

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

TSB-A-90 (31) S  
Sales Tax  
June 29, 1990

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900417A

On April 17, 1990 a Petition for Advisory Opinion was received from George Sexton, 1601 3rd Avenue #34J, New York, New York 10128.

The issue raised by Petitioner, George Sexton, is whether the use within New York State of a private aircraft owned by Petitioner, a resident of New York State, wherein delivery of such aircraft occurred in the state of New Jersey and such aircraft has remained to be permanently hangared at an airport in Linden, New Jersey, falls within the limited use in New York State specified for "private aircraft" in TSB-M-78(12)S dated September 25, 1978 and thus is not subject to the compensating use tax.

Petitioner, a self-employed resident of New York State, purchased a used aircraft in May 1988. Delivery of the aircraft occurred within the state of New Jersey. The aircraft is permanently hangared at an airport located in Linden, New Jersey and is used primarily for business purposes.

Petitioner, an aircraft pilot, performs various services gratuitously for the Civil Air Patrol. Petitioner uses his personally owned aircraft, automobile, and other equipment in performing such volunteer services. Petitioner pays the entire cost of maintenance and repair including purchases of fuel and oil (with the exception of that consumed for certain "Air Force authorized missions") and is not otherwise reimbursed for such expenses.

Since being purchased, this aircraft has remained overnight at a New York State airport on three separate occasions. In each instance, Petitioner was engaged in performing a service for the Civil Air Patrol.

On April 29, 1989 while participating in an emergency search and rescue mission conducted by the Civil Air Patrol, an equipment malfunction and inclement weather resulted in an in-flight emergency, necessitating landing at Stewart Airport, Newburgh, New York. The aircraft remained there until weather conditions permitted departure the following day.

On March 18 and 19, 1989 in Ithaca, New York and on June 3 and 4, 1989 in Syracuse, New York Petitioner participated in Civil Air Patrol training and conference activities. On each of these occasions, the flight originated outside of New York State and terminated with a single landing in New York State. The aircraft remained overnight and departed the following day, flying directly to a point outside New York State with no intervening landings in New York State.

None of these flights was for the purpose of conducting business within New York State, nor was any business, trade, employment, or profession conducted while in New York State.

Petitioner was a resident of New York City on the date the aircraft was purchased. Petitioner has never been a resident of Newburgh, Ithaca or Syracuse, New York nor carried on any employment trade, business or professional activities at those locations.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.--- . . . there is hereby imposed and there shall be paid a tax. . . upon:

(a) The receipts from every retail sale of tangible personal property.

. . .

Section 525.2 of the Sales and Use Tax Regulations states, in part:

Nature of tax:

(a)(3) The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

Section 1110 of the Tax Law states, in part:

Imposition of compensating use tax.--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. . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail.

. . .

Section 531.1 of the Sales and Use Tax Regulations states, in part:

Imposition of compensating use tax. (Tax Law, §1110).

(a) Imposition. The compensating use tax is imposed on the use within the State of tangible personal property and certain services, except to the extent they have been or will be subject to sales tax. . .

(b) Taxable uses. The uses enumerated herein are subject to tax.

(1) Tangible personal property purchased at retail. . .

Section 1111 of the Tax Law states, in part:

Special rules for computing receipts and consideration.

(b) Tangible personal property, which has been purchased by a

resident of New York State outside of this state for use outside of this state and subsequently becomes subject to the compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided, however:

(1) That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this state, such property shall be taxed on the basis of current market value of the property at the time of its first use within the state. The value of such property, for compensating use tax purposes, may not exceed its cost.

Section 531.3 of the Sales and Use Tax Regulations states, in part:

Basis of tax.

(a) Tangible personal property purchased at retail.

(1) The compensating use tax is due upon the use of tangible personal property in this State which has been purchased out of state. The applicable tax rate is imposed on the consideration given or contracted to be given for the property. . .

Section 531.4 of the Sales and Use Tax Regulations states, in part:

Property used outside of State prior to use in New York.

(a) General rule. When tangible personal property is purchased outside of the State by a resident of the State, for use outside of the State, and is subsequently used in the State, the compensating use tax is due on the purchase price.

(b) Use outside the State in excess of six months. Where a resident affirmatively shows that he used such property outside the State for more than six months prior to its first use in New York, the use tax is based on the current market value of the property, not to exceed its cost, at the time of first use within New York.

Example: A New York State resident absent from the State for an extended period purchased a boat outside of this State for \$2,000 on November 1, 1974. On August 1, 1975, the resident brought the boat, having a fair market value of \$1,500, into New York State. The resident is liable for the combined State and local tax on the \$1,500 at the rate in effect on August 1, 1975.

Section 1118 of the Tax Law states, in part:

Exemptions from use tax.--The following uses of property shall not be subject to the compensating use tax imposed under this article:

(7)(a) In respect to the use of property. . .to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property. . . upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

The sales tax is a "destination tax"; that is the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate in accordance with Section 525.2(a)(3) of the Sales and Use Tax Regulations. In the instant matter, Petitioner took delivery of the aircraft outside New York State. Accordingly, the transaction was not subject to the tax imposed under Section 1105(a) of the Tax Law. (Matter of Jamco Investments, Inc., Dec St Tax Comm, January 17, 1986, TSB-H-86(19)S).

However, since Petitioner is a resident of New York State, delivery of the aircraft outside New York State does not preclude Petitioner from being subject to the compensating use tax imposed under Section 1110 of the Tax Law ". . .for the use within this state. . .of any personal property purchased at retail. . .", where Petitioner "uses" such aircraft within New York State as the term use is defined under Section 1101(b)(7) of the Tax Law.

Petitioner's "use" of the aircraft, while participating in Civil Air Patrol training and conference activities wherein the aircraft landed and remained overnight between March 18 and 19, 1989 at Ithaca, New York and June 3 and 4, 1989 at Syracuse, New York created a "use" as defined under Section 1101(b)(7) of the Tax Law thereby resulting in Petitioner incurring a compensating use tax liability. Petitioner's emergency landing at Stewart Airport, Newburgh, New York in April 29, 1989 because of equipment malfunction and inclement weather is not considered to have created a "use" within New York State as defined in Section 1101(b)(7) of the Tax Law. (Matter of Jamco Investments, Inc., Dec St Tax Comm, January 17, 1986, TSB-H-86(19)S)

Since Petitioner purchased and took delivery of the aircraft outside New York State in May 1988 and as first "use" of such aircraft within New York State did not occur until approximately ten months later on March 18, 1989, Petitioner's compensating use tax liability will be based on the

aircraft's current market value at the time of such first "use" within New York State or its cost, whichever is less. Because Petitioner was not a resident of Ithaca or Syracuse on the date the aircraft was purchased nor on the date of first "use" within New York State, and as Petitioner has never carried on any employment, trade, business or professional activities at either location, Petitioner's tax liability will be limited to the New York State 4% compensating use tax. Petitioner will not be liable for any local compensating use tax at this time.

As Petitioner purchased the aircraft outside New York State, Petitioner may be entitled to a credit against the New York State use tax due for the amount of sales or use tax paid to the other state where the aircraft was purchased or permanently hangared, provided such state has a reciprocal exemption for sales or use taxes paid to New York State. As Petitioner is not liable for any local use tax within New York State, the credit will be limited to the state portion of sales or use tax paid to such state. No credit will be allowed for any local sales or use tax paid to such other state. In order to claim a credit for such sales or use taxes paid, Petitioner must submit documentation, from a qualified official of the relevant state, indicating that the reciprocal exemption still exists and that no right to a refund or a credit exists for the particular taxes paid. The credit allowed pursuant to Section 1118(7)(a) of the Tax Law will not be granted without such documentation.

DATED: June 29, 1990

s\PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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