

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

TSB-A-98(56)S
Sales Tax
August 6, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S980320A

On March 20, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Rifton Enterprises, Inc., 10 Hellbrook Lane, Ulster Park, NY 12487.

The issues raised by Petitioner, Rifton Enterprises, Inc., are:

(1) Whether airport imposed "flowage fees" and "concession fees" Petitioner is charged as a cost of doing business at the airport and in turn passes on to its customers are includable in receipts subject to sales tax.

(2) Whether "into plane" fees Petitioner charges for fueling services provided at the airport are subject to sales tax.

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

Petitioner is an aviation service company operating from Stewart International Airport. Petitioner has a Fixed Base Operator concession from Stewart International Airport to support private and commercial aviation. In addition to an air chartering service, Petitioner provides services to other air carriers. Specifically, Petitioner provides fueling services, maintenance and ground handling services to both airlines and non-airline transportation companies located at Stewart International Airport.

Stewart International Airport is a New York State owned facility, operated by the New York State Department of Transportation. The airport levies a \$0.06 per gallon flowage fee and a 5% concession fee on Petitioner's services as a condition of permitting Petitioner to perform its services at the airport. Petitioner separately itemizes these fees on its invoices to customers.

Petitioner has not been collecting sales tax on services provided to carriers that meet the definition of an airline under Section 528.10(b) of the Sales and Use Tax Regulations. For the non-airline customers, Petitioner has included the flowage fees and the concession fees in the total invoice amount subject to New York State and local sales tax. The airport has claimed that because it is operating under a contract with the State of New York, the fees are collected on behalf of the State and are exempt from sales tax under Section 1116(a)(1) of the Tax Law.

Additionally, Petitioner charges its own surcharge on fueling services performed at the airport facility. These fees, referred to as "into plane" fees, are included in the full selling price charged to customers.

Applicable Law and Regulations

Section 1101(b)(3) of the Tax Law defines receipt as "[t]he amount of the sale price of any property and the charge for any service taxable under this article . . . without deduction for expenses. . . ."

Section 1101(b)(17) of the Tax Law defines commercial aircraft as [a]ircraft 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 a tax on the "receipts from every retail sale of tangible personal property"

Section 1105(c) of the Tax Law imposes sales tax on the receipts from the following service:

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, 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 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(9) Fuel sold to an airline for use in its airplanes.

* * *

(21) 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.

* * *

(j) The exemptions provided in this section shall not apply to the tax required to be prepaid pursuant to the provisions of section eleven hundred two of this article nor to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article with respect to receipts from sales and uses of motor fuel or diesel motor fuel, except that the exemption provided in paragraph nine of subdivision (a) of this section shall apply to the tax required to be prepaid pursuant to the provisions of section eleven hundred two of this article and to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article with respect to sales and uses of kero-jet fuel.

Section 1120(d) of the Tax Law provides:

Purchase of motor fuel or diesel motor fuel at retail by an exempt organization. A refund or credit equal to the amount of tax imposed pursuant to section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter upon the sale of motor fuel or diesel motor fuel and paid by a purchaser shall be allowed such purchaser if the purchase, use or consumption of such fuel would have otherwise been exempt pursuant to section eleven hundred fifteen or eleven hundred sixteen of this article but for the provisions of subdivision (j) of section eleven hundred fifteen or paragraph five of subdivision (b) of section eleven hundred sixteen of this article.

Section 526.5(e) of the Sales and Use Tax Regulations provides:

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 receipts. (Emphasis added)

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

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The customer is billed as follows

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	<u>5</u>
Total due	\$200

Receipt subject to tax is \$200

Opinion

Petitioner is engaged in the business of providing aviation services to both airlines and non-airline transportation companies located at Stewart International Airport. Stewart International Airport, as the contracted representative of the New York State Department of Transportation, charges Petitioner flowage fees based on the amount of fuel Petitioner sells and concession fees based on a flat rate of 5% of the receipts Petitioner receives for performing its services. In billing its customers, Petitioner itemizes the charges for its services and these fees levied by the airport, and collects sales tax on the entire receipts from its non-airline customers.

With regard to issue "1," in Matter of Penfold v. State Tax Commn., 114 AD2d 696, the court held that dumping charges passed on by an operator of a refuse removal service to its customers were includable in the operator's taxable receipts even though dumping charges per se are nontaxable, since the dumping fees were expenses incurred in the business of selling the refuse removal services and were, therefore, subject to sales tax. In Petitioner's case, Petitioner's receipts include charges for the sale of any tangible personal property or services taxable under Articles 28 and 29 of the Tax Law, and include all expenses incurred by it in making such sales, regardless of the taxable status of the expense items. The airport flowage and concession fees constitute expenses incurred by Petitioner in conducting its aviation service business, regardless of the fact that they are imposed by the contracted representative of the New York State Department of Transportation. Accordingly, these charges passed on by Petitioner to its customers are includable as taxable receipts under Section 1101(b)(3) of the Tax Law (see Section 526.5(e) of the Sales and Use Tax Regulations; Matter of Penfold v. State Tax Commn., supra). It should be noted that maintenance services are not subject to sales tax when performed on commercial aircraft as specified in Section 1115(a)(21) of the Tax Law, whether or not the commercial aircraft are used by airlines.

Likewise, concerning issue "2," the "into plane" surcharge is not identifiable as an independent sale by Petitioner but is deemed to be part of the total cost of the fuel sold. Therefore, the amounts attributable to "into plane" fees are includable as taxable receipts under Section 1101(b)(3) of the Tax Law.

All airline or commercial aircraft purchasers of aviation gasoline must pay the sales tax on the fuel and may then apply to the Tax Department for a refund of the tax paid. See Sections 1115(j) and 1120(d) of the Tax Law. Commercial aircraft operators, other than airlines, must pay sales tax on purchases of kero-jet fuel also and may then apply for a refund. Sales of kero-jet fuel to

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airlines for use in their aircraft, including the amounts attributable to "into plane" fees, are exempt from sales and use taxes (upon receipt of Form FT-1020, Exemption Certificate for Certain Taxes Imposed on Diesel Motor Fuel and Propane). See Sections 1115(a)(9) and 1115(j) of the Tax Law. All sales of fuel to noncommercial aircraft operators are subject to sales tax without refund.

DATED: August 6, 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.