Florida State Tax Reporter, American Aircraft Sales International, Inc. v. Department of Revenue. Florida Department of Revenue, DOR 97-25-FOF-- Sales and use-- Taxability of persons and transactions-- Scope of tax-- Conversion from inventory to capital asset, Florida, ¶203-469, (Dec. 30, 1997)

¶203-469. American Aircraft Sales International, Inc. v. Department of Revenue. Florida Department of Revenue, DOR 97-25-FOF, December 30, 1997.

Sales and use: Taxability of persons and transactions: Scope of tax: Conversion from inventory to capital asset.– A dealer's depreciation of aircraft for federal tax purposes was a conversion of inventory items to capital assets subject to Florida sales and use tax and local government infrastructure surtax because the depreciation claim was a declaration that the airplanes were used in the taxpayer's business. The taxpayer did not pay sales or use tax when the airplanes were purchased, and its use of the airplanes was limited to efforts to resell them. The taxpayer's attempt to avoid the use tax by amending its federal returns to omit the depreciation deduction failed because the depreciation deduction was an exercise of a right or power incident to the taxpayer's ownership of tangible personal property the moment the deduction was claimed, and was therefore a taxable use of the property. Secs. 212.02(20) and (21); 212.06(1), F.S.; Rules 12A-1.007(10)(g); 12A-1.071(1), F.A.C.

See ¶60-210

FINAL ORDER

This cause came before me, as Executive Director of the Department of Revenue, for the purpose of issuing a final order. The Administrative Law Judge assigned to conduct the final hearing issued a Recommended Order on October 3, 1997. A copy of that document is attached to this Final Order and incorporated to the extent described herein.

STATEMENT OF THE ISSUE

Whether Petitioner's conversion of three aircraft from inventory items to capital assets for the purpose of claiming depreciation on federal income tax returns were taxable uses of these aircraft, despite Petitioner's later amendment of its federal income tax returns to remove the claimed deductions for depreciation.

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact in the Recommended Order.

CONCLUSIONS OF LAW

The Department of Revenue adopts and incorporates in this Final Order paragraphs 22 and 23 of the Recommended Order. The Department further adopts and incorporates paragraph 28 of the Recommended Order renumbered as a paragraph 24 of this Final Order. The remaining Conclusions of Law in the Recommended Order are rejected as misapprehensions of law, or as irrelevant.

25. Use tax is imposed at the moment the property is used in Florida. Section 212.06(1), Florida Statutes. Use means the exercise of any right or power over tangible personal property incident to the ownership, except that it does not include the sale at retail of that property in the regular course of business. Section 212.02(20), Florida Statutes.

26. The legislature has specifically defined the term “use” for purposes of application of Chapter 212. Section 212.02(21) provides that:

> "Use" means and includes the exercise of *any* right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business. (Emphasis supplied).

The facts in this case established that Petitioner exercised rights and powers incident to ownership of the property beyond those necessary for resale of that property.

27. The evidence is clear that each of the subject airplanes giving rise to the assessment was listed as a fixed capital asset and depreciated by Petitioner for federal income tax purposes. Rec. Order at 7-9. The King Air 200 was depreciated for 1990, the King Air B90 for 1991 and 1992 [1] and the Renegade for 1991 through 1993. Id. Decisions to claim depreciation were "probably" made by Petitioner's CPA alone, perhaps after discussion with one of the corporate owners. (R.O. 8). [2] In any event, the evidence is clear that these decisions were manifested over the course of several years by means of Petitioner's declaration on its federal tax returns.

28. In *HMY v. New Yacht Sales v. Dep't of Revenue,* 676 So.2d 1385 (Fla. 1st DCA 1996), the First District Court of Appeal approved the Department's determination that a boat dealer's conversion of a yacht from an inventory item to a capital asset by means of depreciating the asset on a federal income tax return was not incident to resale of the property, but was a purposeful use rendering the vessel subject to use tax. [3]

29. The Administrative Law Judge found below that, after receiving the Department's Notice of Decision, Petitioner amended its federal tax returns in order to improve its defense against the Department's assessment. Rec. Order 10-11. Especially in light of this finding, the Petitioner's self-serving attempt to put the Genie back in the bottle by amending its federal returns is not relevant to deciding the issue presented here. [4]

30. Precluding the Petitioner from recharacterizing its already accomplished use is appropriate. See, *State, Dep't of Revenue v. Anderson,* 403 So.2d 397, 399 (Fla. 1981). Allowing such manipulation to be accomplished after a sales and use tax audit would invite abuse and provide incentives that are inconsistent with the Legislative intent embodied in Chapter 212, F.S.

31. Allowing Petitioner to redetermine its cheapest tax alternative after an audit ignores the basic premise that use tax is due at the moment the property is used in Florida. Section 212.06(1), F.S. That use cannot be disavowed by the Petitioner. Petitioner, with the exception of some irrelevant corrections, has not shown that its original federal tax treatment of the aircraft was erroneous. [5]

32. There is no authority to support recognizing belated amendments to federal returns years after their filing, for the sole purpose of gaining an advantage in defending against a state sales and use tax audit. Taxable use is broader than physical use and the common understanding of the word use. *HMY*; *See, Klosters Rederi A/S v. State, Dep't of Revenue,* 348 So.2d 656, 658 (Fla. 3rd DCA 1977). By the time of the amendments to the federal returns, tax was already due.

33. As was the case in *HMY,* this Petitioner's conversion of inventory items to capital assets was a purposeful use, inconsistent with holding these items in inventory. Each aircraft was subject to use tax at the moment it was declared to be a depreciable asset.

34. The Recommended Order found that the Department failed to properly calculate the amount of the assessment. The Department is bound by this finding of fact and so reduces the amount of the tax now due to reflect an assessment of $51,061.32 in sales tax and $150 for surtax. The payment of $5,036.45 was credited in the Department's Notice of Reconsideration. Penalty and interest are recalculated accordingly.

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law it is therefore **ORDERED:**

The Recommended Order is REVERSED. Petitioner owes use tax, local government infrastructure surtax together with delinquent penalties and interest.

Any party to this Order has the right to seek judicial review of the Order pursuant to section 120.68, F.S., by filing a Notice of Appeal pursuant to Rule 9.110, Fla.. Rules of app. Pro., with the Agency Clerk of the

Department of Revenue, Office of the General Counsel, P.O. Box 6668, Tallahassee, Florida 32314-6668, and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of appeal. The Notice of Appeal must be filed within 30 days from the date on which this Order is filed with the Department's Agency Clerk.

DONE and ENTERED in Tallahassee, Leon County, Florida this 30th day of December, 1997.

RECOMMENDED ORDER

On August 4, 1997, a formal administrative heating was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner owes State of Florida use tax and local government infrastructure tax on the alleged use of three airplanes.

PRELIMINARY STATEMENT

On November 21, 1995, the State of Florida Department of Revenue (the “Department”) issued a Notice of Proposed Assessment for sales or use tax and local government infrastructure tax upon the Petitioner, American Aircraft International, Inc. (“American”). The assessment was issued after an audit conducted by the Department confirmed that American had depreciated three (3) aircraft for federal income tax purposes but had paid neither sales tax on their purchase nor use tax on their use. The Department assessed American for use tax and local government infrastructure surtax for the period of August 1, 1989 through July 31, 1994, plus delinquent penalties and interest.

On February 26, 1996, American filed an informal protest. On October 7, 1996, the Department issued its Notice of Decision sustaining the assessment, in full, less partial payments of $5,036.45 on the use tax assessment and $459.99 on the local government infrastructure surtax assessment. American protested the assessment in a Petition for Reconsideration, dated November 6, 1996. The Department denied the Petition for Reconsideration and upheld the assessment in its Notice of Reconsideration, dated January 10, 1997.

American requested formal administrative proceedings on the assessment, and the matter was referred to the Division of Administrative Hearings on February 17, 1997. After two continuances relating to discovery, a formal administrative hearing was held on August 4, 1997, in Tallahassee, Florida. American presented testimony from Mrs. Dorothy Tolbert, co-owner of American, and Mr. Allen Shaw, American's certified public accountant (CPA), and had Petitioner's Exhibits 1 through 6 admitted in evidence. By virtue of a Joint Pre-hearing Stipulation, the Department presented its prima facie case through the stipulated testimony of Tax Auditor, William Berger, and had Department's Exhibits 1 through 7 admitted in evidence. At the end of the final hearing, the Department ordered a transcript, and the parties were given 15 days from the filing of the transcript in which to file their proposed recommended orders.

The transcript of the proceedings was filed on August 19, 1997. However, uncontested motions for extension of time from each party were granted, extending the time to file proposed recommended orders to September 19, 1997.

