

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Western Leasing Company :
John Baumann & Robert Mays, Officers : 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 9/1/77-8/31/80. :

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 25th day of April, 1984, he served the within notice of Decision by certified mail upon Western Leasing Company, John Baumann & Robert Mays, Officers the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Western Leasing Company
John Baumann & Robert Mays, Officers
16300 Daily Dr.
Van Nuys, CA 91406

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
25th day of April, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Carrie R. Hurlum
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 25, 1984

Western Leasing Company
John Baumann & Robert Mays, Officers
16300 Daily Dr.
Van Nuys, CA 91406

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
Edward H. Hein
Breed, Abbott & Morgan
153 E. 53rd St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WESTERN LEASING COMPANY and	:	
JOHN BAUMANN and ROBERT MAYS, OFFICERS	:	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, 1977	:	
through August 31, 1980.	:	

Petitioners, Western Leasing Company and John Baumann and Robert Mays, officers, 16300 Daily Drive, Van Nuys, California 91406, 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, 1977 through August 31, 1980 (File Nos. 33938, 34511 and 34512).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 15, 1983 at 9:30 A.M., with all briefs to be submitted on or before May 26, 1983. Petitioners appeared by Breed, Abbott & Morgan (Edward H. Hein, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether New York State sales and use tax is due on receipts arising from the leasing of corporate aircraft hangared in New York.

II. Whether reasonable cause exists for the remission of penalties and interest.

FINDINGS OF FACT

1. Petitioner Western Leasing Company ("Western") was a foreign corporation which engaged in the leasing of aircraft to other entities for the purpose of transporting corporate personnel.

2. On January 28, 1975, Western entered into an aircraft leasing agreement for a period of eight years with the American Smelting and Refining Company ("Asarco"). The agreement provided that Western was to deliver a Lockheed Jetstar airplane to the Westchester County Airport in New York. Asarco agreed to pay Western \$60,048.78, in advance, on or before the fifth day of each month beginning February 1975 as rent until the termination of the agreement. If the aircraft was used in excess of 792 hours per year, additional rent was due. In consideration of the rental payments and in further consideration of a fee based upon five percent of the actual expenses incurred, Western agreed to provide certain services to Asarco. In general, the contract provided that Western was to provide the services related to the operation of the aircraft, but that the pilots were to be provided by Asarco. Asarco acknowledged in the contract that it had no title or property right to the aircraft.

It was agreed between the parties that Western would submit quarterly reports of the actual cost of operation. If such costs were more than the projected costs, then Asarco would reimburse Western. However, if the actual costs were less than the projected costs, Western would reimburse Asarco.

3. On February 4, 1975, Western entered into an agreement for a period of five years with General Cable Corporation ("Cable")¹ to lease a Jet Commander aircraft to be delivered and hangared at the Westchester County Airport in White Plains, New York. The lease acknowledged that Cable had paid Western

¹ In April, 1979, Cable changed its name to G. K. Technologies.

\$175,000.00 to prepare the Jet Commander for Cable's use. In addition, the lease provided that Cable was to pay Western \$12,094.00, in advance, on or before the sixteenth day of each month from February, 1975 until November, 1975 and the monthly sum of \$25,083.50 on or before the sixteenth day of each month in advance, beginning December, 1975 until the termination of the lease. If Cable utilized the aircraft more than the parties anticipated, an additional fee per hour was charged. In general, this contract also provided that Western was to provide the services related to the operation of the aircraft. However, Cable was to provide the pilots. Cable acknowledged in the contract that it had no title or property right to the aircraft.

The agreement further provided that Western was to submit to Cable quarterly and year-end reports of the actual operation of the Jet Commander. If the actual cost of operation was more than the parties estimated, Cable was to reimburse the excess according to certain formula. If the actual cost was less than the estimated cost, Western agreed to reimburse Cable.

4. The estimated expenses for each of the foregoing contracts was based upon the following: fuel and oil; maintenance; mechanics' salaries; crew expense; insurance; reserve for engine overhaul; aircraft rent; hangar rent; landing fees; parking and customs; dues, subscriptions and maps; training; telephone; miscellaneous equipment and supplies; normal office expense; and airway user taxes.

5. The actual expenses of Western were confirmed by auditors of the customer's selection.

6. Following the execution of the leases, an audit of Western was commenced. Upon audit, the auditor found that Western reported only purchases for its own use within New York. This was in accordance with Western's position that the

payments received over the base rental charge for the aircraft were in reimbursement for costs incurred by Western and non-taxable. Accordingly, Western considered the following purchases tax exempt: fuel purchased or used on out-of-state flights; out-of-state landing fees; insurance; dues; aircraft hangar rental and office rental; out-of-state catering; user taxes; freight expenditures; and out-of-state telephone service. Western also considered aircraft lease payments tax exempt. The auditor, however, took the position that the leases were subject to sales tax and that the lease receipts could not be reduced by Western's expenses.

7. In order to conduct the audit, Western and the auditor agreed to the use of a test period. The months of March, 1979 through May, 1979 were selected and used. With regard to the lease to Asarco, the auditor found that Western had a net income of \$177,111.00 during the test period and that sales tax had been paid on purchases of \$78,627.00. This disclosed that petitioner had paid tax on 44.4 percent of its receipts. The auditor then applied this percentage to Western's receipts from Asarco over the entire audit period resulting in additional sales subject to sales tax of \$853,647.00 and additional tax due of \$42,682.35.

8. The auditor found that with regard to the aircraft leased to Cable, Western had paid tax on purchases of \$6,388.00 and that Western had net lease income during the test period from Cable of \$68,379.00. This disclosed that Western had paid tax on 9.3 percent of its lease income from Cable. This percentage was then applied to Western's lease income from Cable during the period resulting in additional sales subject to sales tax of \$807,815.00 and additional tax due of \$40,390.75.

9. On April 3, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Western Leasing Company for the period September 1, 1977 through August 31, 1980. The Notice assessed a tax due of \$83,073.10, plus penalty of \$16,896.47 and interest of \$15,842.54, for a total amount due of \$115,812.11.

10. On April 3, 1981, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to John A. Baumann and to Robert E. Mays. The Notice assessed the same amount as that assessed against Western and was issued to these individuals as officers of Western.

11. In accordance with the provisions of the contract, Western submitted statements of expenses to Asarco and Cable which separately stated the actual cost of operations as follows: fuel and oil; maintenance; mechanics; crew expense; insurance; hangar rent; fees; "dues & jepp."; training; telephone; miscellaneous equipment and supplies; office expense; taxes and licenses.

12. Evidence submitted at the hearing establishes that, in addition to the \$78,627.00 of expenditures during the test period examined by the auditor, there were additional expenditures of \$12,393.79 included in the cost of the operations of the airplane used by Asarco on which New York sales or use tax had been paid.

13. During the test period, Western spent a total of \$79,631.97 on fuel and oil for the plane used by Asarco. Western spent \$28,591.00 on fuel purchased in New York. Western paid sales tax on the fuel purchased in New York and was given credit therefor in determining the assessment. The balance of the fuel and oil expense arose from purchases outside of New York. No sales or use tax was paid on the purchases made outside of New York. All of the fuel and oil

purchases for the aircraft used by Asarco were made by individuals employed by Asarco.

14. Asarco paid Western \$19,770.30 per month for the use of the aircraft independent of the other expenses. The aircraft rental amount was included in the net rental income from Asarco in conducting the audit. Since petitioner did not pay sales tax on the rental income, the auditor did not include it in the \$78,627.00 amount noted in Finding of Fact "6".

15. During the audit period, there were only two flights by Asarco from one location within New York to another location within New York. The aircraft leased by Asarco was principally used in interstate flights.

16. At the hearing, petitioner established that there were additional expenditures of \$743.47 made by Cable on which New York sales tax had been paid.

17. During the test period, the expenditures for fuel and oil for the aircraft used by Cable were \$18,617.63. Of this amount, \$4,498.00 was for purchases of fuel and oil made in New York. Sales tax was paid on the purchases of fuel and oil made in New York and was taken into account by the auditor in determining the amount of the assessment.

18. All of the purchases of fuel and oil used by Cable were made by individuals employed by Cable.

19. Cable paid Western \$9,656.00 per month during the test period for the use of the aircraft independent of the other expenses. Accordingly, the auditor included aircraft rental of \$28,968.00 in Western's net rental income from Cable. Since Western did not pay sales tax on its rental income, none of the \$28,968.00 was included in the \$6,388.00 amount noted in Finding of Fact "7".

20. During the entire audit period, only two round-trip flights were made by Cable from one location within New York to another location within New York without an intervening stop. The aircraft leased by Cable was principally used in interstate flights.

21. Petitioner's representative acknowledged at the hearing that the receipts representing the base rental for the aircraft alone are subject to the provisions of the New York State Sales and Use Tax Law. He argued, however, that the application of tax to such receipts violated the commerce clause of the United States Constitution.

22. Western acted in good faith during the period in issue.

23. In accordance with section 307(1) of the New York State Administrative Procedure Act, all of petitioner's proposed findings of fact have been substantially adopted herein, except for proposed Findings of Fact "12", "16", "21" and "27".

Proposed finding of fact "12" has been rejected in lieu of Finding of Fact "11". The record presented is insufficient to confirm the accuracy of proposed findings of fact "16" and "27". Proposed finding of fact "21" is accepted and incorporated in Finding of Fact "12" with the following modifications:

<u>Exhibit</u>	<u>Check Invoice</u>	<u>Tax Paid on Additional Amount</u>	<u>Basis For Modification</u>
8	10602		Invoice not in record
9	10429	\$54.81	Erroneous amount in proposed finding of fact
8	10593	\$81.20	Erroneous amount in proposed finding of fact

CONCLUSIONS OF LAW

A. That, with certain exceptions, section 1105(a) of the Tax Law imposes a sales tax upon the receipts from the retail sale of tangible personal property.

B. That the term "receipt" is defined in section 1101(b)(3) of the Tax Law as follows:

"(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts, but excluding any credit for tangible personal property accepted in part payment and intended for resale and excluding the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser..."

C. That section 1101(b)(5) defines a "sale" as:

"(5) Sale, selling or purchase. 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, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

D. That, in view of Finding of Fact "21", additional discussion of the taxability of the receipts arising from the rental of the aircraft is unnecessary. It is noted that the constitutionality of the laws of New York State is presumed at the administrative level.

E. That 20 NYCRR 526.5(e) provides that:

"All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts."

The expenses in issue, which petitioner maintains are exempt, arise from lease agreements which separately state Western's expenses and were incurred in the execution of the lease. Accordingly, these expenses were properly includable in determining the amount of petitioner's lease receipts.

F. That, in view of Findings of Fact "12" and "16", petitioner is to be given the benefit of the additional expenditures upon which New York State sales and use taxes were paid.

G. That, since Western acted in good faith, the penalty and interest in excess of the minimum statutory rate are cancelled.

H. That the petitions are granted only to the extent of Conclusions of Law "F" and "G" and the Audit Division is directed to recompute the assessments accordingly; that the petitions are in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 440 976 953

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Western Leasing Co.	
Street and No.	
16300 Dailly Dr.	
P.O., State and ZIP Code	
Van Nuys, CA 91406	
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

P 440 976 954

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Edward H. Wein	
Street and No.	
153 E. 53rd St.	
P.O., State and ZIP Code	
NY, NY 10022	
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