of $150,624.78 is determined.