New York City Tax Appeals Tribunal

In the Matter of	:	
	:	DECISION
AIR PEGASUS CORPORATION	:	
	:	TAT (E) 00-23 (CR)
Petitioner.	:	TAT (E) 00-24 (CR)
	:	

Air Pegasus Corporation ("Petitioner") filed an Exception to the Determination of the Deputy Chief Administrative Law Judge ("DCALJ") dated April 9, 2004, to the extent that such Determination sustained the commercial rent or occupancy tax ("CRT") deficiencies asserted by the New York City Department of Finance (the "Department") for the tax years ending May 31, 1977 through May 31, 1997 (the "Tax Years"). Petitioner appeared by Philip Rosenbach, Esq., of Berman Rosenbach, P.C. and the Commissioner of Finance of the City of New York appeared by Martin Nussbaum, Esq., Assistant Corporation Counsel, New York City Law Department. Both parties filed briefs and neither party requested oral argument.

The Port Authority of the States of New York and New Jersey (the "Port Authority") is a body corporate and politic created by compact between the States of New York and New Jersey in 1921 with the consent of the Congress of the United States of America.[1]

In 1956, the Port Authority entered into a lease with New York City (the "City") (the

[1]The DCALJ's Findings of Fact, although paraphrased and amplified in part, have been generally adopted in this decision.

"Basic Lease") for the construction, operation and maintenance of the West 30th Street Heliport (the "Heliport").[2] The Basic Lease expired in 1971 and the Port Authority remained as a holdover tenant, paying its rent monthly. The Heliport, which is located at 30th Street and the West Side Highway, is a public use airport, with helipads constructed on bulkheads and piers to allow landings and take-offs by helicopters. The Heliport also has a radio control room, fuel storage tanks, fuel dispensing equipment, a passenger lounge and a pilot lounge.

Prior to 1981, the Heliport had three private operators: New York Airways (for a few years in the 1950s); Island Helicopter Corp. (in 1974-1975); and Air Transport Services (in 1977-1978). During other periods, the Port Authority operated the Heliport on a user-demand basis.

Petitioner is a Delaware corporation that was formed by Alvin Trenk[3] to respond to the Request for Proposal announced by the Port Authority in 1981 for the reopening and operation of the Heliport. In July 1981, the Port Authority Board of Directors approved Petitioner as the operator of the Heliport.

Petitioner's operation of the Heliport began in September 1981 and was pursuant to an agreement dated July 1, 1981 and several supplements thereto (the "Agreement").[4] Under the Agreement, the Port Authority granted Petitioner certain privileges for the use, occupancy

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[2]The Port Authority's lease with the City is not in the record.

[3]Mr. Trenk was Petitioner's President throughout the Revised Tax Years. *See* Findings of Fact *infra* p. 14.

[4]Petitioner operated the Heliport from September 1, 1981 through the end of the Tax Years. Brian Tolbert, Petitioner's Director of Operations for part of the Tax Years, testified that New York State took over responsibility for the Heliport from the Port Authority around 1996.

and operation of the operations building (Area A) and three other areas at the Heliport (Areas B, C and D) as shown on diagrams that are exhibits to the Agreement, as well as additional rights to use property of the Port Authority at the Heliport (collectively referred to as "the Premises").

Under Section 3 of the Agreement, entitled "Rights of User," Petitioner was required to:

> use and operate the premises as a public heliport for the following purposes only and for no other purpose whatsoever:
>
> (a) Area A, for the storage of cargo and materials and supplies of a nonhazardous nature; and for business, sales, operations and administrative offices in connection with the operations at the Heliport.
>
> (b) Area B, as a public passenger lounge and waiting room.
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> (c) Area C, as a Public Aircraft Landing Area; and for the storage of aviation fuel and for the sale, dispensing and delivery of such fuel to and into aircraft . . . .
>
> (d) Area D for the parking and storage of aircraft and for the performance of minor maintenance on aircraft . . . . The Operator's rights of user as to Areas B, C and D shall be non-exclusive.
>
> . . . .
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> . . . [T]he Operator understands and agrees that it shall not itself nor shall it permit any other aircraft operator to conduct sightseeing flight operations or to conduct flight training operations . . . at the Heliport.

Section 4 of the Agreement set forth the Schedule of Charges for the use of the Heliport. The Schedule of Charges was determined by the Port Authority and was binding on Petitioner. The Port Authority reserved the "sole and unrestricted right" to make any changes in the Schedule of Charges. It was Petitioner's obligation to collect the charges. The Port Authority had no responsibility for the collection or payment of the charges. Compliance with these provisions by Petitioner was "a special consideration and inducement to the making of this Agreement by the Port Authority, in view of the obligation of the Port Authority to maintain the Heliport as a public facility." The charges were for take-offs, landings, fuel, parking and off-hours access.

It was Petitioner's responsibility under the Agreement to collect the charges. Petitioner was entitled to "retain and keep as its own those charges which are in effect for such use under this Agreement under the Schedule of Charges at the time of use thereof." Petitioner was required to use Port Authority approved invoice forms in billing or sending statements to aircraft operators who used the Heliport. Petitioner was required to post the Schedule of Charges "prominently . . . in or immediately outside of its office, in a place accessible to users of the Heliport facilities." With the Port Authority's permission, Petitioner could enter into agreements with aircraft operators for lower rates, similar to agreements that the Port Authority had with aircraft operators at the Port Authority Downtown Manhattan Heliport. Any losses from such agreements were required to be borne solely by the Petitioner.

Under Section 5 of the Agreement, Petitioner was required to "perform the work and furnish the services usually performed or furnished in connection with the operation of a public heliport facility." As part of its duties at the Heliport, Petitioner staffed and monitored radio frequencies designated by the appropriate governmental authority for use in heliport operations; directed landed aircraft to assigned parking spots; assisted in spotting and

securing the aircraft and removing luggage; periodically inspected the aircraft and the parking area to insure that "no unauthorized person or persons are loitering in the parking area;" and stored, dispensed and sold aviation fuel.

Brian Tolbert, Petitioner's Director of Operations at the Heliport during part of the Tax Years, testified that Petitioner's personnel were also responsible for refueling helicopters, assisting passengers and keeping the premises clean. Petitioner also maintained the pilot lounge and supplied a daily free buffet for pilots.

Under Section 6 of the Agreement, Petitioner was required to pay to the Port Authority an annual fee, of $78,779, payable in equal monthly installments of $6,565. The annual fee was the amount of the Port Authority's rent obligation to the City. In addition to the basic monthly fee, Petitioner was required to pay to the Port Authority a percentage fee equivalent to 10% of Petitioner's "gross receipts." The monthly percentage fee was based on Petitioner's gross receipts for the preceding calendar month.

Under Section 7 of the Agreement, Petitioner was obligated to "use its best efforts . . . to maintain, develop and increase the business conducted by it hereunder and the use of the Heliport as a public heliport facility." Petitioner also was obligated to "not divert or cause or allow to be diverted, any business from the Heliport." Petitioner also was required to maintain detailed records regarding the operation of the Heliport and to permit the Port Authority to examine, inspect or audit such records. Mr. Tolbert testified that Petitioner filed weekly reports with the Port Authority, kept the Port Authority informed of Petitioner's operations and sought Port Authority approval for even routine matters. Section 7 of the Agreement also required Petitioner to "observe and obey (and compel its officers, employees, guests, invitees, and those doing business with it to observe and obey)" the rules and regulations of the Port Authority.

Under Section 8 of the Agreement, Petitioner was required to comply with "all laws and ordinances and governmental rules, regulations and orders . . . which as a matter of law are applicable to the operations of [Petitioner] at the Heliport" at its own expense.

Section 9 of the Agreement sets forth the minimum hours that Petitioner was obligated to operate the Heliport. Petitioner also was required to operate the Heliport at other times on notice from the Port Authority or from anyone proposing to land or take-off from the Heliport. The Port Authority had the right to handle flights when Petitioner was not operating the Heliport and to use the equipment at the Heliport without charge.

The Agreement set forth standards of conduct and behavior that Petitioner was to adhere to at the Heliport. It also required Petitioner's personnel to wear uniforms and identification, which were subject to approval by the Port Authority. The Port Authority had the right to object to the conduct and demeanor of Petitioner's employees and those doing business with Petitioner, in which event Petitioner was required to correct the objectionable behavior or demeanor.

The Agreement set the minimum level of staffing at the Heliport and specified that no gratuities were to be solicited or accepted by Petitioner's personnel.

The Agreement prohibited vending machines, restaurants, stores or pay phones unless expressly agreed to by the Port Authority. The Port Authority retained the exclusive right to provide for the operation of such vending machines or facilities, provided that it would only do so in Area A upon Petitioner's request.

The Heliport contained a fuel storage facility composed of two separate fuel storage systems. Petitioner had the exclusive use of one system. Initially, the Port Authority had

exclusive use of the other system.[5] Petitioner was required to operate the fuel storage system assigned to it according to procedures and directions received from the Port Authority and to notify the Port Authority if the system was in need of repair. Petitioner was required, under the Agreement, to dispense fuel from the fuel system assigned to the Port Authority as directed by the Port Authority.