FINDINGS OF FACT

1. Charles and Dorothy Tolbert own and operate American Aircraft International, Inc. (American). American is in the business primarily of selling and brokering aircraft sales. Most of American's business involves brokering in which American earns a commission or fee for putting together a seller and buyer and bringing the transaction to a conclusion. On a much less frequent basis, American will purchase an airplane for resale.

2. American advertises the availability of its airplanes, both brokered and American-owned, for either sale or lease. However, American has not had occasion to lease one of its own aircraft except as part of a lease-purchase agreement.

3. American does not make any other use of airplanes it offers for sale or lease, except as necessary for maintenance and repairs and for demonstration to prospective purchasers or lessees. Such use would be cost-prohibitive. Fuel, crew, and insurance costs would be well in excess of the cost of a ticket on a commercial airline. American's insurance policy only covers the use of the planes for demonstration and maintenance purposes.

4. On February 6, 1990, American traded for a King Air 200, N56GR, serial number 059, at an acquisition value of $650,000. The King Air 200 was delivered to American from Carlisle, Kentucky, and held by American for resale purposes only and was flown only for purposes of maintenance and repairs and for demonstration to prospective purchasers. When it was sold in 1991 to an English company, BC Aviation, Ltd., American had flown the aircraft only 7 hours. The aircraft was delivered out-of-state in May 1991.

5. In July 1991, American bought a kit for a home-built aircraft called the Renegade, serial number 445. The kit was manufactured and sold by a company in British Columbia, Canada. American's intent in purchasing the kit was to build the airplane and decide whether to become a dealer. It took a year and a half to build, and by the time it was completed, American decided not to pursue the dealership. In September of 1991, American sold the Renegage to the Tolberts. The Tolberts registered the Renegade in September 1994, under N493CT.

6. At first, the Tolberts did not pay sales tax on their purchase of the Renegade. They thought that, since they owned American, no sales tax was due. When the Department audited American and pointed out that sales tax was due, the Tolberts paid the tax in December 1994.

7. In 1991, American also purchased a King Air B90, N988SL, serial number LJ438, for $175,000. The King Air B90 was held by American for resale purposes only and was flown only for purposes of maintenance and repairs and for demonstration to prospective purchasers. In July 1991, American sold the aircraft to Deal Aviation of Chicago, Illinois. However, Deal could not qualify for its own financing, so American agreed to lease-sell the aircraft to Deal. Under the lease-purchase agreement entered into on July 21, 1991, the purchase price was $269,000, payable $4,747.85 a month until paid in full. (The agreement actually said payments would be made for 84 months, but that would amount to total payments well in excess of the purchase price; the evidence did not explain this discrepancy.) American continued to hold title to the aircraft and continued to make payments due to the bank on American's financing for the aircraft. The lease-purchase agreement must have been modified, or payments accelerated, because American transferred title to the aircraft in April 1993.

8. The Department asserted that a Dolphin Aviation ramp rental invoice on the King Air B90 issued in August for the month of September 1991 reflected that the aircraft was parked at the Sarasota-Bradenton Airport at the time of the invoice, which would have been inconsistent with American's testimony and evidence. But the invoice contained the handwritten notation of Dorothy Tolbert that the airplane was “gone,” and her testimony was uncontradicted that she telephoned Dolphin when she got the invoice and to inform Dolphin that the invoice was in error since the plane had not been at the ramp since Deal removed it to Illinois on July 21, 1991. As a result, no ramp rent was paid after July 1991. Indeed, the Department's own audit schedules reflect that no ramp rent was paid on the King Air B90 after July 1991.

9. The Department also presented an invoice dated September 16, 1991, in the amount of $3400 for engine repairs done on the King Air B90 by Hangar One Aviation in Tampa, Florida. The invoice reflects that the repairs were done for American and that they were paid in full on September 19, 1991, including Florida sales tax. The Department contended that the invoice was inconsistent with American's testimony and evidence. But although American paid for these repairs, together with Florida sales tax, Mrs. Tolbert explained that the repairs were made under warranty after the lease-purchase of the airplane by Deal. A minor engine problem arose soon after Deal removed the airplane to Illinois. Deal agreed to fly the plane to Hangar One for the repairs, and American agreed to pay for the repairs. After the repairs were made, Hangar One telephoned Mrs. Tolbert with the total, and she gave Hangar One American's credit card number in payment. She did not receive American's copy of the invoice until later. She does not recall if she: noticed the Florida sales tax and did not think to question it; noticed it and decided it was not enough money ($179) to be worth disputing; just did not notice the Florida sales tax.

10. When American's certified public accountant (CPA), Allan Shaw, prepared American's federal income tax return for 1990, he included the King Air 200 as a fixed capital asset on the company's book depreciation

schedule and booked $26,146 of depreciation on the aircraft for 1990 on a cost basis of $650,000. For federal tax purposes, he took the maximum allowable depreciation deduction on the aircraft ($92,857) by attributing a seven-year life to the aircraft and using the double declining balance method of calculating depreciation.

11. The next year, 1991, Shaw included the both the King Air B90 and the Renegade as fixed capital assets on the company's book depreciation schedule. He booked $9,378 of depreciation on the B90 on a cost basis of $175,000 and $1,872 on the Renegade on a cost basis of $25,922 for part of the year 1991. For federal tax purposes, he took the maximum allowable depreciation deduction on the B90 ($12,507) by attributing a seven-year life to the aircraft and using the double declining balance method of calculating depreciation. This depreciation was subtracted from the “gross income from other rental activities” on Schedule K of the return in the amount of $22,796, which represented the payments from Deal under the lease-purchase agreement. The Renegade was depreciated for the same amount as its book depreciation, and no income was recorded as having been generated from use of the Renegade.

12. The next year, 1992, Shaw again included the both the King Air B90 and the Renegade as fixed capital assets on the company's book depreciation schedule. He booked $35,613 of depreciation on the B90 and $5,555 on the Renegade. For federal tax purposes, he took the maximum allowable depreciation deduction on the B90 ($25,014) by attributing a seven-year life to the aircraft and using the double declining balance method of calculating depreciation. This depreciation was subtracted from the “gross income from other rental activities” on Schedule K of the return in the amount of $51,737, which again represented the payments from Deal under the lease-purchase agreement. The Renegade was depreciated for the same amount as its book depreciation, and no income was recorded as having been generated from use of the Renegade.

13. It is not clear from the evidence why American's CPA decided American was entitled to claim depreciation on the three aircraft in question. (Shaw also depreciated another airplane in 1989 which was before the period covered by the Department's audit.) Shaw's final hearing and deposition testimony was confusing as to whether he recalled discussing the question with the Tolberts. He may have; if he did, he probably discussed it with Mrs. Tolbert. Meanwhile, Mrs. Tolbert does not recall ever discussing the question of depreciation with Shaw. In all likelihood, Shaw probably made his own decision that American could depreciate the airplanes to minimize income taxes by claiming that they were fixed capital assets used in the business and not just inventory items being held for resale. For the King Air B90, there were lease payments Shaw could use to justify his decision; but there were no lease payments for the King Air 200 or the Renegade. The evidence was not clear whether there were lease payments for the airplane Shaw depreciated in 1989.

14. For the next year, 1993, Shaw included the Renegade as a fixed capital asset on the company's book depreciation schedule and booked $7,712 of depreciation on the Renegade. For federal tax purposes, the Renegade was depreciated for the same amount as its book depreciation, and no income was recorded as having been generated from use of the Renegade.

15. When the Department audited American starting in July 1994, tax auditor William Berger saw the depreciation schedules and tax returns, both of which indicated to him that the three airplanes in question were used by the company, but no sales or use tax was paid on them. (He also pointed out the Tolberts' failure to pay sales tax on the purchase of the Renegade from American, and the Tolberts later paid the tax, as previously mentioned.) As a result, on July 26, 1995, the Department issued two notices of intent. One was to make sales and use tax audit changes which sought to assess American $56,097.77 in use taxes, together with delinquent penalties of $14,657.36 and interest through July 26, 1995, in the amount of $31,752.61, for a total of $102,507.74, with subsequent interest accruing at the rate of $18.44 per day. The second was to make local government infrastructure surtax audit changes which sought to assess American $609.99 in the surtax, together with delinquent penalties of $163.14 and interest through July 26, 1995, in the amount of $256.33, for a total of $1,029.46, with subsequent interest accruing at the rate of $.20 per day.

16. It is not clear from the record how the Department arrived at the use tax and surtax figures. The alleged use tax assessment should have been calculated as $51,061.32 (six percent of the acquisition costs of the airplanes), and the alleged surtax assessment should have been calculated at the statutory maximum of $50 per item, for a total of $150.

17. On August 28, 1995, American made a partial payment of $5,496.44 on the Department's use tax and surtax audit change assessments, intending to leave a disputed assessed amount of $51,061.32 in use tax and $150 in surtax. It is not clear from the record what American intended the $5,496.44 to apply towards.

18. American filed an Informal Protest of the use tax and surtax audit change assessments on February 26, 1996. The Informal Protest contended that the use tax and surtax were not due and that the federal income tax depreciation schedules were “not determinative.”

19. On October 6, 1996, the Department issued a Notice of Decision denying American's protest primarily on the ground that the depreciation of the aircraft for federal income tax purposes constituted using them for use tax purposes.

20. After receiving the Notice of Decision, on November 4, 1996, American filed amended tax returns to remove the depreciation of the airplanes (together with the “gross income from other rental activities” on Schedule K of the 1991 return). (Although CPA Shaw refused to admit it, it is clear that American's federal income tax returns were amended in order to improve its defense against the Department's use tax and surtax [asse]ssments.) As a result of the amended returns, American had [to] pay an additional $15,878 in federal income tax on the 1990 return; there was no change in the tax owed on any of the other returns.

21. On November 6, 1996, American filed a Petition for Reconsideration on the ground that the returns had been amended and the additional federal income tax paid. On January 10, 1997, the Department issued a Notice of Reconsideration denying American's Petition for Reconsideration on the ground that “subsequent modifications made to the federal income tax returns will have no affect [sic] upon” the use tax and surtax assessments.

CONCLUSIONS OF LAW

22. Under 120.80(14)(b), Florida Statutes (Supp. 1996), the Department's burden of proof is limited to proof of the assessment and the factual and legal basis for it. Since, in this case, the Department met its burden of proof, the burden shifted to the Petitioner to demonstrate by a preponderance of the evidence that the assessment is incorrect. *See Dept. of Revenue v. Nu-Life Health and Fitness Center,* 623 So. 2d 747, 751-752 (Fla. 1st DCA 1992).

23. Section 212.02(20), Florida Statutes (1995), states:

> “Use” means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business.

Unless a specific exemption applies, use tax is imposed at the moment the property is used in Florida. *See* Section 121.06(1)(a), Florida Statutes (1995).

24. Department of Revenue Rule 12A-1.007(10)(g), Florida Administrative Code, provides in pertinent part:

> (g)1. Registered aircraft dealers who purchase aircraft exclusively for resale are exempt from the payment of tax on the purchase price at the time of purchase but shall pay a tax computed on 1 percent of the value of the aircraft each calendar month that the aircraft is used by the dealer.
>
> 2. The payment of such use tax shall commence in the month during which the aircraft is first used for any purpose for which income is received by the dealer for its use, including charter, rental, flight training, and demonstration where a charge is made.

25. Although some supporting documentation could not be produced, the evidence in this case proved that American did not use the three aircraft in question except to maintain and repair them and to demonstrate them for purposes of resale.

26. The evidence was clear that the King Air 200 and Renegade were only used in this fashion. The case of the King Air B90 is more complicated since American received lease payments from Deal Aviation. However, American received those lease payments under a lease-purchase agreement.

27. Rule 12A-1.071(1), Florida Administrative Code, provides in pertinent part:

(d) Where a contract designated as a lease transfers substantially all the benefits, including depreciation, and risks inherent in the ownership of tangible personal property to the lessee, and ownership of the property transfers to the lessee at the end of the lease term, or the contract contains a purchase option for a nominal amount, the contract shall be regarded as a sale of tangible personal property under a security agreement (commonly referred to as a conditional-sale type lease) from its inception. The purchase option shall be regarded as a nominal amount if it does not exceed $100 or 1 percent of the total contract price, whichever is the lesser amount.

(e) Whether a lease is a conditional sale-type lease or an operating lease shall be determined in accordance with the provisions of the agreement, read in light of the facts and circumstances existing at the time the agreement was executed. Taxpayers who calculated and paid taxes on leases entered into after January 2, 1989, pursuant to any amendments to paragraph (1)(d) of this rule adopted after January 2, 1989, shall be deemed to be in compliance with the requirements of this rule.

28. The primary basis for the Department's assessment of use tax on the three airplanes in question is that they were depreciated on American's initial federal income tax returns and thus, in the Department's view, “used” by American in its business. The Department's position is based on the decision in *HMY New Yacht Sales v. Dept. of Revenue,* 676 So. 2d 1385 (Fla. 1st DCA 1996).

29. The *HMY New Yacht Sales* case involved the imposition of use tax on “The Bandit,” a 47-foot fishing vessel boat owned by HMY, a company engaged in the business of yacht sales. HMY had purchased “The Bandit” for $520,000 from Davis Yachts, Inc., the manufacturer, primarily for the purposes of resale. HMY, however, also used the boat for promotion of sales of other boats and to generally promote good will for its business. Indeed, Davis Yachts bore some of the expense of the promotional activities which inured to the benefit of both businesses. Further, HMY had depreciated the boat on its federal tax returns, reflecting that it was a depreciable capital asset rather than a nondepreciable item of inventory. In affirming the imposition of the use tax, the court held that the use of the boat for promotional activities unrelated to the sale of that specific vessel constituted a taxable use and that the claim of depreciation on the boat on federal income tax returns reflected a declaration that the yacht was used in HMY's trade or business.

30. In the instant matter, however, unlike the factual situation in HMY, there was no use of the aircraft for any purposes other than those directly related to the resale of the aircraft. Such activities, as reflected in the *HMY Yacht* decision, do not constitute a taxable use.

31. Further, in *HMY* there was a purposeful inclusion of the vessel on HMY's federal tax return for depreciation purposes. HMY did not claim that such inclusion was erroneous, nor were any amended federal tax returns filed removing the claimed depreciation on the vessel. Consequently, the instant matter is distinguishable from the *HMY Yacht Sales* decision.

32. Since there was no taxable use of the aircraft in question in this case, their depreciation on American's federal income tax returns was in error. The erroneous depreciation should not be viewed as a use of the aircraft. Nor should the error be viewed as irremediable. The Department's view would render meaningless amended tax returns, the sole purpose of which is to correct errors made on initial tax returns.

33. Notwithstanding American's erroneous federal income tax return, the American-Deal lease-purchase agreement, read in light of the facts and circumstances existing at the time the agreement was executed, conferred on Deal substantially all the benefits and risks inherent in ownership of the King Air B90, including depreciation. For sales and use tax purposes, the American-Deal lease-purchase agreement was a conditional-sale type lease under Rule 12A-1.071(d)—(e) and is treated as a sale, not a lease.

34. The local government infrastructure surtax “piggy backs” the use tax up to a maximum of $50 per item. Section 212.055(2), Florida Statutes (1995). Since no use tax was due, neither was any surtax.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Revenue enter a final order withdrawing the assessment of use tax and local government infrastructure surtax, delinquent penalties, and interest against American.

RECOMMENDED this 3nd day of October, 1997, in Tallahassee, Leon County, Florida.

Footnotes

1 It appears from the record that the King Air B90 was depreciated for a period of time during 1991 prior to its lease purchase. Any depreciation that may have been erroneously taken after the lease purchase agreement for the B90 is irrelevant for Florida use tax purposes.

2 The Department accepts the Recommended Order's finding that the Petitioner's CPA decided that the Petitioner could depreciate several aircraft on its federal returns beginning as early as 1989. The Recommended Order does not find that the corporate owners were unaware of, or disapproved of, the CPA's interpretation of federal law.

3 A recent decision has held that the use of an item of tangible personal property in promoting the sale of that same item, or in the promotion of the business generally, where the use was no more than that necessary to sell the item, was not a taxable use. This decision contravenes dicta in *HMY,* but is not on point with the holding of that case. See *Allied Marine Group v. Dep't of Revenue,* Case No. 97-0914 (Fla. 1st DCA, 12-2-97).

4 Viewed in light of the findings of fact adopted herein by reference, the Petitioner's amendment was not meaningless since it was motivated by a desire to improve its defense in the administrative proceeding.

5 The Petitioner purchased the Renegade in July, 1991, and it sold the Renegade to the Petitioner's corporate owners in September, 1991. Rec. Order 4. It appears that the Petitioner depreciated the plane for that part of 1991 during which it owned the plane. The Petitioner's continued claim of depreciation in 1992 and 1993 may well have been error since the Petitioner had sold the aircraft to the corporate owners by then. Rec. Order 7-9. However, the record is unclear on this point.