

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
SEABOARD WORLD AIRLINES, INC.	:	DECISION
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 September 1,	:	
1974 through February 28, 1979.	:	

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Petitioner, Seaboard World Airlines, Inc., c/o Flying Tiger Lines, 7401 World Way West, Los Angeles, California 90009, 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 September 1, 1974 through February 28, 1979 (File No. 37361).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 23, 1984 at 10:55 A.M., with all briefs to be submitted by June 29, 1984. Petitioner appeared by White & Case (David Sachs, Esq. and Richard E. Widin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly assessed New York State and City use taxes upon the entire rental amount of short-term leases of aircraft, where the aircraft were used exclusively in interstate or international commerce.

II. Whether the imposition of use tax upon the entire rental amount is unconstitutional on the grounds that such tax: is not fairly apportioned; discriminates against interstate or foreign commerce; is applied to an activity

without a substantial nexus to this state; and is not fairly related to the services provided by this state.

FINDINGS OF FACT

1. On October 1, 1980, petitioner, Seaboard World Airlines, Inc. ("Seaboard"), was acquired by Flying Tiger Lines, by which name Seaboard is now known.

2. On December 14, 1981, the Audit Division issued to Seaboard two notices of determination and demands for payment of sales and use taxes due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1974 through February 28, 1979 in the amount of \$940,724.56, plus interest of \$362,091.43, for a total of \$1,302,815.99. Subsequent to the issuance of the assessments, petitioner conceded liability in the amount of \$475,248.48. At the formal hearing, the Audit Division conceded that the correct tax due for the period September, 1977 through December, 1977 was \$15,726.00, resulting in a reduction to the total assessment in the amount of \$100,643.00; thus, the amount now at issue is \$364,833.00.

3. The relevant facts are not in dispute. During the period in question, Seaboard leased DC 8 and Boeing 747 aircraft from Northwest Orient Airlines ("Northwest") to transport cargo between the United States and European cities. The aircraft were delivered to petitioner and returned to Northwest at John F. Kennedy International Airport ("JFK") in New York City. It is the position of the Audit Division, as stated in its answer to petitioner's brief, that "the exercise of power over the planes in issue, by the petitioner, by the action of receiving and retention for any length of time, constitutes a taxable use (citation omitted)" subject to New York State and City use taxes.

4. Petitioner leased aircraft from Northwest on a "per trip" basis, a trip being defined as a departure from the point of origin (JFK) until the

plane's return to that point. Some typical itineraries, gleaned from petitioner's official aircraft logs, are shown below.

<u>DATE</u>	<u>ITINERARY</u>
3/12 - 3/13/78	JFK - London - Paris - Amsterdam - JFK
4/28 - 4/29/78	JFK - Dourados, Brazil - Frankfurt - Zurich - JFK
5/26 - 5/27/78	JFK - Dourados - Frankfurt - Hartford, Connecticut - JFK
6/23 - 6/24/78	JFK - Boston - London - JFK
7/09 - 7/10/78	JFK - London - Amsterdam - Bangor, Maine - JFK
9/11 - 9/12/78	JFK - London - Amsterdam - Gander, Newfoundland, Canada - JFK

Petitioner paid a flat rate per trip, which was not adjusted to reflect the amount of time spent in flight. Most of the leases were for a single roundtrip to Europe.

5. During the period in question, petitioner maintained facilities at JFK consisting of its headquarters, an administrative office building, a cargo terminal with operations offices and a maintenance hangar.

6. The leased freighter aircraft were towed from Northwest's facilities to petitioner's cargo facilities by tractor tug. Petitioner accepted the aircraft by executing a delivery receipt, at which time the provisions of the lease became effective. Once petitioner had physical possession of the aircraft, approximately two hours were required for its personnel to load the cargo onto the craft, fuel up, staff the plane and depart from the airport.

Usual flying time to and from Frankfurt, Germany, petitioner's main operational city in Europe, was approximately 15 hours. The aircraft were reloaded with cargo in Europe for transportation to the United States as part of petitioner's regularly scheduled service; approximately two hours were consumed in reloading and other preparations for departure.

When the craft returned to JFK, approximately 30 minutes to an hour was required to transfer possession back to Northwest.

Thus, of the total average lease period of approximately 20 hours, aircraft were on the ground at JFK approximately three hours.

CONCLUSIONS OF LAW

A. That Tax Law section 1110 provides, in pertinent part, "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..., except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail...". The term "use" is defined as "[t]he exercise of any right or power over tangible personal property by the purchaser thereof..." (Tax Law section 1101[b][7]), and the term "sale, selling or purchase" as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration..." (Tax Law section 1101[b][5]). Since petitioner did not pay New York State and City sales taxes upon the lease of the subject aircraft, but used said aircraft in those jurisdictions, New York State and City use taxes were properly imposed.

B. That the exemption from sales and use taxes of receipts for "commercial aircraft primarily engaged in intrastate, interstate or foreign commerce" was added by the Laws of 1978, Chapter 773, section 2. "The amendment to section 1115 took effect on March 1, 1979 and was not intended to be retroactive (citation omitted)." Matter of Broome County Aviation, Inc. v. Tully, 87 A.D.2d 714, 715.

C. That the constitutionality of New York statutes and of the application thereof in particular instances is presumed at the administrative level of the Tax Commission.

D. That the petition of Seaboard World Airlines, Inc. is hereby denied, and the assessments, issued on December 14, 1981 and modified by the parties' agreements, are sustained.

DATED: Albany, New York

JAN 18 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER