STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AMERICAN AIRLINES, INC.	:	DECISION DTA NO. 819514
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1995 through November 30, 1998.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 10, 2005 with respect to the petition of American Airlines, Inc., 4333 Amon Carter Boulevard, Fort Worth, Texas 76155-2664. Petitioner appeared by McDermott, Will & Emery, LLP (Arthur R. Rosen, Esq. and Alysse Grossman, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was heard on August 2, 2006 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation is bound by the terms of the stipulation by which the parties agreed to a formulation of the question to be decided and the specific monetary consequences of the answer.

II. Whether petitioner is entitled to a refund of sales and use taxes paid on its purchases of electricity that was used solely and directly in repairing and maintaining commercial aircraft at maintenance hangars in New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

During the period from December 1, 1995 through November 30, 1998 (the "audit period"), American Airlines ("petitioner" or "American") owned commercial aircraft that it used primarily to transport persons or property for hire. The commercial aircraft were all primarily engaged in intrastate, interstate or foreign commerce during the audit period.

During the audit period, American leased a passenger terminal from the Port Authority of New York and New Jersey (the "Port Authority") at John F. Kennedy International Airport ("JFK") and also leased a passenger terminal from the Port Authority at LaGuardia Airport ("La Guardia"). Each of these terminals was located in New York State.

American performed maintenance and repairs on its commercial aircraft at hangars (the "maintenance hangars") located at JFK and LaGuardia during the audit period. The maintenance hangars were used solely for the repair and maintenance of the commercial aircraft.

On November 1, 2000, petitioner filed a request for refund of sales and use taxes in the amount of $1,582,608.40 which it had paid during the audit period.

On February 15, 2002, the Division of Taxation ("Division") granted petitioner's request for refund to the extent of $149,617.46 in tax, denied the request to the extent of $1,403,556.00. Additionally, $213,706.86 was allowed but used to offset additional tax determined to be due pursuant to an audit conducted by the Division.

Petitioner filed a timely request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services with respect to a denied refund claim in the amount of $1,228,723.80. On April 3, 2003, petitioner withdrew its request for a conciliation conference; the Bureau of Conciliation and Mediation Services acknowledged petitioner's request to withdraw in a letter dated April 9, 2003.

On June 9, 2003, petitioner filed a petition for an administrative hearing with the Division of Tax Appeals which protested the denial of its refund claim in the amount of $1,228,723.80. Petitioner's refund claim involved two issues: (1) the taxability of petitioner's purchases of hot and cold water services at JFK for heating and cooling its passenger terminals ("the heating and cooling issue") and (2) the taxability of petitioner's purchases of electricity and natural gas at JFK and LaGuardia for use in the maintenance and repair of petitioner's commercial aircraft (the "maintenance and repair issue").

In light of the decision in ***Matter of British Airways*** (Tax Appeals Tribunal, June 3, 2004), the Division agreed to grant petitioner's refund with respect to the heating and cooling issue in the amount of $895,361.00, plus interest, accruing from November 1, 2000.

Petitioner withdraws its refund claim to the extent of sales and use taxes totaling $100,931.43, as this tax was paid on nonexempt purchases of electricity and natural gas. Remaining at issue is $232,431.37 ($1,228,723.80 - $895,361.00 - $100,931.43) of petitioner's claim for refund of sales and use taxes which pertains to the maintenance and repair issue. This amount is equal to the sales and use taxes which American paid on its purchases of electricity that was used solely and directly in repairing and maintaining the commercial aircraft at the maintenance hangars ($71,827.44 of this tax was paid on purchases of electricity that was used to repair commercial aircraft at the maintenance hangars at LaGuardia; $160,603.93 of the tax was paid on purchases of electricity that was used to repair commercial aircraft at the maintenance hangars at JFK).

We make the following additional finding of fact.

The parties entered into a stipulation which states in part that the issue to be decided in this case is as follows:

> Whether electricity is "property" as that term is used in Tax Law § 1115(a)(21). If it is determined that electricity is property for such purposes, then electricity "used by or purchased for the use of [commercial] aircraft for maintenance and repairs" is exempt from the imposition of the New York sales and use tax and, thus, petitioner should be granted a refund of $232,431.37 in tax, plus interest. If it is determined that electricity is not property for purposes of Tax Law § 1115(a)(21), a denial of petitioner's refund claim should be sustained.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge answered the question presented in the stipulation entered into by the parties in favor of petitioner, holding that electricity purchased by petitioner that was used solely and directly in repairing and maintaining commercial aircraft at its hangars in New

York was exempt from sales tax pursuant to Tax Law § 1115(a)(21) because it constitutes "property used by or purchased for the use of [commercial] aircraft for maintenance and repairs."

ARGUMENTS ON EXCEPTION

In support of its exception, the Division argues that electricity cannot be exempt from tax under section 1115(a)(21) because the tax for which section 1115(a) provides exemptions in its numbered paragraphs is expressly limited to sales tax imposed by section 1105(a). Since petitioner's purchases of electricity would be subject to tax under subdivision (b) of section 1105 rather than subdivision (a), section 1115(a) and its numbered paragraphs can have no application (***see***, Division's exception, attachment A; brief in support, pp. 2-4).

The Division also asserts that the Administrative Law Judge erred in finding that electricity is "property" within the meaning of section 1115(a)(21) because that section provides an exemption only for tangible personal property as defined in section 1101(b)(6) and that definition excludes electricity from the definition except for purposes of section 1105(b). Accordingly, the term property in section 1115(a)(21) should not be given a broader meaning (***see***, Division's exception, attachment A; brief in support, pp. 4-5).

In resolving the issue of whether electricity is "property" within the meaning of section 1115(a)(21), petitioner argues that electricity "falls within the broad umbrella that is the ordinary meaning of the term 'property'" and relies on various cases and authorities broadly construing the term in contexts other than sales tax and finding in some circumstances that electricity is property (Petitioner's brief in opposition, p. 4). Petitioner also relies on the expressions of policy found in the legislative history of the commercial aircraft exemption for the proposition

that these words should be given a liberal interpretation (***see***, Petitioner's brief in opposition, pp. 7-12).

Finally, petitioner asserts that the Division is barred by the stipulation quoted above from raising the issue that the exemptions set out in section 1115(a) apply only to taxes imposed by subdivision (a) of section 1105 and accordingly can have no application where as here the tax involved is imposed by subdivision (b) of section 1105 (***see***, Petitioner's brief in opposition, pp. 12-13).

OPINION

This case appears at first glance to present subtle issues of statutory construction. Instead, as discussed below, we have concluded that the meaning of the statutory provisions is not troublesome but that the outcome actually depends on a less certain interpretation of the words of the stipulation into which the parties entered at an earlier stage of the present controversy.

Tax Law § 1105(a) imposes a sales tax upon the receipts from every retail sale of "tangible personal property" except as otherwise provided in Article 28 of the Tax Law. Tax Law § 1101(b)(6) defines "tangible personal property" to mean "[c]orporeal personal property of any nature." The statute states, however, that "except for purposes of the tax imposed by subdivision (b) of section eleven hundred five [which imposes a tax upon, among other things, gas, electricity, refrigeration, steam service, telephony and telegraphy], such term shall not include gas, electricity, refrigeration and steam." Tax Law § 1105(b) imposes sales tax on the receipts from every sale, other than sales for resale, of *inter alia* electricity and electric service of whatever nature.

Tax Law § 1115(a) states in relevant part as follows:

> 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:
>
> * * *
>
> (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.

A similar exemption for commercial aircraft is provided in Tax Law § 1105(c)(3)(v) with respect to the sales tax on the service of installing, maintaining, servicing or repairing tangible personal property.

These provisions were enacted by Chapter 773 of the Laws of 1978. The purpose for the legislation was said to be the following:

> This bill would keep New York State competitive with the twelve other states which offer programs of tax incentives to airlines for maintenance purposes. Generally, the airlines tend to locate their maintenance facilities in those states which offer such programs. . . . It would, therefore, be desirable to make New York as attractive as those states with incentive programs in order to prevent relocation with the consequent loss of jobs and to encourage the establishment of new facilities within the state. . . . It would also help persuade other businesses and industries that the Legislature here is serious about continuing on a course intended to keep and attract business here. American Airlines, for example, now flies its planes to Tulsa, Oklahoma for service and repair to avoid paying the New York sales taxes (Memorandum in Support, Bill Jacket, L 1978, ch 773).

It thus seems clear that the exemption at issue here was intended as an incentive for petitioner and others similarly situated to keep their aircraft maintenance and repair operations in New York. The legislative history does not, however, answer the question of just how generous an incentive was intended. Did the Legislature intend to grant an exemption from all sales taxes, including those imposed by section 1105(b), as petitioner would have it, or only those imposed by section 1105(a) and section 1105(c), as the Division contends? The carefully drawn words of

the statute suggest the latter (***see***, ***Matter of XO New York***, Tax Appeals Tribunal, November 9, 2006).

The central question in this case is the extent to which the scope of our inquiry is constrained by the stipulation that the parties have agreed to which is quoted above and defines the issue to be decided as "[w]hether electricity is 'property' as that term is used in Tax Law § 1115(a)(21)."

The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR, Part 3000) provide rules intended "to afford the public both due process of law and the legal tools necessary to facilitate the rapid resolution of controversies" (20 NYCRR 3000.0[a]). Among these "legal tools" is the stipulation for hearing which is intended to narrow the issues and thereby promote the expeditious and efficient resolution of our cases. Stipulations are generally binding on the parties as stated in section 3000.11(e) of the regulations as follows:

> A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the tribunal, administrative law judge or presiding officer, or agreed upon by the parties. The tribunal, administrative law judge or presiding officer will not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and cannot be used against any of the parties thereto in any other proceeding.

We also find instructive the following statement by the Court of Appeals in ***McCoy v. Feinman*** (99 NY2d 295, 755 NYS2d 693):

> Stipulations not only provide litigants with predictability and assurance that courts will honor their prior agreements (see Kaplan v. Kaplan, 82 N.Y.2d 300, 307 [1993]), but also promote judicial economy by narrowing the scope of issues for trial (see Hallock v. State of New York , 64 N.Y.2d 224, 230 [1984]). To achieve these policy objectives, a stipulation is generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the

> stipulation orally on the record in open court (see CPLR 2104 ; Siegel, N.Y. Prac § 204, at 323; see also Hallock, at 230; Covert v. Covert, 50 A.D.2d 622, 623 [1975]).
>
> When a stipulation meets these requirements, as it does here, courts should construe it as an independent contract subject to settled principles of contractual interpretation (see Keith v. Keith, 241 A.D.2d 820, 822 [3d Dept 1997]; De Gaust v. De Gaust, 237 A.D.2d 862, 862 [3d Dept 1997]). As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress (see e.g. Hallock, 64 N.Y.2d at 230; Matter of Frutiger, 29 N.Y.2d 143, 150 [1971]); or unless the agreement is unconscionable (see Christian v. Christian, 42 N.Y.2d 63, 73 [1977]; Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N.Y.479, 485 [1910]) or contrary to public policy (see e.g. Eschbach v. Eschbach, 56 N.Y.2d 167, 171 [1982]); or unless it suggests an ambiguity indicating that the words did not fully and accurately represent the parties' agreement (see e.g. Keith, 241 A.D.2d at 822) (***McCoy v. Feinman***, ***supra***, 755 NYS2d at 698).

In the present case, there is no suggestion of the presence of any of the circumstances that the court listed as grounds for disturbing a stipulation. We read the regulatory phrase "where justice requires" in section 3000.11(e), quoted above, as involving similar considerations.

In our decision in ***Matter of Amherst Cablevision*** (Tax Appeals Tribunal, March 7, 1996), we held that the Division was bound by a stipulation in which it chose to abandon a legal theory of liability with full knowledge of the hazards of that choice. The following statement in that case applies equally here:

> Since its creation in 1987, this Tribunal has been steadfast in its belief that the foundation of an equitable system of tax administration which respects and assists taxpayers and encourages full compliance with the Tax Law is the ability of taxpayers to reasonably rely upon communications and agreements with the Division [footnote omitted]. The stipulation is a voluntary agreement between petitioners and the Division as to the issues to be litigated in this case. It is the product of the evaluation and acceptance by each party of the others' representations. Absent proof of fraud, malfeasance, misrepresentation of material fact or any other ground which would require this Tribunal, as a matter of justice, to permit the Division to modify the terms of the stipulation, petitioners are entitled to rely upon the representations of the Division as embodied in the stipulation.

The stipulation in the present case limits the issue to be decided to whether electricity is "property" as that term is used in section 1115(a)(21) of the Tax Law. The parties have thus agreed that the provision governing the outcome here is section 1115(a)(21). Accordingly, we find that the stipulation does not permit the Division's argument that section 1115(a)(21) can have no bearing on this case because section 1115(a) and all its numbered paragraphs are limited to tax imposed by section 1105(a) to the exclusion of tax imposed by section 1105(b).

We are also persuaded that electricity is "property," as well as "tangible personal property," both in the sense of everyday speech and in a legal sense. We think that the Administrative Law Judge correctly reached this conclusion in reliance on our decision in ***Matter of Clark*** (Tax Appeals Tribunal, September 14, 1992). If it were not so, the special treatment of electricity in the definition of tangible personal property in section 1101(b)(6) would be surplusage. That provisions states, in part, "except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, [tangible personal property] shall not include . . . electricity. . . ." The effect of the provision is to make subdivision (b) of section 1105 the exclusive provision taxing electricity by removing electricity from the definition of tangible personal property for purposes of subdivision (a).

Therefore, we are left with the ultimate question whether the words of the stipulation permit us to apply the general meaning of the term "property" and reach the same conclusion as the determination of the Administrative Law Judge or instead, through the use of the words "as that term is used in Tax Law § 1115(a)(21)," confine our inquiry to a meaning that reflects the statutory context in which the term "property" is used and accordingly find for the Division. The reading of the stipulation favored by the Division would give fuller, perhaps controlling,

significance to the words "as that term is used in." Nevertheless, that reading depends on a premise that we have previously rejected–namely, that the parties intended to give section 1115(a)(21) no broader application than it would have in the absence of the stipulation.

The parties may not have intended this result, but it seems clear that by entering into the stipulation the parties intended to narrow and restate the issues. Accordingly, our decision is limited to the question as narrowly presented by the parties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of American Airlines, Inc. is granted; and

4. The claim for refund of American Airlines, Inc. is granted except to the extent set forth in finding of fact "9" of the Administrative Law Judge's determination.

DATED: Troy, New York
February 1, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner