

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

TSB-A-00(3)S
Sales Tax
January 28, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990720A

On July 20, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Gap, Inc., 900 Cherry Avenue MIC:1TX1, San Bruno, CA 94066. Petitioner, the Gap, Inc., provided additional information pertaining to the Petition on September 15, 1999.

The issues raised by Petitioner are:

1. Whether its purchase of a 25% interest in a non-commercial aircraft as described below, where delivery of the aircraft is taken outside of New York State, is subject to New York State compensating use tax.
2. If Petitioner's purchase of a 25% interest in a non-commercial aircraft as described below is not subject to New York State compensating use tax, would the following additional facts subject Petitioner to New York State compensating use tax on the aircraft?
 - a. The aircraft comes to rest in New York for a substantial period of time.
 - b. The aircraft is regularly maintained, serviced or repaired in New York.
 - c. The aircraft is, on occasion, maintained, serviced or repaired in New York.
 - d. The aircraft makes intrastate flights in New York.

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

Petitioner ("Owner") is a California corporation which has merchants in New York State. Owner maintains nine headquarter buildings in California and one in New York City. Owner is currently building a distribution center in Fishkill, New York.

Owner will be purchasing a 25% undivided interest in a non-commercial aircraft ("Aircraft") from "Seller" to be used for transportation of its company personnel and guests for pleasure or business purposes through the following arrangement.

Under the terms of the Purchase Agreement, Seller's obligations to sell the interest to Owner are subject to Owner becoming a party to the Management, Joint Ownership and Master Interchange Agreements described below. Seller has the right of first refusal to purchase Owner's interest in Aircraft and may, after five years, compel Owner to sell its interest to Seller at a repurchase price based on the then fair market value of Aircraft.

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Owner will enter into a Joint Ownership Agreement pursuant to which up to sixteen joint owners ("Additional Interest Owners") will be tenants-in-common of Aircraft. The Joint Ownership Agreement will not create a joint venture, partnership, any business organization of any kind or other relationship whereby any party will be held liable for the omissions or commissions of any other party. Under Section 4. of the Joint Ownership Agreement, each owner is entitled to the use of the Aircraft for a defined and specified period of time each year (the "Allocated Hours") as identified and governed by the Management Agreement described below.

Each of the joint owners will enter into a Management Agreement under which an independent manager ("Manager"), will manage Aircraft for the benefit of the joint owners. Seller and Manager appear to be related corporations. Each of the joint owners will also enter into a Master Interchange Agreement with Manager for the purpose of facilitating access to alternate aircraft of other persons participating in an Interchange Program in the event use of Aircraft is unavailable for any reason. Under Section 2. of the Master Interchange Agreement, each of the joint owners agrees to participate in the Interchange Program and to share Aircraft and pilots with such other persons, who are also each a party to the Master Interchange Agreement.

Under the terms of the Management Agreement, Manager will provide management services for the benefit of the joint owners. Such services, at Manager's expense, include arranging for Aircraft to be inspected, maintained, serviced and repaired in accordance with approved Federal Aviation Administration standards and guidelines, administrative services and aircraft hull insurance (naming Manager and all owners as insureds and providing for any insurance proceeds to be paid to Manager for repair or replacement of Aircraft). Manager will pay and provide licensed pilots to operate Aircraft, as well as recurrent pilot training, pilot medical examinations and uniforms. In some instances a pilot may be chosen by Owner but only subject to the approval of Manager. Manager will also pay all operating expenses such as fuel, hangar and general storage fees, and flight planning and weather services. While Owner will select the date, time, point of departure and destination of a particular flight, Manager will make all necessary take-off, flight and landing arrangements. The pilots select their own routes and use their own discretion in performing flight services. Manager will also maintain, on behalf of Owner, all records and logs required by the Federal Aviation Administration ("FAA"). Aircraft will be repaired and maintained at a variety of Manager's facilities located throughout the United States. Payment is made directly to Manager's Texas address on a monthly basis and is based, in part, on the actual hours flown for the month.

Owner is entitled to use Aircraft for a defined number of hours each year. In the event that use of Aircraft is unavailable to Owner, Manager will provide use of another available aircraft to Owner through the Master Interchange Agreement. Manager is entitled to use Aircraft for flight training for its pilots and for demonstration flights when it is not in use by one of the owners, and to retain any money it earns in this use of Aircraft.

Owner will not pay sales tax when it purchases its undivided interest in Aircraft because the sale will occur in a jurisdiction that exempts the sale of aircraft. FAA documents will show that Aircraft has Manager's Texas address. Due to the nature of the joint ownership arrangement, Aircraft will be in continual motion and will not be hangared in any identifiable location. Owner will have no control over the location to which other joint owners fly Aircraft. There is no guarantee that Owner will be using Aircraft each time it flies. Owner is unable to estimate how much of the total usage of Aircraft will be in New York State, or the durations of stays, flight plans or purposes of flights into New York.

Petitioner has submitted copies of the Bill of Sale and the Purchase, Joint Ownership, Management and Master Interchange Agreements as part of its Petition.

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. . . .

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 tax upon the receipts from every sale, except for resale, of certain enumerated services.

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 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.

Technical Services Bureau Memorandum TSB-M-84(7)S, dated April 10, 1984, entitled Bus Company Transactions -- Transportation Service vs. Equipment Rental, provides, in part:

1. Where a bus company conducts a tour for which it determines the time and destination and sells tickets at a predetermined price, the company is providing a transportation service which is exempt.

2. Where a bus company charters a bus to a group, and the bus company retains dominion and control* over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. A chartering party's rights are limited to boarding the bus and riding to the agreed destination. . . .

*Dominion and control remains with the owner of a vehicle when pursuant to an agreement or contract:

- 1. there is no transfer of possession, control and/or use of the vehicle during the terms of the agreement or contract; and

2. the owner maintains the right to hire and fire the drivers; and
3. the owner uses his own discretion in performing the service . . . and generally selects his own routes; and
4. the owner retains the responsibility for the operation of the vehicle; and
5. the owner directs the operation, pays all operating expenses, including drivers' wages, insurance, tolls and fuels.

Opinion

Petitioner ("Owner") is purchasing from "Seller" an "interest" in what appears to be a specified aircraft. Seller's obligations to sell the interest to Petitioner are subject to Petitioner becoming a party to the Joint Ownership, Management and Master Interchange Agreements under which Manager provides management services in connection with the operation of the aircraft and a time sharing arrangement with other private aircraft "owners." Interest in the aircraft is to be shared by various other purchasers who are referred to in the agreements as "Additional Interest Owners." There may be up to sixteen "owners" of this particular aircraft, and each of these owners has entered into these same agreements with Seller and each other:

- (1) Purchase Agreement, under which Seller, as owner of the aircraft, sells to Petitioner an "interest" in the aircraft;
- (2) Management Agreement under which Petitioner engages Manager to provide management services in connection with the operation of the aircraft;
- (3) Joint Ownership Agreement setting forth the relationship among all the owners of an interest in the aircraft; and
- (4) Master Interchange Agreement between Manager and all persons, including Petitioner, participating in an Interchange Program which enables Petitioner to share its aircraft with such other persons taking part in the interchange arrangement, and to use the aircraft of those persons should use of its own aircraft be unavailable.

The documents furnished by Petitioner provide that the interest in the aircraft conveyed by Seller to each owner is subject to the rights of each of the other additional interest owners. All of the owners of an interest in the aircraft have entered into the Master Interchange Agreement with Manager, whereby another aircraft may be substituted by Manager if the aircraft in which Petitioner purchases an interest is not available. When the aircraft is not in use by one of the owners, Manager retains the right to use it. These arrangements among each of the owners and between each owner

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and Manager significantly limits the control any single owner may exercise over the aircraft. Therefore, the interest that will be conveyed to Petitioner by the “bill of sale” is not the transfer of possession of tangible personal property and the word “owner” as used in the context of the agreements does not denote ownership in the typical sense which involves the holding of title to property.

Transportation is not one of the enumerated services upon which sales tax is due (see Matter of Firelands Sewer & Water Construction Co., Inc., State Tax Commission, November 17, 1983, TSB-H-83(184)S). Whether Petitioner’s purchase constitutes a taxable rental of tangible personal property rather than the purchase of an exempt transportation service turns upon the question of dominion and control (see Klondike Cruises, Inc., Adv Op Comm T&F, July 29, 1998, TSB-A-98(46)S; Henry F. Geerken, Adv Op Comm T&F, August 25, 1997, TSB-A-97(52)S). While the provisions of TSB-M-84(7), supra, do not specifically apply to the chartering of an aircraft, the criteria set forth therein are useful in determining whether Petitioner has obtained dominion and control of the aircraft within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations (see Limousine Operators of Western New York, Inc., Adv Op Comm T&F, October 27, 1988, TSB-A-88(55)S; Klondike Cruises, Inc., supra; Henry F. Geerken, supra). In Petitioner’s case, the Management Agreement provides that Manager will furnish qualified pilots to operate the aircraft. The pilots are paid by Manager, who also provides, at its own expense, recurrent pilot training, pilot medical examinations and uniforms. In some instances a pilot may be chosen by Petitioner but only subject to the approval of Manager. While Petitioner will select the date, time, point of departure and destination with regard to a particular flight, Manager makes all necessary take-off, flight and landing arrangements, and the pilots use their own discretion in performing the flight services and select their own routes. Manager has the overall responsibility to manage and operate the aircraft and pays all operating expenses such as fuel, hangar and general storage fees, flight planning and weather services and aircraft hull insurance (which names Manager and all owners as insureds and provides for any insurance proceeds to be paid to Manager for repair or replacement of the aircraft).

In its purchase of an interest in the aircraft for the purpose of transportation of its officials, employees and guests, Petitioner has fulfilled none of the requirements listed in TSB-M-84(7)S, supra, necessary to retain dominion and control over the aircraft. Some additional factors set forth in the agreements which support the view that sufficient custody over the aircraft along with the right to exercise the necessary direction and control have not been transferred to Petitioner for there to be a retail sale of such aircraft are:

1. Manager arranges for the aircraft to be inspected, maintained, serviced, repaired, overhauled and tested in accordance with approved Federal Aviation Administration standards and guidelines.

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2. Manager maintains all records, logs and other materials required by the FAA to be maintained in respect to the aircraft.
3. Manager retains the right to use the aircraft during periods it is not being utilized in the transportation of Petitioner or other owners and to retain any money it earns in this use of the aircraft.
4. Seller's obligations to sell the interest to Petitioner are subject to Petitioner becoming a party to the Management, Joint Ownership and Master Interchange Agreements.
5. Seller has the right of first refusal to purchase Owner's interest in Aircraft and may, after five years, compel Owner to sell its interest to Seller at a repurchase price based on the then fair market value of Aircraft.

Therefore, possession, command and control of the aircraft have not been transferred to Petitioner, and what is being furnished to Petitioner 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 (see Limousine Operators of Western New York, Inc., supra; Revenue Rulings 76-394, 1976-2 C.B. 355 and 68-343, 1968-1 C.B. 491).

Since the additional facts set forth by Petitioner in "Issue 2" are irrelevant for purposes of determining the taxability of transportation services furnished to Petitioner as described above, "Issue 2" is moot, and need not be addressed in this opinion.

DATED: January 28, 2000

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

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