

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN P. REILLY D/B/A	:	DETERMINATION
CONSTRUCTION CONCEPTS	:	DTA NO. 823544
	:	
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Periods December 1, 2006 through February 28, 2007 and	:	
June 1, 2007 through August 31, 2007.	:	

Petitioner, John P. Reilly d/b/a Construction Concepts, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2006 through February 28, 2007 and June 1, 2007 through August 31, 2007.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 2, 2011 at 10:30 AM, with all briefs to be submitted by December 20, 2011, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Gary H. Collison, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether petitioner's purchases of an airplane and a helicopter, for use by petitioner in New York State, are subject to sales and use taxes under Articles 28 and 29 of the Tax Law.

FINDINGS OF FACT

1. On January 23, 2009, following an audit, the Division of Taxation (Division) issued to petitioner a Notice of Determination assessing additional sales and use taxes due for the periods spanning March 1, 2006 through May 31, 2006, December 1, 2006 through February 28, 2007 and June 1, 2007 through August 31, 2007 in the amount of \$126,320.00, plus interest. At the hearing, the parties agreed that only the purchases of an airplane and a helicopter remain in dispute, which involve only the periods of December 1, 2006 through February 28, 2007 and June 1, 2007 through August 31, 2007.

2. Petitioner, John P. Reilly d/b/a Construction Concepts, was a sole proprietor who did business as an excavation contractor for large commercial projects in New York State. His business address, as listed on his sales tax returns, was for a post office box in Vestal, New York. The business was registered as a New York State business. Mr. Reilly is a resident of the Commonwealth of Pennsylvania.

3. The airplane at issue is a Columbia 400 that was purchased on April 4, 2006 for \$519,000.00. This airplane was purchased in California and neither sales nor use tax was paid by petitioner on the purchase. Petitioner uses his airplane for both work and nonwork related trips. The airplane is hangared in Broome County, New York.

4. The helicopter at issue is an Enstrom helicopter that was purchased by petitioner in Rochester, New York, on December 15, 2006. The cost of the helicopter was \$600,000.00. Neither sales tax nor use tax was paid on the purchase. Petitioner took delivery of the helicopter in Rochester before flying it to his domicile in Pennsylvania. Petitioner uses this helicopter for both work and nonwork related trips. The helicopter is hangared at his residence in Pennsylvania.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon the receipts from “every retail sale of tangible personal property. . . .” Tax Law § 1132(c)(1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax “until the contrary is established,” and sets the burden of proving the contrary upon the vendor or its customer (20 NYCRR 532.4[a][1]; [b][1]).

B. With respect to the helicopter, petitioner purchased it in Rochester, New York, and no sales tax was paid. The purchase was subject to sales tax pursuant to Tax Law § 1105(a) unless the helicopter is exempt from taxation. It is well settled that tax exemption statutes are strictly construed against the taxpayer and that exemptions must be clearly indicated by the statutory language (*see Matter of Fagliarone, Grimaldi & Assocs. v. Tax Appeals Tribunal*, 167 AD2d 767 [3d Dept 1990]).

C. Petitioner claims that the helicopter is exempt from taxation since it is a “[c]ommercial aircraft primarily engaged in intrastate, interstate or foreign commerce” within the meaning and intent of Tax Law § 1115(a)(21). Tax Law § 1101(b)(17) 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.”

D. Petitioner argues that Mr. Reilly is a resident of Pennsylvania and that the helicopter is kept at a hangar in Pennsylvania. Moreover, petitioner alleges that the helicopter is used for infrequent trips into New York State and is used only to transport both Mr. Reilly and tangible personal property for use on his projects.

Petitioner has failed to establish that the helicopter was entitled to an exemption. Mr. Reilly's residency is immaterial since petitioner is a sole proprietorship doing business in New York State. Therefore, the Division is correct that the cases discussing a nonresident purchaser are irrelevant to the facts herein.

Furthermore, petitioner has produced flight logs for the helicopter that demonstrate trips for both work and nonwork related activities and Mr. Reilly confirmed this fact in his testimony. Without more, petitioner has failed to sustain his burden of proof to establish that the helicopter was used primarily in his work as an excavation contractor.

E. With respect to the airplane purchased in California, there is no dispute that use tax was not paid on this purchase. The airplane was hangared in Broome County and such purchase is subject to compensating use tax (Tax Law §§ 1110[a]; 1101[b][7]) unless it is otherwise exempt (*see Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000 [3d Dept 1984] [airplane acquired in North Carolina, yet hangared in Westchester County, New York]).

As a with the helicopter, petitioner used the airplane for both work and nonwork related activities. There is no evidence to support a finding that the airplane qualifies for an exemption as a commercial aircraft. Therefore, the purchases were subject to tax.

F. The petition of John P. Reilly d/b/a Construction Concepts is denied and the Notice of Determination dated January 23, 2009, as modified pursuant to Finding of Fact 1, is sustained.

DATED: Albany, New York
May 24, 2012

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE