STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER PAN BUS LINES, INC.	:	DETERMINATION DTA NOS. 819131 AND 819132
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1995 through 1999.	:	

Petitioner, Peter Pan Bus Lines, Inc., P.O. Box 1776, Springfield, Massachusetts 01102-1776, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1995 through 1999.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on June 18, 2003 at 10:30 A.M., with all briefs to be submitted by October 22, 2003 which date began the six-month period for the issuance of this determination. Petitioner appeared by Nixon Peabody LLP (Kenneth H. Silverberg, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Kathleen D. O'Connell, Esq., of counsel).

ISSUE

Whether certain payments by Peter Pan Bus Lines, Inc. to the Port Authority of New York and New Jersey should be included in the property factor in computing petitioner's New York State business allocation percentage.

FINDINGS OF FACT

1. During the years in issue, petitioner, Peter Pan Bus Lines, Inc. ("Peter Pan"), was a route and charter bus company headquartered in Springfield, Massachusetts. It had operations in Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Washington, D.C. and Maryland.

2. In furtherance of its operations, petitioner entered into an "Agreement between The Port Authority of New York and New Jersey ["Port Authority"] and Peter Pan Bus Lines, Inc. for Space and Services at The Port Authority Bus Terminal, New York, New York" ("License Agreement"). Petitioner also entered into privilege permit agreement No. PBT-163 (the "Privilege Permit") and drivers' room agreement No. BTT-59 ("Driver's Room Agreement") with the Port Authority for certain rights and services at the Port Authority Bus Terminal ("Bus Terminal").

License Agreement

3. The License Agreement was characterized by the parties as a "License Agreement." The License Agreement gave Peter Pan a license to use a fixed number of spaces in a specific area of the terminal in common with other carriers ("berth space"). The location of the space was to be determined by the manager of the bus terminal. Peter Pan, in turn, had specific spaces assigned to it by the Port Authority. The License Agreement further provided that Peter Pan's right to use berth space would be determined through an arrangement for sharing the berth space licensed to Trailways of New England, Inc. subject to the advance approval of the manager. If, in the manager's opinion, a condition existed which might affect the safe or efficient handling of passengers, then the manager was authorized to assign a different berth space elsewhere in the Bus Terminal. In practice, this occurred on special occasions such as New Year's Eve.

4. Petitioner was permitted to maintain a dispatcher at the Bus Terminal during certain hours and subject to certain conditions. It had the right to use the dispatcher's booth for dispatching purposes and to maintain a telephone and other communications equipment in the booth. Petitioner was also provided with the right to use the ticket booth space. Petitioner's buses were allowed to enter the Bus Terminal to load and unload passengers and freight, express mail and newspapers. No buses were allowed to remain in the Bus Terminal for longer than the time reasonably necessary to complete loading and unloading operations. If one of petitioner's buses remained in the Bus Terminal for 20 consecutive minutes, regardless of the status of its loading and unloading activity, petitioner was required to remove the bus from the Terminal within 5 minutes of a request by the Port Authority.

5. The berthing location of petitioner's buses was coordinated by petitioner's dispatcher who was located at the terminal.

6. Petitioner and Greyhound Bus Lines ("Greyhound") entered into a pooling agreement which became effective on January 12, 1999. Greyhound also had a pooling agreement with Adirondack Trailways. Prior to the pooling agreement, petitioner operated from the seven odd numbered gates of 23 through 35 in the south wing of the Terminal. Across the floor, Adirondack Trailways operated from the even numbered gates of 26 through 36 and Greyhound operated from 26 gates in the north wing of the Terminal. As a result of this arrangement, people who were getting off a bus were adjacent to people who were boarding a bus and passengers were forced to squeeze through crowds with their luggage. Additionally, there would be "meeters and greeters" lined up in an area where the bus carriers were trying to board their passengers. After the pooling agreement, the 13 gates in the south wing were designated as arrival gates and the buses departed from the north wing.

7. The License Agreement gave petitioner's employees and passengers the right of ingress and egress through the common areas of the Terminal. They were also permitted to use the public waiting room, public telephones, public trash receptacles and public toilets at the Bus Terminal.

8. The License Agreement contained provisions under which the Port Authority agreed to provide various services for Peter Pan including: (1) luggage checking, storage and transfer services for petitioner's passengers; (2) transfer of mail, express shipments and newspapers to petitioner's buses; and (3) making public address announcements for petitioner's buses. The Port Authority further agreed to keep the Bus Terminal clean and in good operating condition.

9. Petitioner paid fees for the rights and services provided by the Port Authority. The original License Agreement required petitioner to pay a fixed monthly fee for each monthly departure from the Bus Terminal of a bus operated by petitioner or on its behalf. During the periods in issue, under the License Agreement and under the supplemental agreements to the original License Agreement, petitioner paid a monthly fee equal to 13 ½ percent of all tickets sold as well as an annual fee for tickets sold for transportation between Central Manhattan and locations within or beyond a certain zone. Petitioner also paid a gate utilization fee of $2,323.00 per gate. Under the original License Agreement, Peter Pan paid a monthly fee of 15 percent of the amounts paid or payable to Peter Pan in connection with the tickets sold or issued in the Borough of Manhattan during the month for transportation of passengers on buses operated by petitioner commencing or ending in Central Manhattan.

10. Petitioner's payments for baggage handling, storage and transfer of mail, newspaper and express shipments were calculated separately. The License Agreement called for petitioner to pay a sum equal to ten percent of the charges payable to it for excess weight and excess value

of outbound manifest baggage. In addition, it was required to pay an amount equal to the charges made for storage of baggage and express shipments claimed at the Terminal. Petitioner was also obligated to pay an amount equal to 25 percent of the charges payable to it on outbound mail, newspaper and express mail shipments in addition to a sum equal to 50 percent of the C.O.D. service charges payable to it on inbound C.O.D. express shipments.

11. Prior to the pooling agreement Adirondack Trailways sold petitioner's tickets at the Bus Terminal pursuant to a contractual agreement. With the advent of the pooling agreement, Greyhound agreed to sell petitioner's tickets. Thereafter, petitioner was allowed to display a sign with its name above the Greyhound name.

12. Prior to the pooling agreement, petitioner's gates were identified by lighted signs. Following the pooling agreement, the signs above the gates displayed the names of the three bus lines, that is, Greyhound, Peter Pan and Trailways.

13. If, for some reason, the pooling agreement were no longer adhered to by the parties, petitioner would have continued to be entitled to the same seven gates it utilized before entering into the pooling agreement. Petitioner continued paying for the seven gates after entering into the pooling agreement.

14. The License Agreement provided that nothing in the document should be construed to grant Peter Pan any interest or estate in real property.

15. The Port Authority closed the south wing spaces (the spaces used by petitioner and certain other carriers) at the Bus Terminal from 1:00 A.M. to 5:30 A.M. or 6:00 A.M. During these hours, petitioner and the other carriers were required to arrive and leave from the north wing despite the fact that they did not have licensed spaces in this wing.

16. In the period before the pooling agreement, other carriers would park a bus in one of the spaces assigned to petitioner when the driver's spaces were occupied and one of the gates assigned to petitioner was open. If petitioner needed the space, the dispatcher's only recourse was to ask the driver who was taking up the space to move.

17. In order to make accommodations while its escalators were being refurbished, the manager of the Port Authority allowed another carrier, named Bonanza, to use one of the spaces that had been previously assigned to petitioner. Petitioner did not have any choice but to agree with the plan. After a period of some confusion, when petitioner had continued to pay for seven gates, it was reimbursed for the gate that had been reassigned.

18. Petitioner had as many as 12 employees working at the Terminal. There was an assistant regional manager, ten dispatchers and a customer service representative. The assistant regional manager would report to the Port Authority on some days and on other days he would report to petitioner's office in Secaucus. Some of the dispatchers would travel from Secaucus to the Port Authority when the Port Authority was busy. The dispatchers occupied the dispatcher's booth in the north wing lower level.[1] After the pooling agreement was entered into, petitioner's customer service representative would attempt to resolve problems for Greyhound as well as for petitioner. Similarly, the other carriers could attempt to resolve problems for petitioner's customers.

19. The effective date of the License Agreement was extended through December 31, 1996, as amended, modified and supplemented pursuant to supplemental agreement numbers 1 through 11. Thereafter, it was not renewed during the period in issue. However, during the

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[1] Prior to the pooling agreement, petitioner used a small dispatcher's booth which was located near gate 25. After the pooling agreement was entered into, petitioner and Greyhound shared a dispatcher's booth that was originally occupied by Greyhound.

years 1997 through 1999, petitioner and the Port Authority continued to conduct themselves as if the License Agreement remained in effect.[2] The Privilege Agreement was effective from February 9, 1995 through January 31, 2001.

Privilege Permit

20. Petitioner and the Port Authority entered into an agreement known as the Privilege Permit wherein the Port Authority granted petitioner, who was referred to in the agreement as the permittee, permission to install and maintain one neon advertising sign and other advertising media upon the advance approval, in writing, of the Port Authority. The Port Authority retained the right to require petitioner to relocate the neon advertising sign at petitioner's expense upon the request of the Port Authority. Petitioner paid a monthly fee (the "advertising fee") in exchange for the privilege permit.

Driver's Room Agreement

21. The Port Authority and petitioner entered into a lease agreement under which the Port Authority "let" to petitioner a driver's room in connection with petitioner's bus operations elsewhere in the Bus Terminal. Under the Driver's Room Agreement, payments from petitioner for the use of the driver's room were characterized as rent.

Petitioner's Tax Reporting Positions

22. For the years ending December 31, 1995, December 31, 1996 and December 31, 1997, petitioner included eight times the amounts paid to the Port Authority under the License Agreement, the Privilege Permit and the Driver's Room Agreement in its New York State and everywhere property values for purposes of computing the property factor and the business

[2] During the years in issue, petitioner's response to inquiries from its private auditors was that there were no changes to any of its contracts.

allocation percentage. On September 24, 1998, the Commonwealth of Massachusetts Department of Revenue issued a determination letter ("Determination Letter") which stated that the amounts paid to the Port Authority under the License Agreement and the Privilege Permit were not rents, but fees. Therefore, they should not have been included in the property factor of the business allocation percentage.

23. Following a review of the Determination Letter and consultation with other tax practitioners, petitioner decided to adopt the reporting position set forth in the Determination Letter. Accordingly, petitioner filed amended Forms CT-3, General Business Corporation Franchise Tax Return and CT-8, Claim for Credit or Refund of Corporation Tax Paid, for the years ending December 31, 1995 and December 31, 1996 in order to recover the amounts claimed to be overpaid due to its inclusion of certain payments to the Port Authority in its New York State and everywhere property values in computing its business allocation percentage. Petitioner also timely filed an amended corporation franchise tax return for 1997 in which it excluded the payments to the Port Authority in its New York State and everywhere property values in computing its business allocation percentage. On its amended corporation franchise tax return for 1998, petitioner excluded the amounts paid under the agreements with the Port Authority from its New York State and everywhere property values for purposes of computing the property factor and business allocation percentage. Similarly, petitioner excluded the amounts paid under its agreements with the Port Authority on its 1999 corporation franchise tax return in computing the property factor and business allocation percentage. Petitioner's payments under the Driver's Room Agreement were reported as rent.

24. The Division has not issued to petitioner a notice of disallowance in whole or in part of its claims for refund for 1995 and 1996.

The Audit

25. The Division conducted an audit of petitioner's returns for the years 1997 through 1999. At the conclusion of the audit, the Division issued a Consent to Field Audit Adjustment dated April 19, 2002. The consent proposed that additional tax was due in the amount of $134,467.00 plus interest in the amount of $33,285.00 for a total amount due of $167,752.00 for the years 1997 through 1999. Under the category of "Rent Expense at Port Authority," the consent increased the value of petitioner's New York State property and everywhere property values by $20,149,408.00 for 1998 and $19,568,640.00 for 1999. In the process, the Division did not accept petitioner's characterization of the payments to the Port Authority in its 1997 through 1999 corporation franchise tax returns. The amounts concern the same type of payments made by petitioner to the Port Authority for the years 1995 and 1996. The adjustments also modified petitioner's liability for the metropolitan business tax surcharge. However, these adjustments were derived from the proposed increase in corporation franchise tax.

26. On May 10, 2002, petitioner mailed a timely letter to the Division acknowledging receipt of the adjustment and expressing its disagreement with the proposed adjustments. Petitioner explained that it did not intend to sign the proposed adjustments.

27. The Division issued a Notice of Deficiency, dated June 13, 2002, which asserted that additional tax was due in the amount of $134,467.00 plus interest in the amount of $33,782.05 for a balance due of $168,249.05 for the years 1997 through 1999. This proceeding followed.

SUMMARY OF THE PARTIES' POSITIONS

28. Petitioner does not contest the Division's determination that the amounts paid for the years 1995 through 1999 under the Driver's Room Agreement should be treated as rent, and should therefore be multiplied by a factor of eight and included in the New York State and

overall property values for purposes of computing the property factor and the business allocation percentage. However, petitioner argues that the payments made by it to the Port Authority under the License Agreement and the Privilege Permit were not rent within the meaning of Tax Law § 210(3)(a)(1) because the Port Authority "transferred no interest in real or personal property to Petitioner and granted no exclusive rights to the Port Authority Bus Terminal . . . that could give rise to rental payments." It is also submitted that even though the License Agreement was not formally renewed after 1996, no payments, activities, or rights changed since the parties continued to operate under the terms of the License Agreement.

29. The Division, relying upon the definition of rent in Black's Law Dictionary, argues that there is no exclusivity requirement in either the statute or regulations and that the term rent includes any amount for the use or possession of property. The Division further argues that, as the agency charged with enforcement of the statute, its interpretation is entitled to great weight. It is further submitted that the term rent does not necessarily require a lease agreement. According to the Division, even if there were an exclusivity requirement, petitioner's payments would constitute rents. Moreover, the Division submits that petitioner's agreement with the Terminal is a lease within the meaning of Tax Law § 210(3). Lastly, the Division posits that petitioner's failure to offer any credible evidence as to the terms under which it operated after the expiration of the License Agreement warrants drawing an adverse inference against it.

30. In its reply brief, Peter Pan submits, among other things, that the Division's argument ignores New York property law. It is further argued that it submitted credible evidence as to the terms under which it operated at the Terminal after the expiration of the Lease Agreement.

31. At the hearing, the parties stipulated that Peter Pan's allocation to the metropolitan commuter transportation district was 100 percent. It was also stipulated that if the Division

prevailed, the total amount of tax owed would be $130,712.00 for the entire period in issue. If petitioner prevailed, it would be entitled to a refund in the amount of $66,405.00.

CONCLUSIONS OF LAW

A. Section 209(1) of Article 9-A of the Tax Law imposes an annual tax on every domestic or foreign corporation for the privilege of exercising its corporate franchise, or of doing business, or of employing capital or of owning or leasing property in New York State in a corporate or organized capacity or of maintaining an office in New York State (***see also,*** 20 NYCRR 1-1.1). The tax imposed in this case was calculated on the alternative base of entire net income (Tax Law § 210[1]). The starting point for calculating entire net income is the taxpayer's Federal taxable income, with modifications, not at issue here, to Federal taxable income to determine entire net income for Article 9-A purposes. To the extent pertinent here, petitioner's entire net income from doing business in New York and in other jurisdictions was apportioned to New York by multiplying petitioner's business income by a business allocation percentage ("BAP"). The BAP purports to be the proportion of petitioner's payroll, property and receipts attributable to New York compared to petitioner's payroll, property and receipts everywhere (Tax Law § 210[3][a][1]; ***see***, ***Matter of Allied-Signal Inc. v. Tax Appeals Tribunal***, 229 AD2d 759, 645 NYS2d 895).

B. The BAP is determined by "ascertaining the percentage which the average value of the taxpayer's real and tangible personal property, whether owned or *rented* to it, within the state during the period covered by its report bears to the average value of all of the taxpayer's real and tangible personal property, whether owned or rented to it, wherever situated during such period." (Tax Law § 210 [3][a][1]; emphasis added.) This section further provides that in the case of

rented property, the term "value of real property" means "the product of (i) eight and (ii) the gross rents payable for the rental of such property during the taxable year. . . . "

C. Petitioner's argument that the Division's position ignores New York property law has merit. Section 4-3.2(a) of the Commissioner's regulations provides that in computing the property factor of the business allocation percentage, real property rented to the taxpayer must be included. Section 4-3.2(b) further provides that the term "gross rents" means "the actual sum of money or other consideration payable directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes . . . [a]ny amount payable for the use or possession of real and tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise." The Regulations at 20 NYCRR 4-3.2(c)(2) explain that the term "gross rents" does not include "amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer." Thus, the concept of exclusivity has been incorporated into the Commissioner's regulations in order to determine whether a payment falls within the rubric of gross rents. This interpretation of the term "gross rents" is consistent with the statutory scheme. As noted by petitioner's representative, rentals are capitalized in order to prevent a taxpayer from distorting its New York apportionment by making a simple rent versus purchase decision.

D. The concept of exclusivity is critical in determining whether an agreement constitutes a license or lease. The applicable case law was summarized in ***American Jewish Theater v. Roundabout Theater*** (203 AD2d 155, 156, 610 NYS2d 256) as follows:

> What defines the proprietary relationship between the parties is not its characterization or the technical language used in the instrument, but rather the manifest intention of the parties (***City of New York v. Pennsylvania R.R. Co.,*** 37 NY2d 298, 300; ***The Statement v. Pilgrim's Landing,*** 49 AD2d 28; *see,* 1 Rasch, New York Landlord and Tenant § 4.1 [3d ed]). The nature of the transfer

> of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights (***Feder v. Caliguira,*** 8 NY2d 400, 404). Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause (***Hartzler v. Westair, Inc.***, 55 AD2d 905). Where one party's interest in another's real property exists for a fixed term, not revocable at will, and terminable only on notice, a landlord-tenant relationship has been created.

On the basis of the foregoing, petitioner's thesis that the term "gross rents" requires that the payments be made pursuant to a lease is persuasive.[3]

E. Both the language of the agreements and the conduct of the parties establish that it was the intention of the parties that the License Agreement and the Privilege Permit grant petitioner a license or privilege to conduct certain acts at the Bus Terminal and therefore the payments should not be included in gross rent. The License Agreement characterized itself as a "License" and specifically stated that nothing in the agreement was to be construed to grant petitioner any interest or estate in real property. Under the Privilege Permit, petitioner was referred to as the "Permittee." The terms landlord, tenant, lessor, lessee or rent were not used in either agreement and the amounts due under the agreements were characterized as fees or sums.

The conduct of the parties also supports Peter Pan's position. Petitioner did not have exclusive control or possession of any bus spaces, and no interest in real property passed to petitioner. The Port Authority, through its manager, was at liberty to change the gates designated for petitioner's use at any time without petitioner's consent. At times, this authority was exercised. The evidence in the record establishes that after the License Agreement expired

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[3] It is noteworthy that on at least two prior occasions, the Division has looked to whether the designated space was under the exclusive control of the taxpayer in order to determine whether fees paid for space constituted gross rents for allocation purposes (***see, Am Jet Aerospace, Inc.***, Advisory Opinion, TSB-A-98(23)C [November 5, 1998]; ***Richard Berman***, *CPA*, Advisory Opinion, TSB-A-94(6)C [April 7, 1994]).

at the end of 1996, the parties continued to conduct themselves in the same manner as if they remained bound by the terms of the agreement. Clearly, the expiration of the License Agreement would not have conferred greater property rights, such as that which would have existed under a lease, than would have existed prior to the License Agreement's expiration.

F. The petition of Peter Pan Bus Lines, Inc. is granted and the claim for refund is granted to the extent stipulated by the parties (***see***, Finding of Fact "31"). The Notice of Deficiency dated June 13, 2002 is canceled.

DATED: Troy, New York
April 22, 2004

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE