

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-98(23)C
Corporation Tax
November 5, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C980805A

On August 5, 1998, a Petition for Advisory Opinion was received from American Jet Engine Co Inc, 37 W 39th Street, New York, New York 10018.

The issue raised by Petitioner, American Jet Engine Co Inc, is whether rent paid for warehousing inventory is included in the property factor of Petitioner's business allocation percentage under Article 9-A of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner buys and sells spare parts for jet engines. It has a sales office in New York. When merchandise is purchased, it is stored at ASA Apple Incorporated, a warehouse located at Unit 3, Carteret Condominium Warehouse in Carteret, New Jersey.

Petitioner states that it has fixed and discrete space at the warehouse. As Petitioner buys more inventory to expand its business, the amount of space (and the overall storage charges) increase.

There is one ASA Apple Incorporated employee at the warehouse who handles all of Petitioner's transactions, receiving and shipping goods. All of the transactions at the warehouse are arranged with this person. He is the only person at the warehouse who services Petitioner's transactions. When items are received at the warehouse, he logs them in. When items are sold, he arranges for shipping. Petitioner has used this person for 15 years and several years ago, when he left the employ of its former warehouse, it went with him to his new warehouse. He is integral to the business.

The reason the storage space charge is computed by cubic feet used, and is not a fixed amount, is because inventory is expanding and hence the space used is expanding. This method gives Petitioner the ability to expand its business.

Petitioner has submitted a warehousing agreement that Petitioner and AmJet Aerospace, Inc (collectively "AmJet") entered into with Apple Freight Systems of America, Inc, and Apple Leasing Corporation (collectively "Apple") executed February 21, 1992, binding the parties through December 31, 1993. The warehousing agreement was assigned to and assumed by ASA, Apple's successor, on or about February 25, 1993, and has been extended through March 31, 1998. The only modifications to the Agreement are with respect to the rates charged. The warehousing agreement provides, in pertinent part, as follows:

2. Warehousing Space. Apple shall provide to Amjet during the term hereof such storage space as Amjet may now or hereafter require, including space for future inventory, in adequate warehousing facilities at the cost set forth herein. The costs and charges set forth herein shall determine the fees charged Amjet by Apple for the period governed by this Agreement Such space must be sufficient to allow Apple to select and handle each lot stored by Amjet in a timely and efficient manner.

3. **Billing.** Apple shall provide Amjet with monthly warehouse activity reports, detailing lots, a description of the make up of each lot, and location by lot of the goods stored by Apple. Said monthly reports shall reflect charges for the cubic footage utilized by Amjet, and must set forth, in cubic feet, the actual footage for each lot by unit for each billing period....

4. **Warehousing Location.** Except as provided in Paragraph 5, all warehousing space and service provided to Amjet hereunder shall be at the warehousing facility currently used by Amjet and located at Unit 3, Carteret Condominium Warehouse, 100 Middlesex Avenue, Carteret, New Jersey 07008. Apple warrants and represents that it has the lawful right to occupy such space and to conduct a warehousing business in the facility set forth herein.

5. **Change in Warehousing Location.** If Apple should move its main warehouse facility operation from its present site to another location within 35 miles of New York City (sites beyond 35 miles from New York City must be consented to by Amjet) the space and services provided to Amjet may be moved to the new main warehouse facility provided such facility is at least the equivalent of the facility currently provided in terms of access, security, structure, safety, and such other factors as are reasonably material.

6. **Change of Warehouse Facilities/Moving.** If the storage of Amjet's goods is to be moved from the existing facility in accordance with the terms of this Agreement, Apple shall take such steps and perform such services as necessary to accomplish the movement of Amjet's goods at Apple's expense. Amjet may, at its option, supervise Apple's performance in accomplishing the movement of Amjet's goods or hire such outside independent contractors, at Apple's expense, as Amjet feels necessary to accomplish the movement of Amjet's goods. Any move performed by Apple, its agents or employees shall be performed so as to keep all components of each lot of the goods stored in the warehouse together, both during transit, and in storage, and, shall enable Amjet to identify the location in storage of each lot in the new facility.

7. **Acknowledgments.** (a) Apple is aware of the nature of Amjet's goods held in the facility. Such goods constitute various numbers and types of aircraft parts, which are mainly packaged in cartons or wood cases. Apple acknowledges that maintenance of the composition and integrity of each lot and all its components is of the utmost importance to Amjet and is of the essence of this agreement because, should any component of a lot be misplaced, or separated from the lot to which it belongs or improperly or mistakenly substituted for a different or inappropriate component, the entire aircraft part may be rendered useless or inoperative, and therefore valueless. Accordingly, the movement of each lot and the location listing of any lot in a manner which fails to retain together all component parts of such lot, or which fails to record each lot's location in storage will result in confusion of the component parts of a lot or lots rendering the good unsalable. Apple will be required to keep a locator system upon which each lot can be located by Amjet.

(b) All of Amjet's goods now in storage or hereafter delivered for storage shall be stored on racks which shall be provided by Apple at no cost to Amjet.

8. **Storage Space Charge.** During the term of this Agreement, Amjet shall continue to lease cubic footage, calculated according to the unit make-up of individual lots, as required for the storage of its goods at the rate ... per cubic foot per month.

9. **Handling and Other Charges.** During the term of this Agreement, handling charges shall be as follows:

| | |
|----------------------------------|-----|
| Handling (In and Out) (New Lots) | ... |
| Pick/Pack Labor | ... |
| Labor | ... |
| Bills of Lading | ... |
| Minimum (receipt) | ... |
| Clerical Labor | ... |

Material used for packaging partial lots for shipment will be supplied by Amjet.

11. **Condition of Premises and Security.** Apple agrees to maintain the warehousing facilities, quality of service available, level of security and means of ingress and egress at or better than such quality or condition as exists at the time of entry into this Agreement.

12. **Risks of, or Damage to Stored Goods.** In the event any occurrence or incident takes place at the warehouse facility, such as but not limited to fire, water leakage or seepage, or breaking and entry, which causes damage to the stored goods or which may potentially cause such damage, Apple shall notify Amjet forthwith in order to allow Amjet the earliest possible opportunity to inspect its goods and to take steps to prevent damage or further damage. Apple shall nevertheless be responsible for any damages to Amjet's goods caused as a result of such incident or occurrence.

13. **Assignability.** The nature of the services to be provided by Apple pursuant to the terms of this Agreement render this Agreement personal in nature and this Agreement may not be assigned or transferred by Apple directly or indirectly to parties other than 100 percent owned subsidiary of Apple or to the equitable owners of Apple. A greater than 40 percent change in the equitable ownership of Apple shall constitute an assignment forbidden by the terms of this Agreement unless consented to in advance in writing by Amjet. Apple shall remain liable under the terms of this Agreement for any breach of this Agreement.

Discussion

Section 4-3.2(a) of the Article 9-A Regulations provides that in computing the property factor of the business allocation percentage, real property rented to the taxpayer must be included.

Section 4-3.2(b) of the Article 9-A Regulations also provides that the term "gross rents" means the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes, among other things, any amount payable for the use or possession of real property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise. Section 4-3.2(c) of the Article 9-A Regulations provides that the term "gross rents" does not include amounts payable for storage, provided such amounts are payable for space not designated and not under the control of the taxpayer.

Therefore, real property rented to the taxpayer is included in the property factor of the business allocation percentage. This would include space rented at a public warehouse. Storage fees or rental fees at a public warehouse are included within the meaning of gross rents under section 4-3.2 of the Article 9-A Regulations if such storage or rental fees are payable for designated space that is under the control of the taxpayer. See, Richard Berman, CPA, Adv Op Comm T&F, April 7, 1994, TSB-A-94(6)C.

In this case, paragraph 2 of Petitioner's warehousing agreement with Apple provides that Apple will provide adequate storage space, including space for future inventory, that is "sufficient to allow Apple to select and handle each lot stored by Amjet in a timely and efficient manner." Paragraph 4 of the agreement provides that all warehousing space and service provided to Amjet by Apple is at the warehousing facility used by Amjet at Unit 3, Carteret Condominium Warehouse, 100 Middlesex Avenue, Carteret, New Jersey. However, in paragraph 5 of the agreement, Apple may move its main warehouse facility operation to another location within 35 miles of the Carteret site, and, if such new facility is at least the equivalent of the current facility, the space and services provided to Amjet may be moved to the new facility without the consent of Amjet. Paragraph 6 of the agreement provides that if Amjet's goods are moved to a new location, Amjet may, at its option, supervise the movement of the goods.

Further, paragraph 7 of the agreement provides that Apple will be required to keep a locator system upon which each lot can be located by Amjet. Paragraph 3 of the agreement provides that Apple will provide Amjet with "monthly warehouse activity reports, detailing lots, a description of the make up of each lot, and location by lot of the goods stored by Apple".

Based on all of these provisions of the agreement, it appears that Petitioner's lease of cubic footage for warehouse space provided by Apple is not for a specific designated space, and it also appears that the storage space is under the control of Apple, not Petitioner. Accordingly, the rent Petitioner pays for the lease of warehouse space at ASA Apple Incorporated, does not constitute "gross rents" as contemplated by section 4-3.2 of the Article 9-A

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Regulations and is not included in Petitioner's property factor of the business allocation percentage.

DATED: November 5, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.