New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(56)S
Sales Tax
November 10, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S100224A

Petitioner [redacted] asks whether its receipts from aircraft community hangar rentals and aircraft tie-downs are subject to New York State sales taxes.

We conclude that Petitioner's charges for aircraft community hangars and aircraft tie-downs do not constitute the service of the storage of tangible personal property subject to the sales tax imposed pursuant to section 1105(c)(4) of the Tax Law.

Facts

Petitioner is a Fixed Base Operator (FBO) at a New York airport. Petitioner has a lease for the premises and license to operate from the airport authority that runs the airport.

Petitioner claims that, generally, an airport authority may require FBOs operating on their premises to provide hangar and tie-down facilities for aircraft used in personal or charter services, sell fuel, provide repair and maintenance services, provide pilot lounges, and various other services and facilities.

Petitioner provides tie-down and hangar facilities for aircraft based at its airport, and for aircraft based elsewhere that fly into Petitioner's airport (transient aircraft). As relevant to this Advisory Opinion, Petitioner provides tie-down facilities and space in community hangars.

Tie-down facilities are outdoor areas located at the airport. Operators of aircraft based at the airport are given specified slots where they can tie down their aircraft. These customers can move their aircraft to and from the tie-down area without the assistance of the FBO. Operators of transient aircraft do not have a specified slot where they can tie down their aircraft. Rather, the FBO brings the aircraft to and from the transient tie-down lot. In both lots, operators have access to their aircraft around the clock, 365 days a year. In both lots, operators can only perform maintenance that will not interfere with access of other operators to their aircraft. Petitioner has written use and occupancy agreements with only one of the operators using its tie-down facilities.

The community hangar is an indoor facility that is available for private aircraft. Each aircraft in the community hangar is available to its operator 24 hours a day, 365 days a year. The operator has a key to the hangar. Although operators might remove their aircraft from the hangar without assistance, that practice is discouraged due to the possibility of damage to other aircraft in the hangar in close proximity to the aircraft being moved. On being advised that an aircraft is needed, Petitioner's employees go to the hangar to retrieve the aircraft. The aircraft is towed to a departure spot and is ready for the arrival of its operator. Petitioner assures the aircraft operators that their aircraft will, upon request, be removed from the hangar within 45 minutes, if not sooner, of an operator's request to have the aircraft available. Operators must leave their aircraft unlocked to facilitate Petitioner's ability to retrieve the aircraft upon the operator's request; however, the operators retain the keys to the aircraft. Maintenance that might hinder Petitioner's ability to retrieve aircraft from the hangar is not permitted. The community hangar is generally used by aircraft operators that

are based at the airport, although the hangar is available for use by operators of transient aircraft. Use of a community hangar by transient aircraft operators is infrequent.

Petitioner has written use and occupancy agreements with most of its community hangar clients, except that there might not be written agreements for month to month occupancies. The various agreements do not designate any particular space that the aircraft operator is to use and do not limit the FBO's access to any of the space in the hangar. The agreements generally provide that the client is responsible for the cleanliness of its space but that the client is generally not responsible for repairs to the space. Clients agree not to move or start the aircraft or engines while the aircraft is in a hangar. Petitioner is responsible for towing or repositioning of aircraft into and out of the contracted space, but the client is responsible for securing the aircraft while positioned in its space. Petitioner retains the right to enter the premises for the purpose of inspecting the space and for repairs, additions, alterations, etc., and the clients may not impede Petitioner in those activities. Some of the agreements provide that the client may not perform maintenance of the aircraft while it is in the hangar, but other agreements permit maintenance, cleaning, and other services (other than fueling and towing) by the client or a third party of the client's choosing, if the entity has adequate insurance coverage. If the agreements permit clients to perform their own aircraft maintenance services, the agreements require the clients to keep the space clean, and store and stow tools, work stands, etc. Petitioner charges the client additional fees for the use of added space to stow and store the maintenance tools. It also restricts noise (playing music on radios, etc.).

The agreements contain extensive provisions relating to the client's maintenance of insurance coverage (worker's compensation, commercial liability, aircraft accident and liability, ground risk and flight physical damage, property liability, etc.). The agreements specifically state that they are not to be construed as creating a bailment, and that Petitioner is not to be considered a bailee or have any obligation to maintain or secure the customer's property. Furthermore, the agreements provide that they are not to be construed as granting an interest in real property, or conveying an estate or vesting property rights in the client, and do not create a landlord-tenant, partnership, agency, joint venture, bailment, trust, or fiduciary relationship. The fee charged to operators for the use of the hangar space varies depending on a number of factors, including the size of the aircraft. Otherwise, the operators are treated equally.

Petitioner maintains that the aircraft that use its community hangar or tie down facilities are all flown at least once a month.

Analysis

Sales tax is imposed on the receipts from the sale of the services of storing all tangible personal property not held for resale (Tax Law § 1105[c][4]), and the parking, garaging, or storing of motor vehicles by persons operating garages, parking lots or other places of business engaged in providing parking, garaging or storing for motor vehicles (Tax Law § 1105[c][6]). Receipts from leases and rentals of real property are not subject to the sales tax, notwithstanding that the rented property is used by the lessee for what would otherwise be a taxable purpose, such as for the storage of tangible personal property or for the parking, garaging or storing of motor vehicles (*See* Sales Tax Reg. § 527.6[b][2]; TSB-M-08(14)S, *Sales Tax Treatment of a Lease or Rental of Real Property for the Purpose of Parking, Garaging, or Storage of Motor Vehicles*, December 17, 2008; TSB-M-86[3]S, *Taxable Status of the Rental of Self-Service Mini Storage Units,* January 16, 1986).

In distinguishing between the existence of a landlord-tenant relationship and the sale of a storage service, the Department has cited the following factors: whether there is a lease agreement; the purchaser's right of access to the premises and to its property maintained therein during normal business hours of the

premises; responsibility for maintaining the space (payment for utilities services, cleaning, trash removal, etc.); exclusivity of the right to occupy the space (with either the owner/landlord being excluded during the tenancy or the person whose property is being stored having no access to the warehouse or its property); and whether the tenant has insurable interests in the premises (*See* Sales Tax Reg. § 527.6; TSB-M-08[14]S, *supra*; TSB-M-04(8)S, *Summary of 2004 Budget Legislation and Other Recently Enacted Legislation Relating to Sales and Compensating Use Taxes*, December 3, 2004; TSB-M-86[3]S, *supra*)

In TSB-M-04(8)S, *supra*, the Department stated the following in respect of hangaring and tie-downs of aircraft:

> It should be noted that unless otherwise exempt, the storage of tangible personal property is subject to sales tax. However, in certain cases, where the owner or lessee of the tangible personal property has unlimited control or access to the place where the property is stored, the charge for such renting or leasing real property is not subject to sales tax. See TSB-M-86(3)S, *Taxable Status of the Rental of Self-Service Mini-Storage Units*. Therefore, the leasing or renting of a hangar or other real property to park the aircraft, and the parking of aircraft in or on hangars, ramps or tiedowns is not subject to sales tax, provided the owner or lessee of the aircraft has regular or immediate access to the aircraft. Also, the service of providing parking for aircraft is not a service enumerated as subject to sales tax under section 1105(c) of the Tax.

Thus, the Department has treated tie-downs and the hangaring of aircraft under appropriate circumstances as the non-taxable rental of real property or an unenumerated service, and has not treated them as a taxable storage service under section 1105 of the Tax Law.

Here, Petitioner has not established that its agreements with aircraft operators to use either the tie down facility or the community hangar constitute leases of real property because it has not shown that an aircraft operator's use of a space in those facilities is exclusive of Petitioner's right of access. Nonetheless, because an aircraft operator has immediate access to his or her aircraft in both facilities, those facilities appear to constitute aircraft parking, rather than storage, and aircraft parking is not taxable (TSB-M-04[8]S, *supra*; Sales Tax Reg. § 527.6[b][3]).

DATED: November 10, 2010

/S/
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Deputy Commissioner and Counsel

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