The Port Authority retained the right to land and take-off aircraft at the Heliport and to enter the Heliport for any purposes including inspecting the Heliport and observing Petitioner's performance under the Agreement. At the start of Petitioner's operations, the Port Authority inspected the Heliport daily to insure that Petitioner's personnel were following proper procedures in operating the Heliport. Later, the inspections were conducted approximately twice a week.

Under Section 22 of the Agreement, the term of the Agreement "shall, in any event, terminate with the expiration or earlier termination . . . of the Basic Lease with the City of New York which covers the premises." As the Port Authority's occupation of the Heliport was subject to the terms of the Basic Lease, it was understood that the Port Authority could not, and did not, intend to grant any greater rights to Petitioner than the Port Authority had under the Basic Lease. Since the Basic Lease had expired, the Agreement also provided that "the term of this Agreement shall in any event, terminate upon the yielding up of the Heliport by the Port Authority to the City . . . ."

Section 25 of the Agreement provides that "[n]o greater rights or privileges with respect to the use of the Heliport or any part thereof are granted or intended to be granted to the Operator by this Agreement . . . than the rights and privileges expressly and specifically

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[5]Petitioner obtained exclusive use of the second fuel storage system in 1984. *See* Findings of Fact *infra* p. 11.

granted hereby."

Under Section 30 of the Agreement, Petitioner was obligated to furnish all the necessary services for the Heliport needed for the operation of all "mechanical, plumbing, power, heating, steam, air conditioning, electrical, boiler, water, toilet, burglar alarm, communications, gas and other systems affecting the premises . . . ." Petitioner was also required to furnish all janitorial, garbage, refuse and snow and ice removal services. Other obligations of Petitioner included taking reasonable Port Authority-approved measures to prevent access to the Heliport by unauthorized persons and providing limited security at the Heliport at certain times. However, the main responsibility for security remained with the Port Authority. Petitioner also was required to furnish and supply all necessary utilities at its own expense. Under the Agreement, the Port Authority was not obligated to furnish or supply any services at the Heliport unless specifically provided for in the Agreement.

Under Section 31 of the Agreement, Petitioner was required to supply, furnish and maintain certain equipment, furnishings and supplies necessary for the operation of the Heliport.

Under Section 32 of the Agreement, Petitioner was not an agent or representative of the Port Authority for any purpose whatsoever. Nor were its officers, employees, contractors or agents considered employees of the Port Authority for any purpose whatsoever.

Under Section 33 of the Agreement, Petitioner was required to conduct a "first-class operation" at the Heliport.

Section 34 of the Agreement provides that "[n]othing contained in this Agreement shall grant or be construed to grant to the [Petitioner] any interest or estate in real property,

and [that] a landlord-tenant relationship shall not be or be deemed to be created hereunder."

Under Section 38 of the Agreement, Petitioner was required to "furnish sufficient trained personnel to perform the services required" under the Agreement. If the Port Authority was not satisfied with the performance of Petitioner's personnel, Petitioner was required to replace the personnel.

Under Section 40(a) of the Agreement, the Port Authority could revoke the Agreement at any time and without cause on thirty days' prior written notice to the Petitioner. Under Section 40(b) of the Agreement, Petitioner could terminate the Agreement on thirty days' notice in the event that the Port Authority decreased the charges in the Schedule of Charges for the Heliport.

Under Section 45(a) of the Agreement, Petitioner acknowledged that it had inspected the Heliport and that it was suitable for its operations, and agreed to take the Heliport in an "as is" condition. Under Section 45(b), work that the Port Authority was required to perform at the Heliport was to be completed by the start date of the Agreement. In the event the work was not completed by the start date, the Port Authority had the right of ingress and egress to complete the work. The Agreement further provided that, "[n]o occupancy of the premises by the Port Authority for the purpose of performing the work or the performance of the work shall be or be deemed an eviction or constructive eviction of [Petitioner]."

Under Section 46 of the Agreement (as amended by Supplemental Agreement No. 1), Petitioner was required to place a deposit with the Port Authority, as security, "throughout the term of the letting." Petitioner is referred to as "Lessee" in Section 46.

On July 1, 1981, the Port Authority and Petitioner entered into a Supplemental

Agreement ("Supplemental Agreement No. 1") simultaneously with the Agreement. Supplemental Agreement No. 1 recites that, in the Agreement, "the Port Authority granted certain rights, licenses and privileges" at the Heliport to Petitioner.

Under Section 5 of the Supplemental Agreement No. 1, Petitioner "represent[ed] and warrant[ed] that it [was] financially solvent and qualified to perform the type of work required" under the Agreement.

On August 31, 1983, the Port Authority prepared Supplemental Agreement No. 2.[6] Supplemental Agreement No. 2 reflects the Port Authority's claim that Petitioner was in arrears in its payments to the Port Authority and contains provisions for the payment of the debt, extension of the term of the Agreement to August 31, 1985 and amendments to the Agreement. Supplemental Agreement No. 2 also contains a provision amending the Agreement to "permit sightseeing flight operations at the Heliport by a single third party aircraft operator," and indicates that the Port Authority had already given its consent to such third party operator.

Section 7 of Supplemental Agreement No. 2 reflects that the interest of the City in the Premises was transferred to New York State (the "State") "excluding the interest of the Port Authority under the Basic Lease . . . and that the Port Authority continues in a right to possession of the Heliport thereunder."

Supplemental Agreement No. 3, dated August 31, 1984, extended the term of the Agreement to August 31, 1986. Supplemental Agreement No. 3 also reduced the area at the

[6]At the Hearing, Mr. Trenk testified that he did not sign Supplemental Agreement No. 2, dated August 31, 1983. However, an agreement effective August 1, 1985, between Petitioner and Resorts International Airlines, Inc. which was signed by Mr. Trenk, refers to Supplemental Agreement No. 2.

Heliport that Petitioner could use and reduced the basic annual fee for a one-year period. In addition, Petitioner was given exclusive possession of both fuel storage systems at the Heliport and was required to repair the fuel storage systems. Any losses relating to the operation of the fuel systems were solely and completely the responsibility of Petitioner. Supplemental Agreement No. 3 also provided for increased hours of operation at the Heliport.

Supplemental Agreement No. 3 included a Contract of Guarantee by which Resorts International, Inc. guaranteed Petitioner's obligations under the Agreement.

On August 31, 1986, the Port Authority, Petitioner and Resorts International Airlines, Inc. ("Resorts") entered into Supplemental Agreement No. 4 (the "Consent"). In the Consent, the Port Authority consented to a proposed sub-user agreement (the "Subagreement") between Petitioner and Resorts. By its consent, the Port Authority intended "merely to permit the exercise of [Petitioner's] rights, powers and privileges [under the Agreement] by [Resorts]," and not to enlarge, vary or change the rights, powers and privileges granted to Petitioner in the Agreement.

Section 6(b)(4) of the Consent notes "that [Resorts] shall take the Heliport subject to any and all rights and possession of [Petitioner] . . . and the Port Authority shall have no obligation . . . to deliver possession of the premises to [Resorts] free of such possession."

The Subagreement, effective August 1, 1985 (which reflects that Petitioner is the "holder of certain privileges respecting the use, occupancy and operation" of the Heliport), granted Resorts the right to use and occupy the Heliport during off-hours for take-off and landing of Resorts aircraft, and to place a structure at the Heliport to conduct its sales and administrative activities. Resorts also had the right to occupy a trailer located at the Heliport

and to move it to another location at the Heliport. Petitioner also granted to Resorts the right to place signs at the Heliport and a scale to weigh luggage. Resorts had unlimited off-hours access to the Heliport, including the keys to the Operations Building. Resorts agreed that it, "shall cause its parent, Resorts International, Inc., to guarantee the payment of 'rents' . . . from [Petitioner] to the Port Authority." Petitioner supplied its employees to Resorts for Resorts' activities at the Heliport, and Resorts reimbursed Petitioner for the cost of providing such employees. Petitioner provided the utilities needed by Resorts to carry out its commercial helicopter operations, for which Resorts paid Petitioner. Petitioner agreed to keep the Heliport in good repair at its sole cost and expense.

Petitioner did not file CRT returns or pay CRT for any of the periods in issue.

The Department of Finance issued a Notice of Determination to Petitioner, dated August 13, 1999, asserting the following CRT deficiencies:

TAX PERIOD	TAX	INTEREST	PENALTY	TOTAL
06/01/77-05/31/78	$ 492.38	$ 2,597.84	$ 1,446.63	$ 4,536.85
06/01/78-05/31/79	9,235.49	46,987.63	26,264.46	82,487.58
06/01/79-05/31/80	9,235.49	44,195.13	24,868.21	78,298.83
06/01/80-05/31/81	8,722.40	38,699.53	21,966.49	69,388.42
06/01/81-05/31/82	8,209.32	33,110.87	19,018.23	60,338.42
06/01/82-05/31/83	8,209.32	29,482.01	17,203.80	54,895.13
06/01/83-05/31/84	8,209.32	25,551.42	16,059.44	49,820.18
06/01/84-05/31/85	7,027.80	19,197.15	12,409.70	38,634.65
06/01/85-05/31/86	7,318.26	17,014.43	11,434.52	35,767.21
06/01/86-05/31/87	7,745.10	15,578.15	10,887.12	34,210.37
	$74,404.88	$272,414.16	$161,558.60	$508,377.64

