

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Broome County Aviation, Inc. :
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 Period 3/1/73 - 2/29/76. :

AFFIDAVIT OF MAILING

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 5th day of February, 1981, he served the within notice of Decision by mail upon Broome County Aviation, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Broome County Aviation, Inc.
Broome County Airport
Binghamton, NY 13902

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
5th day of February, 1981.

Connie P. Hagelunds

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of
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County of Albany

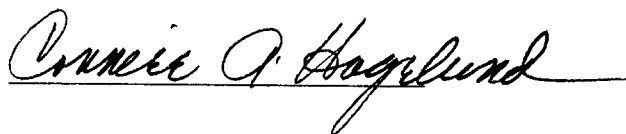
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of February, 1981, he served the within notice of Decision by mail upon Joseph H. Murphy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

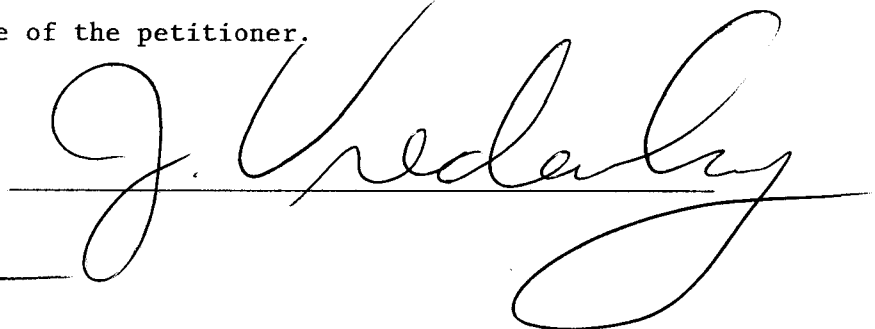
Mr. Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202

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
5th day of February, 1981.


Connie A. Haglund


Jay Vredenburg

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

February 5, 1981

Broome County Aviation, Inc.
Broome County Airport
Binghamton, NY 13902

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
Joseph H. Murphy
Hancock, Estabrook, Ryan, Shove & Hust
1400 Mony Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BROOME COUNTY AVIATION, 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 March 1, 1973 through February 29,	:	
1976.	:	

Petitioner, Broome County Aviation, Inc., Broome County Airport, Binghamton, New York 13902, 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 March 1, 1973 through February 29, 1976 (File No. 16891).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Binghamton, New York, on May 11, 1979 at 9:00 A.M. Petitioner appeared by Joseph H. Murphy, Esq. The Audit Division appeared by Peter Crotty, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether aircraft purchased by petitioner outside the State were subject to use taxes under section 1110 of the Tax Law.

II. Whether repair parts and lubricants used on petitioner's aircraft were subject to use tax under section 1110 of the Tax Law.

III. Whether petitioner's aircraft were exempt from taxation by virtue of section 1115(a)(8) of the Tax Law as commercial vessels engaged in interstate commerce and whether repair parts, lubricants and other supplies were exempt as items used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repair.

FINDINGS OF FACT

1. On June 17, 1976 the Audit Division, pursuant to an audit which disclosed additional purchases subject to use tax, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Broome County Aviation, Inc. in the amount of \$148,446.18, plus penalty and interest of \$59,333.17, for a total of \$207,779.35, for the period March 1, 1973 through February 29, 1976.

2. On August 5, 1976, petitioner applied for refund of sales taxes in the amount of \$71,631.20 for the period June 1, 1973 through May 31, 1976 on the ground that aircraft were exempt from sales tax because they were used continuously in interstate commerce and, therefore, the tax had been paid erroneously. Said tax had been computed by applying the appropriate State and local tax rates to a base of 1.4 percent of the cost of the aircraft pursuant to the instructions contained in a Department Counsel opinion dated January 25, 1968.

3. Petitioner, a New York corporation, was formed in 1958 to operate commercial activities at Broome County Airport near Binghamton, New York. It held air taxi certificates from the Federal Aviation Agency and was certified to operate in interstate commerce. The main business was providing scheduled flight service to the public. Ten percent of the business was charter service. Scheduled flights were offered daily from Binghamton, Elmira and Ithaca, New York to Washington, D.C.; Cleveland, Ohio; Baltimore, Maryland; Newark, New Jersey; Boston, Massachusetts; LaGuardia and Kennedy airports in New York City; and Westchester County airport, New York.

4. Seven aircraft bought outside New York State by petitioner were the subjects of the audit. They were as follows:

a. Navajo 7452L is a five passenger aircraft purchased in 1972. Delivery was taken from the manufacturer at St. Louis. It was claimed that it was based at Dulles Airport in Virginia and was assigned to fly the president of IBM on a daily basis to Dayton, Ohio; Binghamton, New York; Florida and other destinations requested by IBM. Petitioner paid the appropriate sales tax to New York State in each quarter prior to audit period. Petitioner subsequently sought a credit for the total payments made, i.e. \$1,476.20, within the audit period, which was disallowed by the Audit Division. A personal property tax was paid to the State of Virginia. Petitioner offered no documentary or other substantial evidence that the plane was hangered without the State or that its use was exclusively for IBM.

b. Navajo 65220 is an eight passenger aircraft purchased from a Canadian dealer, delivery was taken in Burlington, Vermont. The plane was used primarily in scheduled operations from Binghamton, New York to Cleveland, Washington, Boston, New York and Newark. Tax calculated to be due by the Audit Division was \$8,780.00, of which \$767.38 had been paid, leaving a balance of \$7,911.63.

c. Navajo 61431 was bought in 1974 from its manufacturer at Lock Haven, Pennsylvania, where delivery was taken. It was used on petitioner's routes. Tax calculated to be due by the Audit Division was \$7,311.78, tax paid was \$1,218.60, asserted net tax due \$6,093.18.

d. Piper 59928 an eight passenger aircraft was purchased in 1975 from the manufacturer at Lock Haven, Pennsylvania and was used in petitioner's scheduled operations. Tax was listed at \$7,311.78; tax paid \$1,218.60; asserted net use tax due \$6,093.18.

e. Swearinger Metroliner, 75355M, is a 19 passenger aircraft purchased in 1974 at San Antonio, Texas, where delivery was taken. It was used in

petitioner's scheduled operations. The tax was listed as \$35,400; tax paid \$10,816.66; asserted net use tax due \$24,583.34.

f. Swearinger Metroliner, 5304M, is a 19 passenger aircraft purchased at San Antonio, Texas where delivery was taken and used in scheduled airline service on petitioner's routes. Tax was listed as \$32,298.00; tax paid \$15,701.91; and asserted net use tax due \$16,596.09.

g. Swearinger Metroliner, 5356M, is a 19 passenger aircraft purchased at San Antonio, Texas, where delivery was taken. It was used in petitioner's scheduled operations. Tax was calculated at \$35,400.00; tax paid, \$10,816.66; and asserted net use tax due \$24,583.34.

5. Repair materials, lubricants and parts used in maintenance by petitioner were supplied to the aforementioned aircraft in addition to ten other aircraft owned and operated by the petitioner in scheduled operations. Use tax asserted due was \$58,523.45.

6. Petitioner rented hangar space for all aircraft in Binghamton, New York and Elmira, New York.

7. All flights by petitioner originated either at Binghamton or Elmira and terminated at either airport.

8. Petitioner's executives believed that since petitioner operated in interstate commerce, it was not subject to State and local sales and use taxes.

CONCLUSIONS OF LAW

A. That section 1110 of the Tax Law provides in part:

"Except to the extent that property or services have already been or will be subject to the sales tax...there is hereby imposed...a use tax for the use within this state...except as otherwise exempted... (A) of any tangible personal property purchased at retail..."

That "use" is defined as the exercise of any right or power over tangible personal property by the purchaser thereof (Tax Law Section 1101(b)(7)).

Petitioner exercised such right or power over the aircraft, repair materials and lubricants at issue so as to constitute use of such tangible personal property within this state. Since petitioner did not pay a sales tax in this State upon the purchase of the aircraft, repair materials and lubricants, petitioner is liable for use tax under section 1110 of the Tax Law.

B. That aircraft are not vessels within the meaning and intent of section 1115(a)(8) of the Tax Law and therefore are not exempt from the imposition of use tax. Matter of Airlift International, Inc. v. State Tax Commission, 52 A.D.2d 688. Likewise, repair parts, lubricants and other supplies used on aircraft are not exempt from the imposition of use taxes under said section. (Note: an exemption for commercial aircraft was added by L. 1978, Ch. 773, effective March 1, 1979, subsequent to the period at issue.)

C. That the petitioner acted in good faith; therefore, the penalty and interest in excess of the minimum statutory rate are cancelled.

D. That the petition of Broome County Aviation, Inc. is granted to the extent that interest in excess of the minimum interest and the penalty imposed are waived; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 17, 1976; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

FEB 05 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER