

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions :  
of :  
**DELTA AIR LINES, INC.** : DETERMINATION  
for Revision of Determinations or for Refund of Sales : DTA NOS. 829477 AND  
and Use Taxes under Articles 28 and 29 of the Tax : 829478  
Law for the Period December 1, 2009 through May 31, :  
2017. :  

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Petitioner, Delta Air Lines, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2009 through May 31, 2017.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, by videoconference via CISCO webex, on April 27, 2021 at 10:30 a.m., with all briefs to be submitted by September 3, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Ryan, LLC (Charles Rice, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).

***ISSUE***

Whether petitioner has demonstrated that the Division of Taxation erred in denying its claims for refund of sales tax paid for certain fuel purchases.

***FINDINGS OF FACT***

1. Petitioner, Delta Air Lines, Inc., is an airline that operates at LaGuardia Airport (LGA) and John F. Kennedy International Airport (JFK) in New York State. At both airports,

petitioner employs various types of ground service equipment to service, repair and maintain petitioner's fleet of aircraft.

2. The ground service equipment used by petitioner includes: AC/heat combo unit, AC unit, air start unit, aircraft tow tractor unit, cab service lift truck, cab service van, de-ice truck, ground power unit, heater unit, lavatory service truck, maintenance lift truck, towbarless tow tractor and water truck. This equipment was used at both airports during the periods at issue.

3. The ground service equipment cannot operate without diesel or gasoline. During the period at issue, petitioner purchased diesel and gasoline from Petro King, Servisair and Allied Aviation at LGA and from Mansfield, Triangle Services and Sprague for its ground service equipment at JFK.

4. Petitioner paid sales tax on purchases of fuel from the vendors set forth in finding of fact 3. Thereafter, petitioner filed claims for refund of the sales tax paid based upon its position that a portion of these purchases of diesel and gasoline were exempt from tax since the diesel and gasoline were used to fuel its ground service equipment that was used to service, repair and maintain its fleet of aircraft at both LGA and JFK.

**DTA#829477**

5. Petitioner filed an application for refund of sales tax paid on petroleum products, form FT-500, on June 19, 2017, in the amount of \$1,277,213.96 for the period December 1, 2009 through May 31, 2014. Included with its refund claim were invoices for the diesel and gasoline that petitioner purchased during this time frame.

6. On January 22, 2018, the Division of Taxation (Division) sent a letter to petitioner requesting that it provide the Division with additional information needed to complete the review

of the refund claim. The requested information included fuel disbursement records, fueling inventory records, bulk receipts and invoices from suppliers and an equipment list.

7. On March 16, 2018, petitioner advised the Division that fuel fill logs were not available for the period of the refund claim, but it submitted fuel logs for the vendor, Sprague, for the month of February 2018. Sprague only supplied fuel to petitioner's equipment located at JFK. The Division determined that the records submitted were inadequate to grant the refund claimed. Specifically, the Division stated that the Sprague fuel logs were for a month not covered by the refund claim period. Moreover, the Division was unable to verify self-use disbursements using the list of ground service equipment without any fuel disbursement records. Also, because fueling inventory records were not available, there was no way to support the purchase and withdrawal continuity for the Division to verify that the purchases and withdrawals were complete and accurate.

8. On April 18, 2018, the Division sent a refund claim determination notice denying the refund claim for the period December 1, 2009 through May 31, 2014. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the denial of its refund claim.

9. A conciliation conference was held at BCMS on November 6, 2018. By conciliation order, CMS No. 303656, dated April 19, 2019, the denial of petitioner's refund claim was sustained. On July 10, 2019, petitioner filed a timely petition in protest of the conciliation order.

**DTA#829478**

10. Petitioner filed an application for refund of sales tax paid on petroleum products, form FT-500, in the amount of \$903,383.48 for the period June 1, 2014 through May 31, 2017. This claim for refund was also based upon its position that its purchases of diesel and gasoline

were exempt from tax since the diesel and gasoline were used to fuel its ground service equipment that was used to service, repair and maintain its fleet of aircraft at both LGA and JFK. Petitioner submitted invoices for the diesel and gasoline it purchased during the refund claim period.

11. On January 22, 2018, the Division sent a letter to petitioner requesting additional information to support the refund claim including fuel disbursement records, fueling inventory records, bulk receipts and invoices from suppliers and an equipment list.

12. In response to the Division's request for additional information, petitioner submitted fuel logs for Sprague for fuel delivered at JFK. The Division determined that the Sprague fuel logs were sufficient to verify disbursements into exempt ground service equipment that were fueled by Sprague. Petitioner did not submit similar records from its remaining vendors, Mansfield, Triangle Services, Petro King, Allied Aviation and Servisair.

13. The Division approved a portion of the refund claim based on the uplift records provided by Sprague that showed the exact amount of fuel pumped into each piece of exempt ground service equipment. However, the Division denied the remainder of the refund claim based upon a lack of documentation showing the exact amount of fuel used.

14. On May 28, 2018, the Division sent a refund claim determination notice partially denying the refund claim for the period June 1, 2014 through May 31, 2017, in the amount of \$812,965.28, and approving a refund in the amount of \$90,418.20.

15. Petitioner filed a request for a conciliation conference with BCMS protesting the portion of its refund claim that was denied. A conciliation conference was held on November 6, 2018 wherein petitioner provided additional documentation. By conciliation order, CMS No. 303996, dated April 19, 2019, an additional amount of \$93,904.07 was approved as a refund.

16. On July 10, 2019, petitioner filed a timely petition in protest of its refund claim. However, the petition seeks a refund only in the amount of \$41,342.67.

17. At the hearing, petitioner presented four witnesses. The first to testify was Jeffrey Yanni. He has been employed by petitioner for over 17 years. He is the General Manager for below wing operations for petitioner at LGA. His job responsibilities include safety of his team of 800 employees. They ensure the loading and offloading of baggage, safe deicing of aircraft and on time departure of flights. Mr. Yanni testified to the different types of ground service equipment used by petitioner at LGA.

18. Petitioner next presented the testimony of Rocky Telese. Mr. Telese has worked for petitioner for 17 years at JFK. His title is Operation Service Manager and he is responsible for a team of 120 employees that oversees the deicing operations. Mr. Telese testified about the different types of ground service equipment used by petitioner at JFK.

19. After the testimony regarding the ground service equipment used, petitioner turned its attention to the purchases of diesel and gasoline at both LGA and JFK. Sidonie Maduro, who is a ground service equipment analyst for petitioner, testified regarding her use of the EBis system. EBis is a computer program utilized by petitioner to capture any maintenance activity that occurred on petitioner's ground service equipment.

20. Exhibit 3 is a 135-page printout from the EBis system. Ms. Maduro testified as to the information contained therein. Specifically, as is indicated in the column labeled "city\_abbr," this document pertained to equipment at LGA. The document reflects the specific piece of ground service equipment and the dates correspond to maintenance performed on such equipment. This document tracks maintenance in a column labeled hours. Similarly, exhibit 6 is

a 455-page printout from EBis for maintenance performed on petitioner's ground service equipment at JFK.

21. Ms. Maduro testified that the hours column would include either mileage or hours, depending on the specific piece of equipment. She stated that not all of the ground service equipment has a meter. According to her, some types of equipment have odometers to track mileage, yet other types of equipment have meters that record engine hours.

22. The entries input into EBis are entered manually by airport personnel. Petitioner acknowledges that errors were made. Petitioner does not have any source documentation to corroborate the entries listed within EBis.

23. Petitioner's last witness was Susann Perez-Johnson. She is Director at Ryan, LLC. As Director, she manages a group of consultants who review clients' accounts payable systems and vendor invoices as well as detailed calculations for audits and refund claims. For the case at issue, she supervised the preparation of the refund claim documents and exhibits for the hearing.

24. Ms. Perez-Johnson explained the two refund claims that were filed by petitioner. She noted that the Division denied the refund claims with respect to the diesel and gasoline purchased for petitioner's ground service equipment at LGA. She testified that, with respect to petitioner's equipment at JFK, the Division only allowed a refund on its purchases of fuel from Sprague since Sprague maintained vendor invoices. All other purchases of diesel and gasoline made by petitioner at JFK from other vendors were denied because no vendor invoices were provided.

25. In an effort to determine usage of gasoline and diesel used in maintaining its ground service equipment, Ms. Perez-Johnson testified that she requested fuel uplift logs from Mansfield but was told that such vendor did not retain fuel uplift logs for the time period sought by

petitioner. Therefore, Ms. Perez-Johnson stated that by using the EBis documents in conjunction with the fuel uplift logs provided by Sprague, she was able to calculate the refund amount without having the fuel uplift logs from the other vendors.

26. Ms. Perez-Johnson calculated the refund amount by taking a percentage of the gallons that are consumed by the specific piece of equipment and multiplying that by the total tax that was paid. Specifically, she testified that she used EBis for the total gallons consumed and she would use an average burn rate of the fuel by the total hours or miles listed in the column labeled hours. Ms. Perez-Johnson testified that a burn rate is calculated by total gallons of fuel used divided by the total hours, or miles, for a specific piece of equipment. The average burn rate was calculated using the fuel uplift logs from Sprague for each piece of equipment and then the average burn rate was applied against all the other, similar pieces of equipment that were fueled with gasoline and diesel from the other vendors that were unable to produce vendor invoices.

27. The Division presented the testimony of its auditor to explain his work on the refund claims and the basis for the Division's denial in its entirety of the first refund claim and the basis of the partial allowance for the second refund claim.

28. The auditor explained that petitioner provided him with paid fuel invoices. He stated that this documentation was not sufficient to prove how much fuel was used for each piece of equipment and, specifically, the fuel used to maintain the ground service equipment. Without the disbursement log, the auditor testified that fuel could have been used in either a taxable or non-taxable piece of equipment. The auditor explained that without the disbursement records, there was no way to determine how the fuel was used.

29. The auditor testified that the fuel disbursement records from Sprague were sufficient to demonstrate the fuel that was used for the ground service equipment and the refund with respect to those fuel purchases was allowed.

30. With respect to petitioner's calculations for its refund claims, the auditor stated that the information that was contained in EBis could not be verified, even on a test period basis. He explained that he consulted with Ms. Perez-Johnson to determine how the information from the odometer was traced to the individual piece of equipment and he stated that she explained that it could not be traced back to any specific equipment. He testified that none of the EBis information could be verified independently. He explained that fuel disbursement records are essential in cases as this one because it is imperative for petitioner to be able to demonstrate where the fuel was used. The auditor also noted that petitioner admitted certain discrepancies within EBis and then tried to overcome errors by making adjustments to the numbers afterward. The auditor stated that this is inherently unreliable, which is in stark contrast to the fuel disbursement records that are easily verifiable.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105 (a) imposes a sales tax on the receipts from every retail sale of tangible personal property except as otherwise provided. It is presumed that all receipts for sales of tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable will be upon the person required to collect the tax (*see* Tax Law § 1132 [c]; *Matter of Rizzo v Tax Appeals Trib. of State of N.Y.*, 210 AD2d 748 [3d Dept 1994]).

B. Tax Law § 1115 (a) (21) provides an exemption from sales tax on receipts from property used by or purchased for the use of commercial aircraft for maintenance and repairs.



The parties do not dispute that the ground service equipment at issue in this case would, in fact, be exempt as equipment used to maintain and repair petitioner's aircraft. The sole issue in this case is whether petitioner can prove that it is entitled to a refund based upon its claim of fuel purchases used for its ground service equipment.

C. Tax Law § 1139 (a) authorizes refunds or credits for amounts of sales tax erroneously paid. Petitioner submitted fuel purchase invoices from its suppliers in support of its claims for refund. Such invoices did not establish what amount of fuel was used in the exempt ground service equipment. The auditor testified that the information that was contained in EBis could not be verified, even on a test period basis. He explained that he consulted with Ms. Perez-Johnson to determine how the information from the odometer was traced to the individual piece of equipment and he stated that she explained that it could not be traced back to any specific equipment. He testified that none of the EBis information could be verified independently. He explained that fuel disbursement records are essential in cases as this one because it is imperative for petitioner to demonstrate where the fuel was used in order to receive a refund of sales tax paid.

D. The burden of proof is upon petitioner to clearly establish what portion of its fuel purchases was used in the ground service equipment so that such purchases are exempt from sales tax (*see Matter of XO Communication Servs., LLC*, Tax Appeals Tribunal, May 9, 2018 [wherein the petitioner failed to demonstrate what purchases of electricity were resold to qualify for the resale exclusion]; *see also Matter of Micheli Contr. Corp. v New York State Tax Commn.*, 109 AD2d 957 [3d Dept 1985]). Although petitioner explained the numbers that it used in its calculations, the information upon which it was based cannot be verified and, as such, an accurate substantiation of its fuel purchases used in its ground service equipment cannot be

determined (*see Matter of Evangelista*, Tax Appeals Tribunal, September 27, 1990). Therefore, petitioner has failed meet its burden of proof to show entitlement to the refunds claimed.

E. The petitions of Delta Air Lines, Inc., are denied and the refund claim denial letter, dated April 18, 2018, is sustained and the refund claim denial letter, dated May 28, 2018, as modified in accordance with the conciliation order, dated April 19, 2019, is sustained.

DATED: Albany, New York  
March 3, 2022

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE