

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(23)S
Sales Tax
July 10, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020104A

On January 4, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tropicana Products, Inc., 700 Anderson Hill Road, Purchase, NY 10577-1444.

The issues raised by Petitioner, Tropicana Products, Inc., are:

(1) Whether, under the circumstances described below, its aircraft operations division's purchases of new aircraft, machinery or equipment installed on new or existing aircraft, property purchased for the maintenance and repair of new or existing aircraft, and services rendered for the maintenance and repair of its aircraft are exempt from sales and compensating use taxes under Sections 1115(a)(21) and 1105(c)(3)(v) of the Tax Law.

(2) Whether, under the circumstances described below, the compensation paid to Petitioner's aircraft operations division by related companies constitutes payment for air transportation services which are exempt from sales and compensating use taxes.

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

Petitioner was incorporated in the state of Delaware in 1986. Petitioner's principal place of business is located in Bradington, Florida, with offices and operations in Purchase and White Plains, New York. Petitioner is a first tier subsidiary of PepsiCo, Inc. ("PepsiCo"). Petitioner is a separate and distinct legal entity that operates independently of its parent, PepsiCo, and related companies. Petitioner is responsible for its own business operations, including finances, administration, and management.

Petitioner's aircraft operations division ("SoBe") is fully dedicated to providing aircraft related services. SoBe is not a separate legal entity, but is a distinct operating division within Petitioner. The SoBe division of Petitioner holds title to its aircraft, and is the sole owner of these aircraft. None of the related companies in the PepsiCo affiliated group will have any ownership interests in any of the aircraft. SoBe has approximately 31 employees consisting of airline transport rated pilots, licensed aircraft technicians, certified dispatchers, and administrative personnel. Employees dedicated to aircraft operations work at White Plains Airport where Petitioner regularly owns and operates aircraft. SoBe provides aircraft transportation services to employees, customers, and potential customers of PepsiCo (parent) and PepsiCo's subsidiaries (affiliates of Petitioner) on intrastate, interstate, and international flights. On rare occasions, i.e., less than 2% of all annual flights, Petitioner may use aircraft for the transportation of its own employees.

SoBe is not required to obtain a FAR 135 Air Carrier Operating Certificate under Part 135 of the Federal Aviation Administration (“FAA”) Regulations. SoBe will operate its aircraft under Part 91, Subpart F, of the FAA Regulations, and will be responsible for all flight services, scheduling, fuel, repairs and maintenance, pilots and flight staff for the aircraft.

SoBe will maintain its own aircraft related staff, and will be responsible for its own finances and administration. SoBe exercises complete dominion and control over all aircraft owned or leased by SoBe, including operations and maintenance, as it determines where and when the aircraft fly, and is responsible for all maintenance and costs associated with the aircraft operations.

The related companies compensate SoBe for flights. The compensation charged by SoBe is based on the operating costs of the aircraft; and the related companies pay these costs based on their usage of the aircraft. More than 90 percent of the use of SoBe’s aircraft will be devoted to transporting employees, customers, and potential customers of related companies for compensation. SoBe charges out all its expenses relating to aircraft operations, including both fixed and variable costs, to its users. This charge is allocated between the affiliated entities in proportion to their flight hours in using the aircraft. This formula should result in an intercorporate allocation of almost all of the aircraft’s costs, as measured by flight hours. SoBe provides air transportation services to its affiliates pursuant to a written transportation service agreement.

Applicable Law and Regulations

Section 1101(b) of the Tax Law states, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), 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.

* * *

(7) Use. The exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage,

any installation, any affixation to real or personal property, or any consumption of such property. . . .

* * *

(17) Commercial aircraft. Aircraft used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the aircraft primarily to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes.

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . except:

* * *

(v) such services 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 paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article. . . .

Section 1110(a) 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 under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1115(a)(21) of the Tax Law exempts from the sales tax imposed by Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

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Commercial 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.

Section 526.7(e)(4) of the Sales and Use Tax Regulations provides, in part:

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.

Section 527.5(a)(3) of the Sales and Use Tax Regulations provides, in part:

Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

Opinion

Petitioner's aircraft operations division (SoBe) will purchase and operate aircraft that will be used to transport, for compensation, employees, customers, and potential customers of related companies on intrastate, interstate, and international flights. Petitioner represents that it is a separate and distinct legal entity that operates independently of its parent and the related companies. It is noted that as SoBe is simply a division of Petitioner, Petitioner and SoBe are not separate entities for sales tax purposes.

With respect to Issue (1), since more than 50 percent of the use of Petitioner's aircraft is devoted to transporting employees, customers, and potential customers of related companies for compensation, and the compensation reasonably reflects the cost of operating the aircraft, the aircraft will be considered commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce, within the meaning of Section 1115(a)(21) of the Tax Law. See Philip Morris Management Corp., Adv Op Comm T&F, October 11, 2000, TSB-A-00(38)S; Citiflight, Inc., Adv Op Comm T&F, August 3, 2000, TSB-A-00(30)S; Pasquale & Bowers, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S. This presumes treatment of Petitioner and the related companies as separate legal entities as represented by Petitioner.

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As Petitioner's aircraft qualifies as "commercial aircraft" for purposes of Section 1115(a)(21) of the Tax Law, purchases of machinery or equipment to be installed on the aircraft and of tangible personal property purchased or used by Petitioner to maintain or repair its aircraft will be exempt from New York State and local sales and compensating use taxes. See Federal Express Corporation, Adv Op Comm T&F, December 26, 1996, TSB-A-96(81)S. Likewise, service charges for the maintenance or servicing of the aircraft within the meaning of Section 527.5(a)(3) of the Sales and Use Tax Regulations would be exempt. See Section 1105(c)(3)(v) of the Tax Law.

Concerning Issue (2), whether payments to Petitioner by the related companies constitute payments for the purchase of an exempt air transportation service, as opposed to the taxable rental of the aircraft, turns upon the question of dominion and control. If Petitioner retains complete dominion and control over the aircraft, the transactions are considered to be the provision of a transportation service and Petitioner's charges to the related companies to transport their employees, customers, and potential customers would not be subject to sales or use tax. See The Gap, Inc., Adv Op Comm T&F, January 28, 2000, TSB-A-00(3)S; Philip Morris Management Corp., *supra*; Citiflight, Inc., *supra*. In this case, Petitioner employs the personnel who maintain and operate the aircraft, including pilots, licensed aircraft technicians, certified dispatchers, and administrative personnel. Petitioner determines where and when the aircraft fly, and is responsible for all maintenance and costs associated with the aircraft operations. Therefore, Petitioner does not relinquish dominion and control of the aircraft within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations, and what is being furnished to the related companies is a nontaxable transportation service and not a taxable purchase or rental of tangible personal property pursuant to Sections 1101(b)(5) and 1105(a) of the Tax Law. Citiflight, Inc., *supra*; The Gap, Inc., *supra*.

DATED: July 10, 2002

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