STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN AIRLINES	:	DETERMINATION DTA NO. 819514
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, 1995 through November 30, 1998.	:	

Petitioner, American Airlines, 4333 Amon Carter Boulevard, Fort Worth, Texas 76155-2664, 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, 1995 through November 30, 1998.

On January 10, 2005 and January 12, 2005, respectively, petitioner, appearing by McDermott, Will & Emery (Alysse B. Grossman, Esq., of counsel) and the Division of Taxation by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel) consented to have this controversy determined upon documents and briefs to be submitted by May 27, 2005, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of sales and use taxes paid on its purchases of electricity that was used solely and directly in repairing and maintaining commercial aircraft at maintenance hangers at John F. Kennedy International Airport and LaGuardia Airport in New

York State on the basis that such electricity is "property" as that term is used in Tax Law § 1115(a)(21).

FINDINGS OF FACT

The parties hereto entered into a written stipulation of facts, the contents of which have been substantially incorporated into the following findings of fact.

1. During the period from December 1, 1995 through November 30, 1998 (the "audit period"), American Airlines ("petitioner" or "American") owned commercial aircraft that it used primarily to transport persons or property for hire. The commercial aircraft were all primarily engaged in intrastate, interstate or foreign commerce during the audit period.

2. During the audit period, American leased a passenger terminal from the Port Authority of New York and New Jersey (the "Port Authority") at John F. Kennedy International Airport ("JFK") and also leased a passenger terminal from the Port Authority at LaGuardia Airport ("La Guardia"). Each of these terminals was located in New York State.

3. American performed maintenance and repairs on its commercial aircraft at hangars (the "maintenance hangars") located at JFK and LaGuardia during the audit period. The maintenance hangars were used solely for the repair and maintenance of the commercial aircraft.

4. On November 1, 2000, petitioner filed a request for refund of sales and use taxes in the amount of $1,582,608.40 which it had paid during the audit period.

5. On February 15, 2002, the Division of Taxation ("Division") granted petitioner's request for refund to the extent of $149,617.46 in tax, denied the request to the extent of $1,403,556.00. Additionally, $213,706.86 was allowed but used to offset additional tax determined to be due pursuant to an audit conducted by the Division.

6. Petitioner filed a timely request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services with respect to a denied refund claim in the amount of $1,228,723.80. On April 3, 3003, petitioner withdrew its request for a conciliation conference; the Bureau of Conciliation and Mediation Services acknowledged petitioner's request to withdraw in a letter dated April 9, 2003.

7. On June 9, 2003, petitioner filed a petition for an administrative hearing with the Division of Tax Appeals which protested the denial of its refund claim in the amount of $1,228,723.80. Petitioner's refund claim involved two issues: (1) the taxability of petitioner's purchases of hot and cold water services at JFK for heating and cooling its passenger terminals ("the heating and cooling issue") and (2) the taxability of petitioner's purchases of electricity and natural gas at JFK and LaGuardia for use in the maintenance and repair of petitioner's commercial aircraft (the "maintenance and repair issue").

8. In light of the decision in ***Matter of British Airways*** (Tax Appeals Tribunal, June 3, 2004), the Division agreed to grant petitioner's refund with respect to the heating and cooling issue in the amount of $895,361.00, plus interest, accruing from November 1, 2000.

9. Petitioner withdraws its refund claim to the extent of sales and use taxes totaling $100,931.43, as this tax was paid on nonexempt purchases of electricity and natural gas. Remaining at issue is $232,431.37 ($1,228,723.80 - $895,361.00 - $100,931.43) of petitioner's claim for refund of sales and use taxes which pertains to the maintenance and repair issue. This amount is equal to the sales and use taxes which American paid on its purchases of electricity that was used solely and directly in repairing and maintaining the commercial aircraft at the maintenance hangars ($71,827.44 of this tax was paid on purchases of electricity that was used to repair commercial aircraft at the maintenance hangars at LaGuardia; $160,603.93 of the tax

was paid on purchases of electricity that was used to repair commercial aircraft at the maintenance hangars at JFK).

SUMMARY OF THE PARTIES' POSITIONS

10. The position of petitioner is as follows:

a. The legislative history of the exemption provided for by Tax Law § 1115(a)(21), hereinafter "the Commercial Aircraft Maintenance Exemption," makes it clear that the public policy behind its enactment was to help New York's economy by encouraging airlines to move their maintenance and repair operations to New York State. As such, petitioner asserts that while, admittedly, exemptions are usually strictly construed against the taxpayer, since the exemption was enacted for a public policy purpose, it should be interpreted broadly;

b. The fact that electricity is excluded from the definition of "tangible personal property" for sales and use tax purposes is irrelevant for purposes of determining whether electricity is included in the term "property" for purposes of the Commercial Aircraft Maintenance Exemption. Petitioner contends that if the Legislature had intended to limit the Commercial Aircraft Maintenance Exemption to "tangible personal property," as defined in Tax Law § 1101(b)(6), it would have used the term "tangible personal property" instead of "property" in Tax Law § 1115(a)(21);

c. The use of the term "property" in Tax Law § 1115(a)(8) and (24) which exempt property used by or purchased for the use of commercial vessels or fishing vessels for fuel, provisions, supplies, maintenance and repairs is similar to the term "property" in the Commercial Aircraft Maintenance Exemption and should be construed in the same manner; and

d. The word "property" as used in the Commercial Aircraft Maintenance Exemption must be analyzed according to its ordinary meaning and electricity is property as that term is ordinarily used. While electricity may also be deemed a service, it can also be a property.

11. In response, the Division contends:

a. The electricity at issue does not qualify for the Commercial Aircraft Maintenance Exemption because Tax Law § 1101(b)(6) excludes electricity and certain other energy sources from the definition of property for purposes of sales tax; and

b. While petitioner concedes that statutes creating tax exemptions are to be construed against the taxpayer, its argument that this exemption should involve a lesser standard of review because it was enacted from motives of public policy is without merit because the present matter involves only a specific industry and not the public in general.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from every retail sale of tangible personal property except as otherwise provided in Article 28 of the Tax Law. Except to the extent that property or services have already been or will be subject to sales tax, Tax Law § 1110(a) imposes a use tax for the use within the State of any tangible personal property purchased at retail.

B. Tax Law § 1101(b)(6) defines the term "tangible personal property" to mean "[c]orporeal personal property of any nature." The statute states, however, that "except for purposes of the tax imposed by subdivision (b) of section eleven hundred five (which imposes a tax upon, among other things, gas, electricity, refrigeration, steam service, telephony and telegraphy), such term shall not include gas, electricity, refrigeration and steam."

C. Tax Law § 1115(a)(21) exempts from sales tax the receipts from the sale of "[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."

This exemption was enacted by chapter 773 of the Laws of 1978. The justification for the enactment of this legislation was as follows:

> This bill would keep New York State competitive with the twelve other states which offer programs of tax incentives to airlines for maintenance purposes. Generally, the airlines tend to locate their maintenance facilities in those states which offer such programs. . . . It would, therefore, be desirable to make New York as attractive as those states with incentive programs in order to prevent relocation with the consequent loss of jobs and to encourage the establishment of new facilities within the state. . . . It would also help persuade other businesses and industries that the Legislature here is serious about continuing on a course intended to keep and attract business here. American Airlines, for example, now flies its planes to Tulsa, Oklahoma for service and repair to avoid paying the New York sales taxes. (Mem in Support, Bill Jacket, L 1978, ch 773)

D. "An exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'" (***Matter of Grace v. State Tax Commn.***, 37 NY2d 193, 196, 371 NYS2d 715, 718, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 quoting ***People ex rel. Savings Bank of New London v. Coleman***, 135 NY 231, 234). When the issue to be decided is whether the taxpayer is entitled to an exclusion or an exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn***., ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). The taxpayer's

argument must satisfy the burden of demonstrating clear and unambiguous entitlement to the exemption claimed (***Matter of Marriott Family Rests. v. Tax Appeals Tribunal***, 174 AD2d 805, 570 NYS2d 741, ***lv denied*** 78 NY2d 863, 578 NYS2d 877; ***Matter of W. T. Wang, Inc. v. State Tax Commn.***, 113 AD2d 189, 495 NYS2d 792).

However, as the Tax Appeals Tribunal noted in its citing of ***Matter of Niagara Mohawk Power Corp. v. Wanamaker*** (286 App Div 446, 144 NYS2d 458, ***affd*** 2 NY2d 764, 157 NYS2d 972), the statutory language providing the exemption must be construed in a practical manner (***Matter of Qualex, Inc.***, Tax Appeals Tribunal, February 25, 1995).

E. While petitioner, in its brief, admits that exemptions are usually strictly construed against the taxpayer, it maintains that since the Commercial Aircraft Maintenance Exemption was enacted for public policy purposes, a different standard applies and, accordingly, the provision should be interpreted broadly in favor of the exemption. While petitioner's assertion, in its brief, that a different standard applies is not supported by the cases cited therein, it is true that the courts have held that the legislative intent must be taken into account when construing the intent of statutes (***see***, ***Robert B. Blaikie & Co v. New York,*** 41 Misc 2d 371, 245 NYS2d 121, 125, ***affd*** 14 NY2d 11, 247 NYS2d 865).

As the Tax Appeals Tribunal pointed out in ***Matter of American Communications Technology, Inc.*** (Tax Appeals Tribunal, November 14, 1991):

> In matters of statutory construction generally, legislative intent is 'the great and controlling principle' (***Matter of Sutka v. Conners***, 73 NY2d 395, 541 NYS2d 191, 194, quoting ***People v. Ryan***, 274 NY 149, 152). . . . In interpreting statutes, it is preferable to inquire into the spirit and purpose of the legislation (***Matter of Long v. Adirondack Park Agency***, 76 NY2d 416, 559 NYS2d 941; ***Hudson City Savings Inst. v. Drazen***, 153 AD2d 91, 550 NYS2d 163), which requires examination of the statutory context of the provision as well as its legislative history (***Matter of Sutka v. Conners, supra; see***, ***Ferres v. City of New Rochelle***, 68 NY2d 446, 510 NYS2d 57; ***Matter of Albano v. Kirby***, 36 NY2d 526, 369 NYS2d 655).

F. As noted in Conclusion of Law "C", the legislative intent of the Commercial Aircraft Maintenance Exemption was to keep New York State competitive with other states which offer tax incentives to airlines to locate their maintenance facilities in such states. By granting this exemption from sales tax, it was hoped that new maintenance facilities would be located in the State thereby creating new jobs and that existing facilities would not be relocated, the consequence of which would be loss of jobs in the State. It is noteworthy that the memorandum in support of the legislation which created the Commercial Aircraft Maintenance Exemption made specific mention of this petitioner when it stated that "American Airlines, for example, now flies its planes to Tulsa, Oklahoma for service and repair to avoid paying the New York sales taxes."

It appears, therefore, that the Legislature, in an attempt to improve New York's economy by improving its business climate, sought to achieve this purpose in part by encouraging commercial airlines to locate their maintenance facilities in the State and, as an inducement to do so, enacted an exemption from sales tax for " property used by or purchased for the use of such aircraft for maintenance and repairs." While the exemption may, as the Division contends, be directed at a specific industry, i.e., the commercial airlines industry, it is also clear that the enactment of the exemption had a more general public policy motive which was to improve the business climate in New York by creating new jobs and preventing existing jobs from relocating elsewhere. Since it is apparent that the legislative intent was to provide an exemption from sales tax for petitioner (who was specifically mentioned in the legislative memorandum in support thereof) and other similar commercial airlines which performed maintenance and repairs on their aircraft in the State, what must then be determined is whether electricity purchased by American for use solely and directly in repairing and maintaining commercial aircraft at its maintenance

hangars located in the State constitutes "property" as the term is used in the exemption statute, Tax Law § 1115(a)(21).

G. In ***Matter of Clark*** (Tax Appeals Tribunal, September 14, 1992), the Tribunal stated that "[i]n scientific terms, electrons and electricity are considered to be tangible 'matter.' Therefore, we conclude that, for our purposes, electricity has the tangibility required to be considered a 'good.'"

The Tribunal went on to state:

> There is evidence of a legislative understanding that electricity is tangible personal property in Article 28; for example, the specific exclusion of electricity from the definition of tangible personal property in Tax Law § 1101(b)(6) would not be necessary unless the Legislature believed that electricity ordinarily *does* constitute tangible personal property. (***Matter of Clark, supra***)

If electricity is tangible personal property, it follows then that electricity is property since the terms "tangible" and "personal" are adjectives which merely serve to narrow the definition of "property," a more general and, therefore, a more all-inclusive term than "tangible personal property."

While the Division does point to certain statutes within Article 28 of the Tax Law which reference both "tangible personal property" and "property," a review of those statutes reveals that in each of these statutes (Tax Law § 1115[a][37]; [n][8]; [q], [x][1][1]; [z][1]), the term "property" actually referred to "tangible personal property" since in most cases the statute, after specifically mentioning "tangible personal property" then made a later reference to it by using the term "such property." Nowhere in any of the statutes cited by the Division is there an actual

[1] Reference is made in the Division's brief to Tax Law § 1115(x)(2) as a statute which uses both "tangible personal property" and "property." However, it appears that the Division's reference should have been to Tax Law § 1115(x)(1).

differentiation made between "tangible personal property" and "property." Accordingly, the Division's assertion that the terms "tangible personal property" and "property" are used interchangeably is rejected.

H. In its brief, the Division states because electricity is excluded from the definition of "tangible personal property" by Tax Law § 1101(b)(6), it can only reclaim its status as property if another part of the Tax Law so provides. The Division asserts that had the Legislature intended to include electricity in the Commercial Aircraft Maintenance Exemption, it would have done so expressly as it did in Tax Law § 1115(c)(1) wherein electricity (as well as fuel, gas, refrigeration and steam), when used or consumed directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining or extracting is exempt from sales tax.

Tax Law § 1115(c)(1), as well as certain other statutes in Article 28 of the Tax Law (Tax Law § 1115[b][ii];[c][2]) provide exemptions from sales tax for electricity (as well as fuel, gas, refrigeration and steam) when used in or consumed in a specific manner. Clearly these statutes provide exemptions for these services or items only. The statute which is the subject of the proceeding herein, Tax Law § 1115(a)(21), provides an exemption for "property used by or purchased for the use of such aircraft for maintenance and repairs." Seemingly, it would be impossible to list all of the items which could qualify for the tax exemption if used for maintenance and repairs of aircraft.

In its reply brief, petitioner argues that if the Legislature had intended to limit the Commercial Aircraft Maintenance Exemption to "tangible personal property," as the term is defined in Tax Law § 1101(b)(6), thereby excluding, among other things, electricity used by or purchased for the use of commercial aircraft for maintenance and repairs, it would have used

such term rather than "property" in the statute. Since numerous other statutes in Article 28 of the Tax Law make specific reference to "tangible personal property" rather than "property" as used in Tax Law § 1115(a)(21), petitioner's argument is meritorious.

McKinney's Consolidated Laws of NY, Book 1, Statutes § 92, provides as follows:

> [T]he legislative intent is to be ascertained from the words and language used in the statute, and if language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. What the Legislature intended to be done can only be ascertained from what it has chosen to enact, and it is only when words of the statute are ambiguous or obscure that courts may go outside the statute in an endeavor to ascertain their true meaning.

Inasmuch as the Legislature chose to exempt *property* and not *tangible personal property* "used by or purchased for the use of such aircraft for maintenance and repairs," it must be found that American has sustained its burden of proving that its interpretation of Tax Law § 1115(a)(21) is the only reasonable interpretation thereof and accordingly, has demonstrated a clear and unambiguous entitlement to the exemption set forth therein. The electricity purchased by American that was used solely and directly in repairing and maintaining commercial aircraft at American's maintenance hangars at JFK and LaGuardia airports was exempt from sales tax pursuant to Tax Law § 1115(a)(21) and American is, therefore, entitled to a refund for tax previously paid thereon.

I. The petition of American Airlines is granted, and the Division is directed to refund to petitioner the sum of $232,436.37 plus interest as allowed by statute.

DATED: Troy, New York
November 10, 2005

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE