

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Ontario Pipeline, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 6/1/77-11/30/80.

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Ontario Pipeline, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ontario Pipeline, Inc.
111 Marsh Rd.
Pittsford, NY 14534

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of December, 1984.

David Parchuck

Nicola F. Williams

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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Period 6/1/77-11/30/80.

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Howard E. Konar, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard E. Konar
Boylan & Brown
900 Midtown Tower
Rochester, NY 14604

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Ontario Pipeline, Inc.
111 Marsh Rd.
Pittsford, NY 14534

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Howard E. Konar
Boylan & Brown
900 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ONTARIO PIPELINE, 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 June 1, 1977	:	
through November 30, 1980.	:	

Petitioner, Ontario Pipeline, Inc., 111 Marsh Road, Pittsford, New York 14534, 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 June 1, 1977 through November 30, 1980 (File No. 35921).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on March 12, 1984 at 2:45 P.M., with all briefs to be submitted by August 17, 1984. Petitioner appeared by Howard E. Konar, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

I. Whether a flight service agreement between petitioner and an air charter service operator constitutes the lease of an aircraft or a maintenance agreement.

II. Whether the aircraft is a commercial aircraft thereby exempting the purchases of services and parts for such aircraft from the imposition of sales and use tax.

FINDINGS OF FACT

1. On December 14, 1981, 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 against petitioner, Ontario Pipeline, Inc., in the amount of \$18,389.51 plus interest of \$4,901.58 for a total due of \$23,291.09 for the period June 1, 1977 through November 30, 1980.

2. Petitioner, by Richard F. Albert its vice president and treasurer, executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1977 through August 31, 1978 to December 20, 1981.

3. During the period in issue petitioner was engaged in the business of sewer and pipeline construction. Seneca Flight Operations ("Seneca") operated an air charter service under authorization from the Federal Aviation Administration as an air taxi operator. Seneca is a division of the S.S. Pierce Company, Inc.

4. During the quarter ended May 31, 1978, petitioner purchased a Piper Navajo aircraft. In order to minimize operating and maintenance costs, petitioner, simultaneously with the purchase, entered into an agreement with Seneca transferring possession of the aircraft to Seneca on the following terms and conditions:

a. Seneca assumed all responsibility for complying with Federal Aviation Administration regulations and for providing hangar space, ground crew, flight crew, navigational aids, fuel purchases, routine and nonscheduled maintenance, inspections, aircraft hull insurance, and liability insurance.

b. Seneca agreed to provide petitioner with all flight services for the aircraft, defined to mean transportation of passengers and cargo and provision of maintenance and inspections for petitioner's flights. Under the agreement, Seneca retained complete operational control of the aircraft at all times.

c. Seneca received the right to use the aircraft in its charter service for the S.S. Pierce Company, Inc. and third party charter customers and was solely responsible for scheduling flights. Whenever possible, Seneca agreed to make the aircraft available for petitioner's use. On those occasions when the aircraft was not available for use by petitioner due to maintenance or prior scheduling for a charter customer, Seneca agreed to provide a substitute aircraft from its fleet if one was available.

d. Seneca agreed to compensate petitioner at a specified hourly rate for each hour that Seneca used the aircraft in charter service for the S.S. Pierce Company, Inc. or regular charter customers.

e. Petitioner agreed to make a fixed monthly payment to Seneca to cover the fixed annual costs of maintaining the aircraft, such as hangar rents and insurance. Petitioner also agreed to reimburse Seneca for all direct operating costs, such as fuel, oil, parts, labor, supplies, and maintenance and crew expenses, incurred while providing flight service to petitioner.

5. The aforesaid agreement remained in effect, as amended or renewed, throughout the period in issue. The amendments and renewals changed only the amounts due from petitioner for fixed and direct operating costs and the amounts due from Seneca for charter service to other customers; other terms of the agreement remained unchanged.

6. Petitioner did not pay sales tax on its purchase of the aircraft nor on the amounts reimbursed to Seneca for direct operating costs arising from petitioner's use of the aircraft. Petitioner carried the aircraft as an asset on its books and took the allowable depreciation; however, the aircraft was registered with the Civil Aeronautics Board in Seneca's name. Seneca provided charter service to petitioner in accordance with the agreement and also provided charter service to regular charter customers at rates of approximately \$200.00 per hour, and to the S.S. Pierce Company, Inc. and its subsidiaries at slightly discounted rates. Seneca did not use the aircraft to transport its own employees.

7. On audit, the Audit Division determined that the flight service agreement between petitioner and Seneca was merely a maintenance agreement by which Seneca provided services, fuel and parts to petitioner's aircraft in return for petitioner's monthly payments. Therefore, the Audit Division determined that there was no purchase for resale of the aircraft and that tax was due on the purchase. The Audit Division also determined that the payments made by petitioner for fuel, oil, parts and labor furnished to the aircraft were subject to sales tax.

8. Petitioner maintains that the flight service agreement was a lease by which it transferred possession of the aircraft to Seneca thus rendering the purchase of the aircraft a purchase for resale and not subject to sales tax. Additionally, petitioner argues that the payments for fuel, oil, parts, and labor were exempt from sales tax as services and property purchased for qualifying commercial aircraft as specified in sections 1105(c)(3)(v) and 1115(a)(21) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines a sale, in part, to mean

"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...".

A retail sale is defined, in part, in section 1101(b)(4)(i)(A) as a "sale of tangible personal property to any person for any purpose, other than ... for resale as such or as a physical component part of tangible personal property...".

B. That 20 NYCRR 526.7(c)(1) provides:

"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. Whether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement."

Additionally, 20 NYCRR 526.7(e)(4) provides that:

"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."

C. That it is undisputed that petitioner transferred possession of the aircraft to Seneca immediately following purchase. If the transaction gave Seneca full dominion and control over the aircraft, the transaction is a rental pursuant to section 1101(b)(5) of the Tax Law (see Concrete Delivery Co. v. State Tax Commission, 71 A.D.2d 330). Seneca was allowed to utilize the aircraft as it saw fit in its air taxi operations. Although petitioner was given a preferred status in the scheduling of flights, Seneca could make any aircraft in its fleet available, not necessarily the Piper Navajo purchased by petitioner. Moreover, Seneca was required to provide a substitute aircraft only if one was available. Seneca was free to charter the aircraft to any customer it wished with no prior approval from petitioner. Seneca, therefore had the right to possession of the aircraft, actual possession, and the right to control or direct the use of the aircraft, thus satisfying all the requirements of 20 NYCRR 526.7(e)(4). Petitioner relinquished all dominion and control over the aircraft when it transferred possession to Seneca, and therefore, a rental took place within the meaning and intent of section 1101(b)(5), of the Tax Law and petitioner's purchase of the aircraft was a purchase for resale and not subject to sales tax.

D. That section 1105(c)(3)(v) provides for an exception to the sales tax on the receipts from maintaining, servicing or repairing tangible personal property when such services are rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in section 1115(a)(21) of the Tax Law. Section 1115(a)(21) provides for an exemption from sales tax on receipts from the sale of "[c]ommercial 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."

E. That inasmuch as petitioner leased the aircraft to a Federal Aviation Administration authorized air taxi operator which used the aircraft primarily for commercial purposes, the purchases of fuel, oil, parts and labor furnished to the aircraft were exempt from sales and use tax under sections 1105(c)(3)(v) and 1115(a)(21) of the Tax Law.

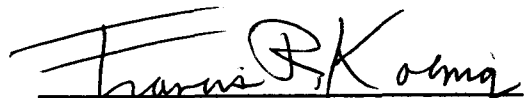
F. That the petition of Ontario Pipeline, Inc. is granted and the Notice of Determination and Demand For Payment of Sales and Use Taxes Due issued December 14, 1981 is cancelled.

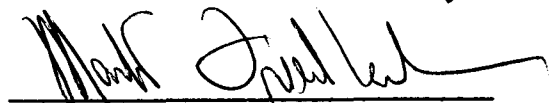
DATED: Albany, New York

DEC 31 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 369

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Harold E. Lerner</i>	
Street and No. <i>Boston & Grove</i>	
P.O., State and ZIP Code <i>900 Madison Tower</i>	
Postage <i>Postmarked NY 14604</i>	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 316 368

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Ontario Pipeline Co</i>	
Street and No. <i>111 Main St</i>	
P.O., State and ZIP Code <i>Pittsford NY 14534</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982