STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSS LIPMAN	:	DETERMINATION DTA NO. 816710
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 Ended December 18, 1994.	:	

Petitioner, Ross Lipman, 31 Jane Street, Apt. 3-B, New York, New York 10014-1925, 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 ended December 18, 1994.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 11, 1999 at 10:30 A.M., with all briefs to be submitted by September 10, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner's use of an airplane in New York rendered it subject to use tax.

FINDINGS OF FACT

1. On August 6, 1994, petitioner, Ross Lipman, and Steven A. Hammond purchased an airplane, a Cessna 177RG, from The Phillipy Company. At the time of the purchase, petitioner resided in New York City. The purchase occurred in Mississippi at a cost of $52,500.00 and

delivery took place at Teterboro Airport, in Teterboro, New Jersey. The United States registration number of the aircraft was N39PC.

2. The State of Mississippi did not impose sales tax on the conveyance of the aircraft.

3. Following the purchase of the aircraft, petitioner kept it hangared at Teterboro Airport. Petitioner first brought the airplane into New York State on August 7, 1994, when he landed it at the Sullivan County Airport and then returned to the Teterboro Airport on the same day.

4. Between August 7, 1994 and October 4, 1995, petitioner's flight log indicates that he made approximately 116 flights to various destinations around the country. During this period, petitioner's flight log indicates that he made landings in or departures from New York as follows:

DATE	DEPARTURE	DESTINATION
August 7, 1994	Teterboro	Sullivan County Airport
August 7, 1994	Sullivan County Airport	Teterboro
December 18, 1994	Teterboro	Stewart International Airport
December 18, 1994	Stewart International Airport	Sullivan County Airport
December 18, 1994	Sullivan County Airport	Teterboro
December 23, 1994	Teterboro	Rochester
December 23, 1994	Rochester	Teterboro
January 14, 1995	Teterboro	Sullivan County Airport
January 14, 1995	Sullivan County Airport	Teterboro
March 10, 1995	Teterboro	Buffalo
March 10, 1995	Buffalo	Teterboro
April 17, 1995	Teterboro	Utica
April 17, 1995	Utica	Teterboro
April 22, 1995	Teterboro	Rochester
April 22, 1995	Rochester	Teterboro

April 27, 1995	Teterboro	Utica
April 27, 1995	Utica	Teterboro
May 25, 1995	Teterboro	Watertown
May 25, 1995	Watertown	Utica
May 25, 1995	Utica	Teterboro
June 1, 1995	Teterboro	Utica
June 1, 1995	Utica	Teterboro
July 28, 1995	Teterboro	Utica
July 28, 1995	Utica	Teterboro
July 29, 1995	Teterboro	Montauk
July 29, 1995	Montauk	Teterboro

5. The Division of Taxation ("Division") introduced into the record of this matter a second flight log covering the period July 29, 1994 through August 14, 1995. The Division claimed that this was the flight log of Steven A. Hammond, the co-owner of the aircraft. The flight log indicated 136 flights over the period of time covered by the log, with 34 of the flights involving a take-off or landing in New York. Unlike the flight log of petitioner, this second flight log was not signed in the place reserved for the pilot to sign, nor did it contain any other indication that it belonged to Steven A. Hammond.

6. Petitioner never permanently stored or hangared the aircraft in New York.

7. On December 15, 1995, the Division advised petitioner that his use of the airplane in New York caused him to be subject to use tax on the aircraft's purchase price. In reaching this conclusion, the Division reasoned, in pertinent part, as follows:

> New York State has both sales tax and use tax. Sales tax applies to tangible personal property purchased and/or delivered in New York State. (Use tax applies to tangible personal property purchased out of New York State by a New York

> resident and later brought into the state. Although it appears that no sales tax is due, use tax became due upon first entry into New York State).

8. On January 22, 1996, the Division issued a Notice of Determination to petitioner which assessed use tax due for the period ended December 18, 1994. The notice assessed tax of $2,100.00, plus interest. The tax was based upon the cost of the aircraft multiplied by the State use tax rate of 4 percent.

CONCLUSIONS OF LAW

A. Tax Law § 1110 provides for the imposition of the compensating use tax, in pertinent part, as follows:

> Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . (A) of any tangible personal property purchased at retail. . . . For purposes of clause (A) of this section, the tax shall be at the rate of four percent of the consideration given. . . .

The term "use" is defined in Tax Law § 1101(b)(7) as follows:

> Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or retention *for any length of time*, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. (Emphasis added).

B. In order to be subject to the imposition of the use tax, a taxable event must occur within New York State (***see***, ***Matter of Savemart, Inc. v. State Tax Commission***, 105 AD2d 1001, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029, ***lv denied*** 65 NY2d 604, 493 NYS2d 1025; ***Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892). A review of the facts in this matter leads to the conclusion that a taxable event occurred within this State. It is uncontroverted that petitioner had 28 takeoffs and landings in New York State, including a takeoff and landing at Stewart International Airport in Newburgh, New York,

on December 18, 1994. Moreover, the flights were for petitioner's benefit and the aircraft, while being flown by petitioner in New York, was under his exclusive control. Consequently, despite the fact that approximately 75 percent of all takeoffs and landings during the period July 29, 1994 through October 4, 1995 took place outside of New York State and despite the fact that the airplane was hangared in New Jersey, the landing of the aircraft in New York on December 18, 1994 constituted a taxable event in this State (***see***, ***Matter of Atlantic Gulf & Pacific Co. V. Gerosa***, 16 NY2d 1, 261 NYS2d 32, ***appeal dismissed*** 382 US 368, 15 L Ed 2d 426; ***Matter of Savemart, Inc. v. State Tax Commission***, ***supra; Matter of Maplecrest Sausage Co. V. Tully***, 67 AD2d 329, 415 NYS2d 311; ***Matter of Airlift International v. State Tax Commission***, 52 AD2d 688, 382 NYS2d 572).

C. Petitioner's reliance on ***Matter of Xerox Corporation v. State Tax Commn.*** (71 AD2d 177, 422 NYS2d 493) for the proposition that the aircraft is not subject to use tax because the airplane's takeoffs and landings in New York constituted only 25 percent of all its takeoffs and landings and the airplane was hangared in New Jersey, is misplaced. In the ***Xerox Corporation*** case, the court was addressing the situation where the Division was attempting to collect the local Monroe County use tax on a particular aircraft that was not hangared at the county and was only occasionally at the Monroe County Airport. The court stated that:

> unless a vehicle is garaged in a local taxing jurisdiction or principally used in a local taxing jurisdiction, it is not subject to that jurisdiction's sales or use tax. Where a vehicle is used only briefly or occasionally in other local taxing jurisdictions, it is not subject to the sales or use tax in those other jurisdictions. Thus, under the rules of the State Tax Commission, the proper location for imposition of the sales or use tax by a local jurisdiction is the county where the aircraft is garaged. (***Matter of Xerox Corporation v. State Tax Commn.***, ***supra***, 422 NYS2d at 495.)

It is clear that the court in ***Xerox Corporation*** was concerned with the use tax imposed by the local jurisdictions, and not the use tax imposed on a statewide basis by New York. Thus, the decision cannot be considered as precedent in the current matter. Furthermore, numerous cases have permitted states and cities, including New York, to subject certain personal property to use tax despite the short amount of time spent by the property in the taxing jurisdiction.

D. In ***Matter of United Air Lines v. Joseph*** (281 AD 876, 120 NYS2d 532, ***lv denied*** 306 NY 981), the court upheld the imposition of the New York City sales and use tax on airplane parts that were installed in the City on airplanes which spent most of their time in travel outside the City. Similarly, the taxpayer in ***Matter of Airlift Intl. Inc. v. State Tax Commn.*** (52 AD2d 688, 382 NYS2d 572) owned a fleet of airplanes involved in interstate and international commerce. A Boeing 727 owned by the taxpayer was damaged in a landing at Kennedy Airport. The taxpayer flew parts into New York, repaired the airplane and placed it back into interstate and international commerce. The court upheld the imposition of the State use tax on the parts brought into New York to repair the airplane reasoning that a taxable event occurred in New York between the time the material arrived in New York and the time when the material was installed in the aircraft and the aircraft resumed its interstate and international flights. The use tax was imposed even though the court described the time period as "only a very short period of time" within which the taxable event had occurred.

The Supreme Court, in ***Southern Pacific Co. v. Gallagher*** (306 US 167, 83 L Ed 586), upheld the use tax upon railroad equipment and machinery, some of which was installed upon importation, on interstate transportation facilities. The Court stated that "[w]e think there was a taxable moment when [these items] had reached the end of their interstate transportation and had not begun to be consumed in interstate transportation." Although in that case the Court was

interested in the question of a state tax upon the operations of interstate commerce, its decision points up the inconsequence of the shortness of time that a taxed article remains within the state as a factor in determining the tax's validity (***see***, ***Matter of Atlantic Gulf & Pacific Co. v. Gerosa***, ***supra***). In the ***Atlantic Gulf*** case, the property at issue was a dredge purchased by the taxpayer in Maryland and put into use in South Carolina, Florida and Virginia. The taxpayer was engaged in the business of dredging rivers and harbors. Eight years following its purchase, the dredge was brought into New York City for a six-week period to fulfill certain contractual obligations of the taxpayer and then was moved to Connecticut. The court upheld the imposition of the New York City use tax despite the short period of time that the dredge had been in New York City, holding that a taxable event occurred when the dredge came to rest in the City.

E. As these cases illustrate, it is not the amount of time that the property spends in New York that is the controlling factor but whether a taxable event occurs such that the State is free to tax the property involved. In the present matter, that taxable event occurred when the aircraft came to rest in New York State at the Stewart International Airport, allowing the State to subject the aircraft to the imposition of the use tax (***Matter of Pepsico v. Bouchard***, ***supra***; ***Matter of International Telephone & Telegraph Corp.***, 70 AD2d 700, 416 NYS2d 387).

F. The petition of Ross Lipman is denied and the Notice of Determination dated January 22, 1996 is sustained.

DATED: Troy, New York
February 17, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE