

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
British Airways Corp. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Periods 12/1/70 - 11/30/73. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1981, he served the within notice of Decision by certified mail upon British Airways Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

British Airways Corp.
245 Park Ave.
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of October, 1981.

Cornelia R. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
British Airways Corp. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Periods 12/1/70 - 11/30/73.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of October, 1981, he served the within notice of Decision by certified mail upon Peter F. Vetro the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter F. Vetro
British Airways Board
245 Park Avenue
New York, NY 10017

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
9th day of October, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 9, 1981

British Airways Corp.
245 Park Ave.
New York, NY 10017

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Peter F. Vetro
British Airways Board
245 Park Avenue
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BRITISH AIRWAYS BOARD	:	DECISION
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under Arti-	:	
cles 28 and 29 of the Tax Law for the	:	
Period December 1, 1970 to November 30,	:	
1973.	:	

Petitioner, British Airways Board, 245 Park Avenue, New York, New York 10017, 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, 1970 through November 30, 1973 (File No. 11196).

A formal hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 19, 1977, July 12, 1977 and November 29, 1978 at 9:15 A.M., 9:20 A.M. and 9:30 A.M., respectively. The hearings April 19, 1977 and July 12, 1977 were held before Michael Alexander, Hearing Officer, and the hearing November 29, 1978 was held before Harry Issler, Hearing Officer. Petitioner appeared by Peter F. Vetro, Esq. The Audit Division appeared by Peter Crotty, Esq. (Richard Kaufman and Laurence Stevens, Esqs., of counsel).

ISSUE

Whether petitioner, a foreign air carrier providing scheduled international air service between the United Kingdom and the United States, is subject to the New York State Compensating Use Tax on spare airplane engines and parts used for repairs to its airplanes.

FINDINGS OF FACT

1. Petitioner, British Airways Board was a public corporation of the United Kingdom of Great Britian and Northern Ireland. It was engaged throughout the world in the transportation by air of persons, property and mail. It had been designated by the government of the United Kingdom as an air carrier authorized to exercise the rights to conduct scheduled air services to and from the United States in accordance with the air services agreement between the United States of America and the United Kingdom of Great Britian and Northern Ireland. The agreement was executed in Bermuda on February 11, 1946. The agreement was silent as to state taxes.

2. On November 21, 1974, the Audit Division issued a timely Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, British Airways Board stating:

"The following tax is computed as the result of the recent audit of records of the corporation. Use tax is due on engines, power plants and parts, stores acquisitions, exclusive of engines, power plants and parts, uniforms and accessories transferred from the United Kingdom, purchases for terminal and office and purchases of fixed assets used at terminal.

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY and INTEREST</u>	<u>TOTAL</u>
2/28/71	\$ 216,794.08	\$104,061.15	\$ 320,855.23
5/31/71	221,290.75	99,580.83	320,871.58
8/31/71	256,768.93	107,842.95	364,611.88
11/30/71	261,474.23	101,974.94	363,449.17
2/29/72	269,186.37	96,907.09	366,093.46
5/31/72	278,764.73	91,992.36	370,757.09
8/31/72	272,325.99	81,697.79	354,023.78
11/30/72	259,322.57	70,017.09	329,339.66
2/28/73	248,553.46	59,652.83	308,206.29
5/31/73	263,894.53	55,417.85	319,312.38
8/31/73	274,708.85	49,447.59	324,156.44
11/30/73	<u>257,773.96</u>	<u>67,021.22</u>	<u>324,795.18</u>
Total Due	\$3,080,858.45	\$985,613.69	\$4,066,472.14"

3. The tangible items that the Audit Division prescribed as the basis for the taxes are as follows:

- a. Expense purchases of office supplies incurred in and around British Airways' New York City office valued at approximately \$554,564.55 resulted in an alleged use tax liability in the amount of \$38,819.52;
- b. Equipment transfers from London, England to John F. Kennedy International Airport, consisting essentially of uniforms and accessories valued at approximately \$157,682.76 resulted in an alleged use tax liability in the amount of \$11,037.79;
- c. Expense purchases of miscellaneous supplies incurred in and around John F. Kennedy International Airport valued at approximately \$90,087.31 resulted in an alleged use tax liability in the amount of \$6,306.11;
- d. Fixed assets delivered to John F. Kennedy International Airport valued at approximately \$39,033.00 resulted in an alleged use tax liability in the amount of \$2,732.31;
- e. Aircraft engines and spare parts maintained at John F. Kennedy International Airport valued in excess of \$43,000,000.00 resulted in an alleged use tax liability in the amount of \$3,021,962.72 exclusive of interest and penalties.

4. While petitioner objected to the assessment in its entirety and served its formal petition with respect to the entire use tax assessment, a settlement agreement was concluded between the parties and placed upon the record (see pages 178-182 of the transcript of the hearing dated November 29, 1978). The agreement terminated the controversy as to all use tax assessments except those relating specifically to Finding of Fact 2 e. i.e., aircraft engines and spare parts maintained at John F. Kennedy International Airport. Thus, there is still a controversy as to the validity of the use tax deficiency in the amount of \$3,021,962.72, exclusive of interest and penalties.

5. The aircraft engines and spare parts were used solely for repair or replacement purposes on petitioner's airplanes and until used they were stored in a bonded warehouse under exclusive U.S. Customs' supervision and control.

All of the aircraft engines and spare parts were permitted entry into the United States duty free.

6. a. The books and records maintained by the petitioner were insufficient for the Audit Division to determine petitioner's exact tax liability.

b. Because of the unavailability of past records, a test period was established in which all engines and spare part entries on the perpetual inventory were audited in detail. The test period was April 1, 1973 through December 1, 1973.

7. In order to establish petitioner's liability, the results of the test period examined were multiplied by four to arrive at the total three year assessment.

8. a. In addition to the spare parts, the auditor reported, for the test period, the existence of nine airplane engines as follows:

- 1 - VC-10
- 1 - B707/436
- 7 - B747/136

b. The auditor admitted counting one B747/136 engine twice.

c. The auditor admitted that he did not know how to ascertain whether the engines were new or used, nor did he attempt to ascertain whether the engines were new or used; and, if used to what extent they were used. Accordingly, the auditor, not knowing the true value of the engines assessed them all at 100 percent of original cost.

9. For the same test period, it was petitioner's contention that there were only six airplane engines in existence during the test period:

- 1 - 707/436
- 4 - Super VC-10
- 1 - 747/136

Petitioner had the serial numbers for the six engines. Petitioner also had an alleged value for each engine as follows:

<u>ENGINE</u>	<u>ACQUISITION COST</u>	<u>REMAINING VALUE</u>
707/436	\$ 171,620.00	\$ 36,726.00
SVC-10	287,755.00	102,727.00
	287,755.00	185,025.00
	287,755.00	123,159.00
	287,755.00	123,159.00
B747/136	783,125.00	614,753.00
TOTAL	<u>\$2,105,765.00</u>	<u>\$1,185,549.00</u>

10. The Audit Division places a value of \$43,000,000.00 on the spare parts and engines as against petitioner's evaluation of \$14,419,162.00.

11. Petitioner has destroyed the original records examined by the auditor.

12. Petitioner objects to the tax assessment, in issue, on two grounds:

- a. it is contrary to the United States Constitution.
- b. the evaluation of the spare parts and engines is excessive.

13. The petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That, the constitutionality of the laws of the State of New York are presumed at the administrative level and accordingly the New York State Tax Commission does not have jurisdiction to declare State Laws unconstitutional.

B. That, clearly, it was the intent of the legislature to impose the tax herein since it was not until the enactment of Chapter 773 of the Laws of 1978, effective March 1979, that the Tax Law was amended to provide an exemption from sales and use tax for commercial aircraft (maintenance and repairs), machinery and equipment installed on the aircraft and the refurbishing of aircraft as follows:

- a. Section 1105(c)(3) provides an exemption for "...services rendered with respect to commercial 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...".
- b. Section 1115(a)(21) exempts "Commercial 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".
- C. That, section 1138(a) of the Tax Law provides in part as follows:
- "(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available..."
- D. That, accordingly, since the records maintained by petitioner were inadequate, the auditor's use of a test period was proper. .
- E. That the penalty is cancelled and the interest is reduced to the minimum statutory rate.
- F. That the petition of British Airways Board is granted to the extent indicated in Finding of Fact 8b and Conclusion of Law "E"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 21, 1974; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER