

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

AERONAUTICAL RADIO, 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, 1978
through August 31, 1981.

Petitioner, Aeronautical Radio, Inc., 2551 Riva Road, Annapolis, Maryland 21401, 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, 1978 through August 31, 1981 (File No. 37814).

On October 24, 1985, petitioner advised the State Tax Commission, in writing, that petitioner desired to waive a hearing and to submit the case to the State Tax Commission, with all briefs and documents to be submitted by February 14, 1986. After due consideration of the entire file, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner's furnishing of communications equipment in conjunction with a communications service is subject to New York State sales and use tax.

11. Whether petitioner's service of maintaining communications equipment is subject to New York State sales and use tax.

FINDINGS OF FACT

1. On February 26, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due to petitioner, Aeronautical Radio, Inc. ("ARINC"), for the period September 1, 1978 through August 31, 1981. The Notice assessed sales and use taxes due of \$10,139.42, plus interest of \$1,619.05, for a total amount due of \$11,758.47. The Notice was premised upon the Audit Division's position that petitioner was allegedly leasing radio equipment to its customers and that sales and use tax was due on the receipts from said leases.

2. Prior to the submission herein, petitioner and the Audit Division entered into a stipulation of facts which is set forth, in relevant part, as follows:

A. Petitioner is a Delaware corporation which was incorporated December 2, 1929.

B. Petitioner's stock is owned principally by the scheduled airlines and other air transport operators. These companies are the principal users of petitioner's services, which petitioner's bylaws require it to provide on a nonprofit basis.

C. Petitioner's stock is subject to a provision that it may not be sold without first being offered back to the corporation at its par value, as reflected in Article Fourth of petitioner's Certificate of Incorporation. There is no public market for petitioner's stock.

D. Petitioner is engaged in the business of providing communication services to air transport operators. One of the services provided enables users to communicate with air transport aircraft from the ground. This is accomplished through either a radio network system or a radio station, usually owned by petitioner, which is located on the airline's premises. In addition to air/ground communications, petitioner provides point-to-point communications between the facilities of air transport operators and

related organizations, related message switching services, airport telephone services and supporting data processing services. Petitioner also serves as a secretariat for industry activities involving radio frequency coordination, equipment specifications, and maintenance activities, and provides some miscellaneous communications-related services. It is the air/ground communications and the maintenance services which are involved in this proceeding.

E. All of petitioner's communications services to air transport operators are provided under a standard form of "Service Agreement" designated as ARINC Form 125.¹ These forms provide the general conditions of service. Each service agreement or service contract is accompanied by one or more "Service Supplements" or equivalent in a variety of standard forms, covering specific types of service. The types of Service Supplements or other agreements for the specific services involved in this proceeding are noted below.

F. Petitioner's air/ground communications services are provided primarily through an unmanned network of some 350 ground radio stations, interconnected by wire line with its communications centers in San Francisco and New York, or with petitioner's automated data network. Both the voice and the data networks permit communication between aircraft of various operators while en route, and their operations offices and other ground locations. These services are not involved in this proceeding.

1 "ARINC" is the name by which petitioner is popularly known. Petitioner also uses a "Service Contract", Form 1255C and earlier iterations, for services to non-air transport companies, which are not at issue in this appeal.

G. Petitioner owns or controls approximately 3,500 non-network ground radio stations. These are licensed by the Federal Communications Commission ("FCC") to petitioner and their operation is governed by the "ARINC Manual of Rules and Regulations for Ground Radio Stations." Approximately 64 percent of these stations are owned by the airlines and leased to petitioner, in consideration of petitioner's assumption of responsibility as licensee of the stations and its agreement to provide communication services to the airline. The rent and the charge for communication services are considered to offset each other, and no funds change hands. The remaining 36 percent of the stations (currently 1,259 stations, of which 78 are located in New York State) are owned by petitioner. In all cases, the stations are located on airline premises and staffed by airline employees who are designated as "ARINC Station Representatives" but receive no compensation from petitioner. The non-network stations serve the same purpose as the network stations except that they communicate predominantly with the flights of a single operator.

H. Non-network communication services through ARINC-owned stations are provided for under ARLNC Form 125-9 (Service Supplement to Form 125, the Service Agreement), or similar forms, which include maintenance.

I. Billings for this type of transaction represent approximately 44 percent of the sales tax assessment: in this case. They are based on petitioner's average cost of the service, equipment, licensing and overhead. Maintenance charges on this equipment represent approximately 40 percent of the assessment at issue in this appeal. Maintenance of ARINC-owned equipment is provided under the terms and conditions described in Finding of Fact "2(J)". Non-network communications using airline-owned equipment

are provided under other forms of agreement, which are not involved in this proceeding.

J. In addition to petitioner's extensive maintenance programs for equipment owned by petitioner, petitioner sometimes provides maintenance services on communications equipment owned by users. This service is provided under a Maintenance Agreement. Most of this equipment is licensed by the FCC in petitioner's name and staffed under petitioner's control, in accordance with petitioner's "Rules and Regulations", by user employees designated as "ARINC Station Representatives". Approximately 10 percent of the taxes assessed in this case represent maintenance services on such equipment, all of it consisting of ground radio stations providing non-network air/ground voice radio communications. In all cases, these Maintenance Agreements form part of an overall contract which also includes air/ground communications services.

K. Occasionally, and primarily as an accommodation to users of its other communication services, petitioner also provides maintenance services on equipment owned by users and licensed in the name of the user, in this case portable "handy talkie" business radio transceivers used in airport ground services. The same forms are used for maintenance in this service, which is provided only as part of a communications service involving two-way communication on channels subject to petitioner's coordination. This business radio communications and maintenance service is offered for user-owned equipment only where the user's equipment is of the same make and model as the petitioner's own equipment. Billings for such services represent approximately 6 percent of the taxes assessed in this case. In

all cases, these Maintenance Agreements form part **of** an overall contract which includes air/ground communications services.

L. It is petitioner's practice to pay New York State use tax on its out-of-state purchases, or New York State sales tax on its in-state purchases **of** equipment purchased for use in providing its communications services and located in New York State, including parts used in its maintenance services in New York State, whether or not these parts are charged directly to users. Petitioner believes that New York State sales or use tax has been paid on all communications equipment which it **owns**, which is **so** used, and on all such parts.

M. It is also petitioner's practice to pay New York State sales tax on lease payments by petitioner to suppliers, such as RCA, from which it leases certain communications equipment used by petitioner in New York State in providing communications services. Petitioner believes that it has paid New York State sales tax on all such lease payments, both throughout the period covered by this appeal and subsequently.

N. It is petitioner's practice to pay New York State sales tax on its billings from local telephone companies, such as New York Telephone Company, on line, equipment, and all other charges for intrastate communications services within New York State. Petitioner believes that it has paid New York State sales taxes on all such billings, both during the period covered by this proceeding and subsequently.

CONCLUSIONS OF LAW

A. That Tax Law §1101(b)(5) defines "sale, selling or purchase" as follows:

"Any 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, or any agreement therefor...".

B. That the Sales and Use Tax Regulations provide that:

"The terms 'rental, lease, license to use' refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property." 20 NYCRR 526.7(c)(1).

C. That 20 NYCRR 526.7(e)(4) further provides:

"Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

- (i) custody or possession of the tangible personal property, actual or constructive;
- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property."

D. That, since the radio stations were located on airline premises and operated by airline employees, there was a transfer of possession within the meaning of 20 NYCRR 526.7(e)(4)(i) and 526.7(e)(4)(iii). Accordingly, the Audit Division properly concluded that the furnishing of the communications equipment was subject to New York State sales and use tax.

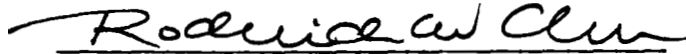
E. That section 1105(c)(3) of the Tax Law imposes sales tax upon, among other things, the receipts from the "...maintaining, servicing or repairing tangible personal property...". Accordingly, the Audit Division properly imposed sales tax upon the maintenance services at issue herein.


F. That the petition of Aeronautical Radio, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 26, 1982, is sustained.

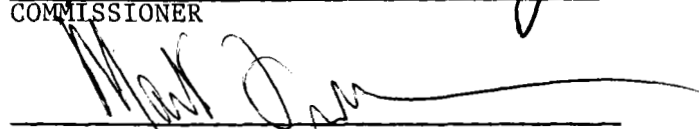
DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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★ U.S.G.P.O. 1985-480-794

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