STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROCHESTER AMPHIBIAN AIRWAYS, INC.	:	DETERMINATION DTA NO. 821342
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 & 29 of the Tax Law for the Period Ended February 21, 2003	:	

Petitioner, Rochester Amphibian Airways, Inc., 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 February 21, 2003.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 130 West Main Street, Rochester, New York, on June 22, 2007, at 9:15 A.M., with all briefs due by October 22, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared by Sherry S. Kraus, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly estimated and asserted sales or use taxes due on petitioner's purchase or use of an aircraft in New York State.

II. Whether the Division of Taxation has the burden of proof on legal issues underlying a notice of determination after the filing of a petition in response to the notice.

III. Whether the Division of Taxation has established that petitioner, a corporate entity, is a "sham" corporation which should be disregarded and its sole shareholder held liable for the sales or use tax due.

IV. Whether the Division of Taxation has established that petitioner should be disregarded as a corporation thereby permitting it to "pierce the corporate veil" and hold petitioner's sole shareholder liable for the sales or use tax due.

V. Whether the Division of Taxation has established that petitioner leased the aircraft to its sole shareholder or entered into a barter or exchange with him for the right to use the plane, thus subjecting it to sales tax liability.

VI. Whether petitioner has demonstrated reasonable cause for the abatement of penalty asserted by the Division of Taxation pursuant to Tax Law § 1145.

FINDINGS OF FACT

1. Rochester Amphibian Airways, Inc. (petitioner) was a Delaware corporation, incorporated on April 16, 2002 for the general purpose of engaging in "any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware." Its sole shareholder, officer and director, Mark Rueckwald, a New York resident who maintained residences in New York and Florida, and a skilled pilot, explained that the corporation was incorporated in Delaware because other corporations he owned were incorporated there also. For tax purposes, petitioner was treated as a Subchapter C corporation under the Internal Revenue Code.

2. Petitioner's registered office in Delaware was located at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, and the registered agent was the Corporation Service Company.

3. Petitioner was formed for the primary purpose of shielding Mr. Rueckwald from liability arising from the ownership and operation of aircraft, an ownership methodology his family had historically utilized.

4. Petitioner was originally formed to purchase and hold ownership in an amphibious World War II vintage aircraft called a Grumman "Widgeon." The aircraft had been owned by Mr. Rueckwald's grandfather, bequeathed to him and his brother and then sold to a third party. Mr. Rueckwald experienced "seller's remorse" and attempted to purchase the aircraft back. However, his attempt was in vain, as were attempts to locate another Widgeon in similar condition throughout the country.

5. The Widgeon, which had been located in New York State when owned by Mr. Rueckwald and his brother, was sold to a New York company owned by a resident of Rochester, New York.

6. When it was not able to purchase another Widgeon, petitioner began a search for another World War II era plane called a P-51 Mustang, a fighter plane which, like the Widgeon, lacked stability in favor of increased maneuverability and required a very skilled pilot.

7. The corporation remained dormant until late 2002, when it purchased a new stunt plane called an "Extra" 300L (Extra), which petitioner's 2002 U.S. Corporation Income Tax Return valued at $304,934.00 and revealed was purchased with a combination of a mortgage, notes and bonds, capital contributions and loans from the shareholder.

8. On April 24, 2003, petitioner purchased a 1944 P-51 Mustang aircraft (Mustang) from two Illinois residents for $1,600,000.00. This aircraft had been carefully restored by its owners consistent with its original design. Petitioner took delivery of the Mustang on April 25, 2003 in

East Troy, Wisconsin, where the plane was flight tested and inspected by Mr. Lee Lauderback, a nationally recognized aviation expert and flight trainer for the P-51 Mustang aircraft.

9. In performing his inspection, Mr. Lauderback noted that the Mustang had been overhauled in August 1998 and had since logged 140.4 hours of flying time. With few minor exceptions, the aircraft was determined to be a "very nice flying aircraft" with exceptional overall appearance. In fact, the aircraft, called "Miss Marilyn II," was later featured on the cover of Warbirds International Magazine, Volume 23, Number 3, May/June 2004.

10. The Mustang was financed in a manner similar to the Extra, including a commercial loan from the Uptown National Bank of Chicago (Bank) in the sum of $1,280,670.00, guaranteed by Mr. Rueckwald, and personal loans from Mr. Rueckwald as well.

11. Although informed by petitioner's attorney that petitioner did no business in the State of New York, the bank demanded, as an additional requirement for granting the loan, that petitioner file an "Application for Authority" in New York State in order that the bank would be able to utilize the courts of the State of New York to enforce its loan agreement with petitioner. Said Application designated the Secretary of State as agent of the corporation for service of process in New York and provided an address to which the Secretary of State would forward such process. The address provided was 1110 Crosspointe Lane, Building A, Suite D, Webster, NY 14580, which was an office address leased by one of Mr. Rueckwald's businesses.

12. As mandated by the Bank, petitioner maintained a policy of insurance on the Mustang in the sum of $1,500,000.00 and liability coverage of $1,000,000.00 for bodily injury and property damage for which petitioner paid an annual premium of $42,094.00.

13. Petitioner registered the Mustang with the Federal Aviation Administration (FAA) and a certificate was issued on June 12, 2003. Under the "Limited Operating Limitations" imposed

by the FAA with respect to petitioner's Mustang, the aircraft could not be used for commercial purposes, such as carrying persons or property for compensation or hire, and violation of said provision could be grounds for severe penalties. Violation could result in revocation of the airworthiness certificate on the aircraft and any person operating the aircraft after such revocation would be subject to sanctions and possible loss of his or her pilot's license.

14. There was no written lease or rental agreement between petitioner and Mr. Rueckwald or any other person or entity for use of the Mustang aircraft, and petitioner has never advertised the Mustang for hire or other commercial use. In fact, there was no market for rental of a plane of this vintage which required a highly skilled pilot, could carry only one aviator and was notably unstable.

15. Petitioner's Mustang aircraft was a "one seater" World War II fighter plane that was very difficult to fly and required special pilot training, making it unsuitable for transporting passengers or use in other commercial or business ventures. Pilots of Mustangs wore parachutes and helmets for safety and received training on specially modified "two seater" aircraft at schools such as "Stallion 51," operated by Lee Lauderback in Kissimmee, Florida, where petitioner's sole shareholder, Mr. Rueckwald, perfected his skills in flying the P-51 Mustang aircraft.

16. During the time petitioner owned the aircraft, between April 24, 2003 and September 2004, only two other pilots besides Mr. Rueckwald flew the Mustang. Mr. Lauderback flew the plane during the inspection and flight test to confirm its condition and airworthiness in April of 2003, and then on a regular basis for maintenance after the aircraft was moved to his facility in Florida in December 2003, for which he was named as an approved pilot on petitioner's insurance confirmation. Antique aircraft such as petitioner's Mustang must be "exercised" or flown regularly to keep them in operational order and avoid metal deterioration, accelerated

aging of hardware and lack of lubrication. Exercising the aircraft entailed bringing all parts and fluids to operating temperatures a "couple" of times a month while flying the plane. Therefore, it was necessary to have a Mustang certified pilot available to perform this maintenance year round.

The only other pilot to fly the plane was John Williams, one of the individuals who sold petitioner the Mustang, who was permitted to fly the aircraft in the Oshkosh Air Show shortly after petitioner purchased the plane.

17. Petitioner never received any fees or compensation for appearances by its Mustang in air shows, since such appearances were for educating the public and preserving the heritage of the last generation of aircraft flown in combat without the benefit of computers, missile systems or other sophisticated artificial intelligence.

18. As mentioned, petitioner moved the Mustang to Stallion 51 in Kissimmee, Florida, in December 2003, where it remained in the care of Mr. Lauderback until its sale in September 2004, although moved to Georgia during a hurricane threat. The annual inspection of the aircraft on May 15, 2004 noted 170.4 hours flown since its restoration. Since the number of hours since restoration was 140.4 when petitioner acquired the plane in April 2003, this meant it had been flown 30 hours during that time. It excludes the flight time expended for exercise flights between May and September 2004. During the 17 months petitioner owned the Mustang, it was in New York State for 5 months. It was also kept in Michigan, Wisconsin, Illinois and Florida.

19. Although Mr. Rueckwald had hoped the value of the Mustang would have appreciated before petitioner sold the aircraft, such that his loans to petitioner would be paid, in fact the Mustang was sold below the price paid to acquire it 17 months earlier.

20. Petitioner's 2003 federal and New York State tax returns reported no income or profits from the use of the Mustang or any other asset, and none of petitioner's returns in evidence,

including the 2002, 2003 and 2004 federal income tax returns or the 2003 and 2004 New York State corporation tax returns indicated that any of petitioner's assets had been depreciated, indicating that said assets were not used in a trade or business.

21. Testimony of Mr. Robert Penta, petitioner's accountant, and the federal and New York State tax returns demonstrated that, in the absence of income or profits, the expenses of the corporation in purchasing and owning the Mustang were paid by institutional loans, shareholder contributions to capital and shareholder loans.

22. Mr. Rueckwald kept a separate record of the corporation's expenses and his payments on petitioner's behalf, but he did not report all his payments to his accountant for inclusion on petitioner's tax returns because no expenses in excess of income could be passed through to his individual return. Consequently, during 2003 and 2004, although Mr. Rueckwald paid the down payment on the aircraft, purchase money debt and other debt financing, bank finance charges, fuel, insurance, inspection and maintenance expenses in the sum of $614,101.24, he did not include all of these payments made on petitioner's behalf as loans from shareholders on the balance sheets of the corporation attached to the federal income tax returns. Specifically, expenses such as those for insurance, fuel, maintenance and inspections were not reflected on the balance sheets attached to petitioner's returns, even though such payments were intended to be shareholder loans. In addition, the corporation maintained a checking account during the period the Mustang was owned by petitioner. The account was maintained at JP Morgan Chase Bank and Mr. Rueckwald was a signatory on the account. The bank account was established by a validly executed corporate resolution.

23. Although Mr. Rueckwald had hoped to recoup his loan payments when the Mustang was sold, he only received $114,000.00 on the sale of both the Extra 300L and the Mustang in 2004. Other than this sum, Mr. Rueckwald never took any money or assets from the corporation.

24. As of the date of the hearing, petitioner remained a corporation in good standing in the State of Delaware, holding no assets, but still able potentially to hold assets, conduct a trade or business or earn income in the future under its broad "purposes" clause.

25. Petitioner's management requirements were straightforward and included maintaining a record of expenses, filing income tax returns and asset maintenance. Petitioner maintained no offices for these functions and found it advantageous and convenient to use various mailing addresses as "mail drops" for tax and other important documents. In fact, petitioner never had office furnishings, fixtures, equipment, supplies or business cards. The choice of "mail drops" was made to assure that important communications would be made in a timely fashion to petitioner's sole officer and to insure prompt compliance with government authorities and financial institutions. At various times, petitioner used the home and business addresses of Mr. Rueckwald and its attorney, John Bulger, Esq. Specifically, petitioner used the address for one of Mr. Rueckwald's companies, Mitchell Technologies, at 1110 Crosspoint Lane, Suite D, Webster, New York.

26. Petitioner never maintained a separate telephone listing for itself, but did on occasion use the telephone number for Mitchell Technologies when a telephone number was required, to ensure that Mr. Rueckwald, its sole officer, would be contacted on its behalf.

27. Petitioner's capital included the two aircraft owned by the company worth in excess of $1,900,000.00 and a contribution to capital of $10,000.00. The Mustang was insured for 1.5 million dollars and carried liability insurance for one million dollars. The record is not clear on

the funds advanced to the corporation by Mr. Rueckwald that were not listed as shareholder loans on its books, other than that Mr. Rueckwald paid all the expenses of the corporation and that such payments were made in anticipation of reimbursement on the sale of the aircraft. As such, they may have been loans or contributions to capital.

28. The Division of Taxation (Division) regularly received information from Aero Fax, a private company which monitors the registration of aircraft with the Federal Aviation Administration (FAA) that lists a location for aircraft within New York State. In this matter, the Division was informed by Aero Fax that the Mustang had been registered with the FAA and listed a New York address. Further, the Division had no record of any payment of sales or use tax by petitioner.

29. The Division sent petitioner a letter, dated October 6, 2004, which sought information on the purchase of the Mustang. Although petitioner admitted the plane had been in New York State, it claimed it was entitled to an exemption from tax as a foreign corporation not conducting a trade or business in New York.

30. The Division issued a Notice of Determination to petitioner pursuant to Tax Law §§ 1133, 1138 and 1145, dated June 3, 2005, which asserted tax due in the sum of $128,000.00, interest of $46,359.94 and penalty of $38,400.00 for a total amount due of $212,759.94. The tax was calculated by applying an 8% tax rate to the purchase price of the Mustang, $1,600,000.00.

31. At no time has the Division asserted fraud or wrongdoing against petitioner or Mr. Rueckwald, other than assessing a penalty for underpayment of tax.

CONCLUSIONS OF LAW

A. Tax Law § 1110 imposes a compensating use tax on every person for the use within the State of any tangible personal property purchased at retail (***see also*** 20 NYCRR 531.1[a]). Tax

Law § 1101(b)(7) defines the term "use" as 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 any keeping or retention for any length of time" (***see also*** 20 NYCRR 526.9).

An exemption for the use of property by a nonresident of the State is provided for by statute, but provides that any person engaged in carrying on any employment, trade, business or profession in New York shall not be deemed a nonresident for purposes of the exemption (Tax Law § 1118[2]; 20 NYCRR 526.15[b][2]).

The undisputed facts of this case demonstrate that the Mustang aircraft was purchased by petitioner from Illinois residents and transfer of the plane occurred in East Troy, Wisconsin. The Mustang was stored in New York State for 5 months of the 17 it was owned by petitioner. Given the statutes and regulations cited above, if petitioner, a foreign corporation , was not carrying on any employment, trade, business or profession in New York, it would qualify for the exemption from use tax provided for in Tax Law § 1118(2).

To determine if petitioner was doing business in New York State, it is necessary to examine the totality of the circumstances surrounding its creation and existence.

B. The Tax Appeals Tribunal defined "doing business" for purposes of the use tax in its decision in ***Matter of Sunshine Developers, Inc.*** (Tax Appeals Tribunal, May 2, 1991), as follows:

> the phrase 'doing business' or 'carrying on a business' refers to carrying on a commercial or mercantile activity engaged in for gain or livelihood [citation omitted]. Applying this test, we hold that the corporation's purchase and ownership of the boats in question did not constitute doing or carrying on a business in New York. It is unchallenged that the corporation performed no other functions but that of buying and holding title to boats operated solely for the pleasure of its officers. Also, the corporation owned no other assets but the vessels at issue and there is no showing that they were leased out to other businesses during the relevant periods. Given these facts, we conclude that there was nothing commercial about petitioners'

> activity. Accordingly, we conclude that the corporation did not engage in doing or carrying on a business in New York.

The Court of Appeals adopted the Tribunal's definition in its decision but refused to pierce the corporate veil and hold the sole director liable for the use tax. (***Morris v. New York State Department of Taxation and Finance***, 82 NY2d 135, 603 NYS2d 807 [1993].)

In the instant matter, the corporation was formed on April 16, 2002 for the general purpose of engaging in "any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware." In fact, the evidence revealed that Mr. Rueckwald formed the corporation to purchase and own an amphibious aircraft, a Widgeon. When this plan failed, petitioner purchased two other planes, the last of which was the P-51 Mustang, purchased in April 2003. The corporation owned and maintained these two aircraft until 2004. Mr. Rueckwald credibly testified that his family had historically formed corporations to purchase and own aircraft in order to achieve a limitation of their personal liability and that this was the reason he formed petitioner. Limitation of liability has been recognized as a "perfectly legal" express purpose to incorporate. (***Morris v. New York State Department of Taxation and Finance***, 603 NYS2d at 810; ***Bartle v. Home Owners Co-Operative, Inc.***, 309 NY 103 [1955].)

The Division contends that petitioner maintained a place of business in New York, thus bringing it within the definition of a "resident" as set forth in the regulations at 20 NYCRR 526.15(b)(1). It notes petitioner's use of the 1110 Crosspointe Lane, Webster, NY, address on the Application for Authority filed with the New York State Secretary of State. However, this form, filed on April 28, 2003, only indicated an address within New York where an office would be established in the future and was specifically filed in order to fulfill a loan commitment requirement of the Uptown National Bank of Chicago to induce it to extend credit to petitioner

on the purchase of the Mustang. It does not establish that petitioner maintains an office or does business in New York.

As noted in the facts, petitioner's management requirements were simple and straightforward, and included maintaining a record of expenses, filing income tax returns and asset maintenance. No offices were maintained for these functions and petitioner found it advantageous and convenient to use various mailing addresses as "mail drops" for tax and other important documents. Petitioner never had office furnishings, fixtures, equipment, supplies or business cards. The choice of "mail drops" was made to assure that important communications would be made in a timely fashion to petitioner's sole officer and to insure prompt compliance with government authorities and financial institutions. At various times, petitioner used the home and business addresses of Mr. Rueckwald and its attorney, John Bulger, Esq. Specifically, petitioner used the address for Mitchell Technologies at 1110 Crosspoint Lane, Suite D, Webster, New York.

Further, petitioner never maintained a published telephone number in its name. Any records maintained by petitioner's accountant for the preparation of tax returns, legal records and records relating to the financing of the aircraft maintained by petitioner's attorney, and any simple accounting programs maintained by Mr. Rueckwald to keep track of his loans to the corporation cannot be said to constitute a specific place of business maintained by petitioner in New York.

The corporation's purpose was to purchase and own the aircraft, which it accomplished with very little administrative resources after purchase, much less the need to establish and maintain a place of business. It did not, as the Division contends, operate a business of collecting appreciating assets which provided a revenue stream. That theory had no basis in the

facts adduced. Mr. Rueckwald credibly testified that he hoped to receive enough money on the sale of the aircraft to pay off the corporation's debts, including the loans he made to it, but that never materialized. It is concluded that the de minimus nature of extending loans to the corporation when necessary over 17 months did not rise to the level of carrying on a trade or business or "maintaining a place of business in the State" which would confer resident status on petitioner. (20 NYCRR 526.15[b][1].)

C. Having established that petitioner was entitled to the use tax exemption set forth in Tax Law § 1118(2), it is necessary to address the Division's contention that the corporate form should be disregarded and Mr. Rueckwald be held liable for the use tax due. This issue was examined in depth by the Court of Appeals in the ***Morris*** case, where it stated:

> The concept of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation [citations omitted]. The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed [citation omitted]. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners . . . .
>
> . . . Generally, however, piercing the corporate veil requires a showing that: 1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and 2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury [citations omitted].

(Morris, at 810; ***see also Millennium Construction, LLC v. Loupolover,*** 44 AD3d 1016, 845 NYS2d 110 [2007].)

The mere fact that Mr. Rueckwald was the sole officer, shareholder and director of petitioner does not, by itself, require that the corporate form be disregarded. While it is conceded that he exercised complete control of the corporation by virtue of the fact that he was the sole

officer, director and shareholder, he certainly was not the cause of any fraudulent act or wrong perpetrated on the Division. It is very compelling that petitioner was formed for the legal purpose of purchasing and owning an aircraft, in this case an amphibian plane called a Widgeon which had belonged to Mr. Rueckwald's grandfather. Petitioner received its name from a play on words associated with the purchase of this specific plane. It was noted that the Widgeon was located in New York and that its purchase would be subject to sales tax, an expense Mr. Rueckwald conceded would have been incurred had he been able to purchase it, regardless of petitioner's status as a nonresident of New York. However, upon the failure to acquire the plane, petitioner became dormant, left only with its name as a reminder of what might have been.

It is also noteworthy that the Division has not raised the argument that petitioner was formed for the purpose of tax avoidance, and in fact, there exists no evidence in the record to support such a contention and the history of the company belies such a claim.

When petitioner later acquired the Mustang, it occurred under different circumstances which entitled it to the use tax exemption set forth in Tax Law § 1118(2). There was no intent to defraud or perpetrate a wrong on the Division; no intent to evade payment of sales or use tax. Therefore, the Division has not established both elements necessary to authorize piercing the corporate veil.

The Court of Appeals in ***Morris*** was clear in its holding that to hold an officer, shareholder or director liable by piercing the corporate veil for a liability the corporation does not owe is inconsistent with the essential theory of the doctrine, reasoning that pursuing an officer or director under the doctrine presupposes that the corporation is liable. Therefore, since petitioner was not liable for the use tax asserted, piercing the corporate veil was not warranted as a theory for pursuing Mr. Rueckwald.

D. The Division's other arguments that seek to disregard the corporate entity are vague, but mention the concepts of sham entity and substance over form. The Division's arguments appear to espouse the belief that if a corporation has but one officer, shareholder and director it must be a mere alter ego of the individual and deserving of no separate identity or limitation of liability, particularly when the corporate form entitles it to a tax exemption. The Division has no legal or factual basis for making such a broad assumption in this matter given the conclusions reached above.

As the Court of Appeals opined in ***Morris***:

> In general, in matters relating to revenue a corporation will be recognized as having a separate taxable identity unless it is shown to have had no legitimate business purpose either in its formation or its subsequent existence or that it was a sham or set up for tax avoidance. [Citations omitted.]

Here, it was concluded that petitioner had a legitimate business purpose in its formation and carried on its business of owning and maintaining aircraft thereafter, and the Division of Taxation has failed to demonstrate that it was set up as a sham or for the purpose of tax avoidance. (***Cf. Dannasch v. Bifulco***, 184 AD2d 415, 585 NYS2d 360 [1992] [where defendant appropriated assets for his own use, drained income from the corporation and conducted business in disregard of corporate formalities].)

The Division's contentions that the corporation should be disregarded because it was thinly capitalized and its financing "bogus" are meritless. For petitioner to be categorized a thinly capitalized corporation it would have to be established in the record that it had an insufficient level of assets in relation to its debts and operational needs for capital. This ratio will differ from corporation to corporation depending on the discreet circumstances specific to the entity itself.

> There are no established rules for determining when a corporation's capital will be deemed inadequate so that the corporate existence may be disregarded. For example, some investors may prefer, for tax reasons, to lend money to their corporation rather than making additional equity purchases. The fact that the loans greatly exceed the investments need not necessarily indicate that the corporation was undercapitalized. (12 Zolman Cavitch, Business Organizations with Tax Planning, § 154.03[2][c] [1997].)

Petitioner's balance sheet for 2004 indicated a stated capital contribution (common stock) of $10,000.00 and shareholder loans valued at over $485,000.00. The loans were made to cover the down payment on the purchase of the Mustang and its initial debt costs and expenses. Additionally, Mr. Rueckwald made continuing payments of petitioner's expenses with respect to its aircraft, although he admittedly never "booked" all his contributions because they were so far in excess of income (none in this case). Petitioner owned two aircraft in its own name, the Extra 300L, valued at $304,934.00, and the P-51 Mustang, valued at $1,600,670.00. The Mustang alone was insured for $1.5 million and carried a liability coverage of one million dollars.

The Division has not disputed these figures and failed to develop its thin capitalization theory in furtherance of its argument to disregard the corporate entity. In fact, given the discussion of capitalization above, the Division's argument fails if the loans are considered either shareholder loans or contributions to capital. In either case, the corporation could have been considered sufficiently capitalized and it is concluded from the totality of the facts that it was.

E. The Division contended that the actual substance of the relationship between Mr. Rueckwald and petitioner was that of lessor/lessee, where Mr. Rueckwald paid the corporation for the use of the aircraft. There is no dispute that an actual lease did not exist. In fact, the record established that to lease the Mustang would have jeopardized petitioner's FAA airworthiness certificate and the license of any pilot who flew the aircraft after such a violation. Further, there was no market for such a rental.

In its answer, the Division argued that a rental agreement need not be in writing or formally declared, saying all that was needed was a transfer of consideration to evidence a sale upon which tax was due. The Division claims that because Mr. Rueckwald had dominion and control over the aircraft, there must have been a transfer of possession for purposes of sales tax. (20 NYCRR 526.7[e][4].)

The facts of this matter do not support the Division's characterization of the shareholder's contributions to capital and loans to the corporation. The Division makes the sweeping and unfounded generalization that the corporation was thinly capitalized and then attributes all the contributions to capital and shareholder loans by Mr. Rueckwald as de facto rental payments for the use of corporate property. Even the case cited by the Division in support of its argument required the assessment of only the reasonable rental value of the use of the property. In that case, the value of the rental was then added to the shareholder's income. (***See Rethorst v. Commissioner*** 33 TCM 1101 [1972] citing ***International Artists, Ltd.***, 55 TC 94.) The Division once again is seeking to ignore the fact that the corporation was created for a legal and valid purpose and chose to embrace that stated purpose in its purchase and owning of aircraft, just as petitioners in the ***Morris*** case had done. Part of owning a vintage World War II fighter plane is keeping it in vintage condition. The corporation had to constantly exercise the plane, insure it and have routine maintenance performed and parts replaced. Therefore, it was imperative to have a constant cash flow.

Its financing strategy, constituted by capital contributions, bank loans and loans from shareholders was also valid, regardless of whether the corporation had 1 or 20 shareholders. It was a sound plan to address the need for funding which did not constitute a rental payment subject to sales tax. It was the shareholder's duty to devise a financing plan, whether by loans or

capital contribution, to enable the corporation to fulfill its purpose. The Division has not demonstrated an identity of the shareholder loans and rental payments other than to say that if money was paid to the corporation it must have been for personal use of the aircraft. This is pure conjecture and not supported by the record. In fact, Mr. Rueckwald did not even fly the Mustang from December 2003 through September 2004 when the plane was in Florida, over half the period petitioner owned the Mustang, yet he continued to make loans or contributions to capital to assist petitioner in maintaining it, without any opportunity to use the asset. Yet the Division made no adjustment for the tax it claims is due on the de facto lease (***cf. Rethorst v. Commissioner of Internal Revenue, supra***), revealing a further weakness in its lease theory and underscoring its recurring failure herein to recognize the separate corporate entity as more than Mr. Rueckwald's alter ego.

F. Petitioner brought a motion prior to hearing objecting to the timing of the Division's alternative theories for its assessment and the subsequent effect on the shifting of the burden of proof. Since all motions, with few exceptions not in issue, are dealt with in the final determination, it will be addressed here. (20 NYCRR 3000.5[f].)

The Tax Law does not have a separate provision for the burden of proof in sales tax administrative proceedings. However, the regulations provide that the burden of proof is upon the petitioner except as otherwise provided by law. (20 NYCRR 3000.15[5].) In addition, the State Administrative Procedure Act (SAPA) provides that the burden of proof shall be on the party who initiated the proceeding (petitioner). (SAPA § 306[1].) In ***Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990, the Tribunal stated in pertinent part:

> While we have recognized that where fundamental considerations of fairness and due process are implicated it is appropriate to shift the burden of proof to the Division [***see, Matter of Ilter Sener***, Tax Appeals Tribunal, May 5, 1988 (placing

> the burden of proof on the Division where the late-payment penalty is asserted for the first time by the Division in its answer as an alternative to the fraud penalty)], we perceive no such concerns present here. Petitioner has not asserted any violation of the principles of fairness or due process and we fail to discern any such violations of sufficient magnitude to warrant shifting the burden to the Division in this matter.

Petitioner herein suffered no violation of its due process rights and was accorded the fundamental considerations of fairness. Prior to hearing each side was aware of the legal theories of its adversary, and the Administrative Law Judge, through prehearing conferences with the parties, was able to discern that neither party would be surprised by additional theories at hearing or be unable to freely offer evidence, either in support of its own position or as a defense to its adversary's position. The proper remedy for surprise or inability to respond in a meaningful manner is not a shifting of the burden of proof, as petitioner urges, but being afforded the additional time necessary to make that response. Since petitioner has never asserted a violation of its due process rights or the principles of fairness, and the Administrative Law Judge observed none, it is determined that none occurred.

G. The petition of Rochester Amphibian Airways, Inc. is granted and the Notice of Determination, dated June 3, 2005, is canceled.

DATED: Troy, New York
April 17, 2008

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