The Department of Finance issued a Notice of Determination to Petitioner, dated August 4, 1999, asserting the following CRT deficiencies:

TAX PERIOD	TAX	INTEREST	PENALTY	TOTAL
06/01/87-05/31/88	$ 7,902.78	$ 14,180.85	$ 10,251.55	$ 32,335.18
06/01/88-05/31/89	10,125.48	15,503.05	11,801.72	37,430.25
06/01/89-05/31/90	12,363.06	16,265.38	13,077.92	41,706.36
06/01/90-05/31/91	10,562.88	11,101.11	9,775.71	31,439.70
06/01/91-05/31/92	16,304.64	13,895.48	13,469.59	43,669.71
06/01/92-05/31/93	19,188.72	13,859.13	14,605.06	47,652.91
06/01/93-05/31/94	19,343.64	11,592.15	13,533.53	44,469.32
06/01/94-05/31/95	23,666.22	11,327.81	15,130.40	50,124.43
06/01/95-05/31/96	17,129.28	6,261.51	9,982.47	33,373.26
06/01/96-05/31/97	5,151.60	1,220.84	2,671.06	9,043.50
	$141,738.30	$115,207.31	$114,299.01	$371,244.62

The tax asserted in the deficiencies for the period June 1, 1977 through May 31, 1985 was based on the annual fee plus 10% of the gross receipts reported on Petitioner's General Corporation Tax ("GCT") return for 1986. The tax in the deficiencies for the period June 1, 1986 through May 31, 1995 was based on rent expense and/or fees paid to the Port Authority as reported on Petitioner's Federal Forms 1120S ("Federal Returns") covering those periods. The tax deficiencies for the period June 1, 1995 through May 31, 1997 took into account fees paid to the Port Authority reported on Petitioner's Federal Returns covering those periods or, where no return was provided to the auditor, from a prior period. Interest was computed to August 20, 1999.

Penalties were imposed for failure to file CRT returns for all tax years at issue. The auditor imposed penalties for negligence, 5% of principal and 50% of interest payable in accordance with §§11-715(d)(1) and (2) of the New York City Administrative Code (the "Code")[7]. The auditor also imposed a penalty for failure to file a return of 5% per month (up to 25%), under §11-715(c)(1)(A) of the Code, and a 10% penalty for substantial understatement of liability, under §11-715(j) of the Code.

At the Hearing, Respondent conceded the amount of CRT asserted against Petitioner for the period June 1, 1977 through May 31, 1981 based on evidence that Petitioner provided prior to the Hearing that established that Petitioner did not use or occupy the Heliport prior to the implementation of the Agreement. Thus, Respondent only asserted a CRT deficiency against Petitioner for the period June 1, 1981 through May 31, 1997, (the "Revised Tax Years").

Petitioner contended, before the DCALJ, that: (1) it is exempt from the CRT because the City lacks jurisdiction to tax a public use heliport; (2) it is exempt from the CRT because it operated the Heliport under permit from the Port Authority and thus performed a governmental function; (3) the operation of a public heliport is not a commercial activity subject to the CRT; (4) the Port Authority is not a landlord for CRT purposes; (5) its activities at the Heliport were as the Port Authority's agent and not as its tenant; and (6) it is exempt from the CRT because it used the Heliport for air transportation purposes; because it used the Heliport as piers in interstate commerce; and because the Heliport is special franchise property. Petitioner further argued that if it is found to be subject to the CRT it is

[7]The Administrative Code was recodified effective September 1, 1986. For the period June 1, 1977 until the recodification, the relevant provisions of the CRT were contained in former Title L of Chapter 46. For ease of reference, we have referenced the New York City Administrative Code provisions in accordance with their current designations.

not liable for any penalties.[8]

Respondent contended that: (1) Petitioner is at least a licensee and therefore is subject to the CRT; (2) the Port Authority is a landlord for CRT purposes; (3) Petitioner's activities at the Heliport were commercial; (4) no exemptions apply to either Petitioner or the Heliport; and (5) Petitioner's activities at the Heliport were not performed as an agent of the Port Authority. Respondent, at the Hearing and in her brief filed with the DCALJ, made no arguments regarding the propriety of the penalties asserted in the Notices of Determination.

The DCALJ concluded that Petitioner was subject to the CRT as the Agreement, in effect during the Revised Tax Years, was a sublease, license or concession; the Port Authority is a "person" and the payments to the Port Authority were rent paid by a "tenant" to a "landlord" for the use or occupancy of "taxable premises." Furthermore, the DCALJ concluded that there are no provisions of the CRT or any other law that exempt Petitioner from the CRT or that bar Respondent from applying the CRT to Petitioner. In addition, the DCALJ abated the 5% negligence penalty and 50% negligence interest penalty because Petitioner acted neither in a negligent manner nor with intentional disregard of the law. The 5%/25% maximum late-filing penalty and the 10% understatement penalty were abated because Petitioner acted in good faith and with reasonable cause. Thus, the DCALJ sustained the Notices of Determination, dated August 4, 1999 and August 13, 1999, except: (1) with respect to the period June 1, 1977 through May 31, 1981 (for which period Respondent abated the tax, interest and penalties) and (2) with respect to the assertion of all other penalties.

[8]While challenging the imposition of the CRT, Petitioner did not raise any objection to the calculation of the tax nor did it claim a sub-tenant deduction for payments from Resorts under the Subagreement. Petitioner did not clearly establish either an entitlement to or the amount of such a deduction.

On appeal, Petitioner asserts that: (1) it is not a "tenant" under the CRT as it is not a tenant, licensee or concessionaire; (2) for the limited purpose of operating the Heliport, Petitioner is an agent of the Port Authority and stands in the shoes of the Port Authority for this purpose and that the test used by the DCALJ with respect to the issue of agency is not the proper test; (3) for purposes of the CRT (as distinguished from tort law), the operations of the Heliport are a governmental function and not a proprietary function, and are therefore not a commercial function taxable under the CRT; (4) Petitioner's operations of the Heliport are exempt from the CRT based on the applicable circumstances and pertinent law even if Petitioner seeks to earn a profit from its operations because the use of the Heliport is a governmental function.[9]

Respondent contends that the Determination of the DCALJ should be affirmed as it correctly held that Petitioner was subject to the CRT as the Agreement was either a sublease, license or a concession, the Port Authority was a "person" and the payments to the Port Authority were rent paid by a "tenant" to a "landlord" for the use or occupancy of "taxable premises." Furthermore, the DCALJ correctly concluded that there are no provisions in the CRT statute that exempt Petitioner from the CRT or bar Respondent from applying CRT to Petitioner.

Section 11-702 of the Code imposes the CRT on every tenant of taxable premises. A "tenant" is defined at §11-701.3 of the Code as a "person paying or required to pay rent for premises as a lessee, sublessee, licensee or concessionaire." A "landlord" is defined at §11-701.2 of the Code as a "person who grants the right to use or occupy premises to any lessee, sublessee, licensee or concessionaire, whether or not such person is the owner of the premises." A "person" is defined at §11-701.1 of the Code as "[a]n individual, partnership,

[9] *See* footnote 8 *supra*.

society, association, joint stock company, corporation. . . ." "Rent" is defined at §11-701.6 of the Code as the "consideration paid or required to be paid by a tenant for the use or occupancy of premises. . . . " "Taxable premises" is defined at §11-701.5 of the Code as "[a]ny premises in the city occupied, used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity. . . ."

"Whether called a tenant or licensee, whether holding a lease or a license, one who uses the premises of another and pays for such use must contend with the CRT." Matter of Square Plus Operating Corp., TAT No. 90-1221 at 9, (NYC Tax Appeals Tribunal, October 29, 1992); *aff'd*, 212 A.D.2d 448 (1st Dept. 1995), *lv. den.*, 87 N.Y.2d 804 (1995). Thus, the central issue is not whether Petitioner is a lessee, sublessee or a licensee but whether Petitioner made payments for the use and occupancy of taxable premises.

The Agreement grants to Petitioner rights, licenses and privileges with respect to the use, occupancy and operation of the Heliport but specifically provides that (1) it neither grants Petitioner an interest or estate in real property nor creates a landlord-tenant relationship; and (2) it does not constitute Petitioner the agent or representative of the Port Authority for any purpose whatsoever.[10] As this Tribunal stated in Matters of Plaza 43 Associates, TAT(E) 93-127(CR), TAT(E) 96-79(CR), TAT(E) 96-80(CR) and TAT(E) 99-16(CR), (NYC Tax Appeals Tribunal, November, 15, 2004), "the terminology used by the parties is not controlling, 'we must look to the rights it [the agreement] confers and the obligations it imposes in order to determine the true nature of the transaction and the relationship of the parties.' Feder v. Caliguira, 8 N.Y.2d 400, 404 (1960) citing Matter of

[10]However, Section 46 of the Agreement does refer to Petitioner as "Lessee." In addition, Petitioner reported the payments to the Port Authority as "rent" on its Federal Returns for several years.

New York World-Tel. Corp. v. McGoldrick, 298 N.Y. 11, 18 (1948)."[11]

A review of the Agreement shows that exclusive control of Area A of the Heliport was transferred to Petitioner for the Revised Tax Years, as well as non-exclusive control of other areas. Petitioner used Area A as an important part of its operations. Petitioner also had exclusive control of one of the fuel storage areas at the Heliport for all of the Revised Tax Years and exclusive use of the other fuel storage area for a part of the Revised Tax Years. The Schedule of Charges was determined by the Port Authority but it was Petitioner's responsibility to collect and retain the charges. Petitioner was obligated to pay a monthly fee (equal to the Port Authority's rent to the City) for the use of the Heliport plus 10% of its gross receipts. Petitioner was obligated to pay the fees whether or not it collected sufficient fees from operating the Heliport. Petitioner was also required to place a deposit with the Port Authority, as security. Petitioner entered into a Subagreement permitting Resorts to use and occupy the Heliport during certain hours. The Port Authority retained the right to land and take-off aircraft at the Heliport and to enter the Heliport for any purposes including inspecting the Heliport and observing Petitioner's performance pursuant to the Agreement.

An agreement that transfers "absolute control and possession of property at an agreed rental" is a lease. Feder, *supra* at 404. However, it is not uncommon "for landlords [to] exercise a tight rein over tenants, even to the extent of regulating their rates, hours of operation, employees and configuration of leased space . . . ." Square Plus, *supra* at 8. "A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein." Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D. 2d 143, 150 (1st Dept. 2001). *See also*, The Greenwood Lake and Port Jervis

[11] *See also*, The Statement, Inc. v. Pilgrim's Landing, Inc., 49 A.D. 2d 28, 33 (4th Dept. 1975) where the court said that "the end sought by the instrument rather than mere words governs its nature."

Railroad Company v. The New York and Greenwood Lake Railroad Company, 134 N.Y. 435 (1892); Lahti v. State of New York, 98 Misc. 2d 829 (Ct. Claims 1979).

While the Agreement contains some essential elements of a lease or sublease, the CRT is properly imposed whether the Agreement constitutes a lease, license or concession. Thus, it is not necessary to "analyze the myriad provisions of the . . . agreement to determine whether it created a 'true' landlord-tenant relationship . . . . " Matter of Debenhams, Inc. v. Commissioner of Finance of New York City, 92 A.D.2d 829 (1st Dept. 1983). As the DCALJ found, Petitioner was granted the privilege to operate the Heliport for a term of years; the Agreement and Subagreement refer to rights, powers, licenses and privileges granted to Petitioner with respect to its use and occupancy of the Heliport. Thus, at the least, Petitioner is a licensee or concessionaire. We find, as did the DCALJ, that Petitioner was a "tenant" pursuant to the CRT. We also find that the Port Authority is a "person" within the broad definition contained in §11-701.1 of the Code as "person" includes a corporation and the Port Authority is a body corporate and politic.

Petitioner asserts that because of the vast control exercised by the Port Authority over Petitioner's activities in operating the Heliport, the relationship between Petitioner and the Port Authority is not that of a tenant, licensee, or concessionaire but that of an agent operating on behalf of a principal. Thus, Petitioner contends that it is not subject to the CRT. In addition, Petitioner argues that the test applied by the DCALJ in concluding that Petitioner was not the agent of the Port Authority was erroneous.

The DCALJ applied the elements of agency (consent, fiduciary duty, absence of gain or risk to the agent, and control by the principal) as set forth in Boss v. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, 567 F. Supp. 845 (1983), *aff'd.*, 742 F.2d 1446 (2d Cir 1983), *cert. den.*, 469 U.S. 819 (1984), to the

facts in the matter at bar and found that Petitioner was not the agent of the Port Authority. As the Agreement specifically declared that Petitioner is not the Port Authority's agent or representative, the DCALJ found that there was no consent to an agency relationship. The DCALJ also concluded that there was nothing in the Agreement which evidenced a fiduciary relationship between Petitioner and the Port Authority. Although the Schedule of Charges was set by the Port Authority, the monies were collected by Petitioner and "kept as its own." The monies were not collected by Petitioner on behalf of the Port Authority. If Petitioner were the agent of the Port Authority, the Port Authority would have paid Petitioner a management fee. Instead, Petitioner paid to the Port Authority monthly payments (rent) that were measured in part by the amount of rent the Port Authority paid to the City. The financial risk associated with the operation of the Heliport fell on the claimed agent as Petitioner was obligated to make its payments to the Port Authority regardless of the amount of fees and charges that it collected (or did not collect) at the Heliport. Lastly, while the DCALJ agreed that some degree of control remained with the Port Authority, the record before us shows that Petitioner was not an agent of the Port Authority.

Petitioner argues that control is the "overriding consideration in assessing an agency relationship" and that the elements of control were so extensive that Petitioner was the agent of the Port Authority for purposes of the operations of the Petitioner. The cases cited by Petitioner do not support its contention that the DCALJ's analysis with respect to the existence of an agency relationship between Petitioner and the Port Authority is erroneous. While the cases refer to the element of control none of the cases support a finding that other elements should be ignored in determining whether an agency relationship is present.

The Port Authority is exempt from the CRT pursuant to §11-704.a.1 of the Code which provides that:

> The following shall be exempt form the payment of the tax imposed by this chapter:
>
> 1. The state of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada), improvement district or other political subdivision of the state;

This exemption, by its terms, does not apply to Petitioner. In addition, Petitioner is not entitled to reduce its "base rent" (defined by §11-701.7 of the Code as the "rent paid for each taxable premises by a tenant to his or her landlord for a period, less [certain] amounts received by or due such tenant for the same period from any tenant of any part of such premises . . . .") by the amount reasonably ascribable to Petitioner's own use of the premises as "premises used for air transportation purposes" (pursuant to §11-704.c.2 of the Code) or as "piers insofar as such premises are used in interstate or foreign commerce" (pursuant to §11-704.c.3 of the Code). "Premises used for air transportation purposes" is defined at §11-701.9 of the Code, in relevant part, as:

> [t]he portion of any premises, located within an airport or within an air transportation terminal shared by more than one air line, of any person actually operating an air line as a common carrier, used by such person for normal or necessary air transportation purposes . . . . [Emphasis added.]

Petitioner cannot reduce its base rent pursuant to §11-704.c.2 of the Code as it does not operate an airline as a common carrier. In addition, Petitioner cannot reduce its base rent pursuant to §11-704.c.3 of the Code as Petitioner's operation of a Heliport on property partially supported by bulkheads and piers does not constitute Petitioner's own use of the

premises as piers in the conduct of interstate or foreign commerce.

As noted by the DCALJ, the Port Authority's exemption from the CRT (pursuant to §11-704.a.1 of the Code) is not based on whether it performed governmental rather than proprietary functions at the Heliport, but is based on its status as a public corporation. Furthermore, as Respondent contends, "[t]he cases dealing with the governmental vs. proprietary function of government concern issues of placing restrictions or liability on the governmental agency, . . ." (Respondent's Brief at 14.) Thus, whether the Port Authority is performing a governmental or proprietary function in maintaining and operating an air terminal is not relevant to the issue of whether Petitioner is subject to the CRT.

Petitioner has not cited nor have we found any provision in the CRT or in any other statute exempting Petitioner from the CRT. As Respondent argues, "[t]he fact that the Port Authority is exempt from taxation does not mean that those who transact business with it are also exempt." (Respondent's Brief at 12.) Also, the court in Astoria Federal Savings and Loan Association v. State of New York, 222 A.D.2d 36, 42 (2nd Dept. 1996), *app. dis.*, 88 N.Y.2d 1064 (1996), *app. den.*, 89 N.Y.2d 807 (1997), *cert. den.*, 522 U.S. 808 (1997), stated:

> any exemption from taxation 'must clearly appear', and where 'a statute or regulation authorizing an exemption is found, it will be 'construed against the taxpayer' unless the taxpayer can 'point to some provision of law plainly giving the exemption' [citations omitted] . . . The taxpayer must prove not only that his interpretation of the statute is plausible, but that is the only reasonable construction.

In addition, we are unconvinced by Petitioner's attempt to use the governmental function vs. proprietary function analysis to render a clearly commercial activity performed by a "for

profit" corporation exempt from the CRT.

Lastly, Petitioner claims that its activities in operating the Heliport are not commercial activities for purposes of the CRT. We find, as did the DCALJ, that Petitioner conducted business at the Heliport with the expectation of making a profit; that it provided services at the Heliport for a fee; and that it entered into a Subagreement with Resorts to use and occupy the Heliport for a fee. The CRT was "intended to apply to premises where an integral part of a commercial enterprise is carried out." Matter of Peat Marwick Main & Co. v. New York City Department of Finance, 76 N.Y. 2d 527, 531, 532 (1990). Clearly, Petitioner was engaged in a commercial activity at the Heliport during the Revised Tax Years.[12]

[12]We note that although the case was dismissed on procedural grounds, the court in Matter of Pan American Athletic & Social Club, Inc. v. Commissioner of Finance of the City of New York, 94 A.D.2d 606 (1st Dept. 1983), in *dicta*, stated that the CRT applies to premises leased from the Port Authority located in an airport.

Accordingly we affirm the DCALJ's Determination.[13]

Dated: February 4, 2005
New York, New York

_____
GLENN NEWMAN
Commissioner and President

_____
ARTHUR A. STRAUSS
Commissioner

_____
KALMAN FINKEL
Commissioner

[13]We have considered all other arguments raised by Petitioner and we deem them unpersuasive.