

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

TSB-A-04(11)S
Sales Tax
April 27, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030825A

On August 25, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from M Ventures, LLC and Arrow Operations, LLC, c/o Ernst & Young, LLP, 5 Times Square, New York, New York, 10036. Petitioners, M Ventures, LLC and Arrow Operations, LLC, submitted additional information pertaining to the Petition on November 7, 2003, December 12, 2003, and March 8, 2004.

The issues raised by Petitioners relating to the purchase, lease, and ultimate use of an aircraft under the following circumstances, are:

1. Whether M Ventures, LLC (“Ventures”) may purchase the aircraft exempt from New York sales and use taxes since it will lease the aircraft 100% of the time to other entities, as described below.
2. Whether lease payments to Ventures will qualify for exemption under the commercial aircraft exemption pursuant to section 1115(a)(21) of the Tax Law.
3. Whether payments to the lessees by third parties will be exempt from sales and use taxes as charges for the provision of a nontaxable transportation service.

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

Ventures and Arrow Operations, LLC (“Arrow”) are single member LLC’s, wholly owned by Wenner Media LLC (“Wenner”). Business operations of the group are conducted through Wenner, and Wenner’s wholly owned single member LLCs, Rolling Stone LLC (“Rolling Stone”) and Men’s Journal LLC (“Men’s Journal”). Ventures and Arrow are, in effect, brother/sister entities of Rolling Stone and Men’s Journal. Ventures and Arrow are separate and distinct legal entities that operate independently of one another and of their affiliates.

Ventures will purchase an aircraft that it will lease to Arrow or an unrelated Air Charter Co. (“CharterCo”) based on availability. This is Ventures’ only activity. Ventures is responsible for insurance, acquiring hangar space, and the costs to maintain and repair the aircraft. Ventures is also responsible for and has final authority over scheduling the lease of the aircraft. Both Arrow and CharterCo are required to notify Ventures in advance when they have a need to lease the aircraft. In the event of a conflict, the request which is received first is the one which is honored.

The lease fees paid by each lessee to Ventures are based upon hourly rates. Arrow will pay a lease fee to Ventures based upon the number of hours the plane is leased. CharterCo’s lease fee

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to Ventures is based upon a percentage of charter revenue, which is similarly based upon the number of flight hours related to each charter.

Arrow will provide transportation services to affiliates for compensation. Arrow will be responsible for its costs relating to operating the plane (such as making lease payments, employing pilots, fueling the airplane and accounting or administrative functions associated with its operation of the airplane). As is currently the case with other members of the affiliated group, accounting and administrative functions will be performed by a related entity and charged to Arrow based on costs incurred. Arrow will enter into a fuel and services agreement with CharterCo to purchase fuel and services (such as weather forecasting).

Arrow will charge Wenner, Rolling Stone or Men's Journal an amount which reflects the cost of operating the airplane. Arrow will operate the aircraft under Part 91, Subpart F of Federal Aviation Regulations (hereinafter FAR), for operations described herein, and is not required to obtain an Air Carrier Operating Certificate under FAR Part 135. Arrow will utilize the plane to provide transportation services to the employees, officials and guests of Wenner, Rolling Stone or Men's Journal for compensation as allowed under FAR Part 91. It will have full dominion and control of the aircraft while in its possession.

Pursuant to a written transportation service agreement, Wenner, Rolling Stone and Men's Journal will be charged a fee which under FAR Part 91 may not exceed Arrow's fixed and variable costs of leasing and operating the aircraft. The costs allocated to these users will be in accordance with a formula based on flight hours. It is the intention that charges to Wenner, Rolling Stone and Men's Journal, in total, will cover all of Arrow's fixed and variable costs of leasing and operating the aircraft.

Ventures will also lease the plane to CharterCo, which will utilize the plane for the transportation of third parties (not employees, officials or guests of Wenner, Rolling Stone or Men's Journal) for a fee. CharterCo is an air taxi operator authorized to charter aircraft to third parties. It will operate the aircraft under FAR Part 135 when it leases the aircraft from Ventures. It will have full dominion and control of the plane while in its possession. CharterCo will be responsible for its costs of operating the plane (such as making lease payments, arranging for pilots and fuel) when leasing and using the aircraft. CharterCo will charter the aircraft to third parties for a market rate fee (hourly rate) and it will pay Ventures a lease payment equal to 85% of these hourly charter fees less direct operating expenses (including fuel) incurred by CharterCo.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(17) Commercial aircraft. Aircraft 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.

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1115(a)(21) of the Tax Law provides an exemption for:

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.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definition.

(1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(c) Rentals, leases, licenses to use.

(1) The terms rental, lease and license to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale" or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement. . . .

* * *

(e) Transfer of possession.

* * *

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

Opinion

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Section 1101(b)(4) provides, in relevant part, that a retail sale is a sale of tangible personal property to any person for any purpose, other than for resale. The resale exclusion applies only when the tangible personal property is purchased exclusively for resale. See *John B. Pike and Son, Inc.*, Adv Op St Tx Comm, July 26, 1985, TSB-A-85(29)S; *P-H Fine Arts, Limited et al*, Dec Tax App Trib, October 13, 1994. Since Ventures' only activity is the rental or lease of an aircraft to either Arrow or CharterCo, it may purchase the aircraft exempt from sales and use tax as a purchase for resale.

The taxability of the subsequent rental or lease of the aircraft to Arrow or Charterco is dependent on whether the aircraft qualifies as commercial aircraft as defined by section 1101(b)(17) of the Tax Law.

Arrow will be responsible for its costs relating to operating the plane (such as making lease payments, fueling the aircraft, employing the pilots, and any accounting or administrative functions associated with its operation of the airplane). Arrow will charge the users an amount which reflects Arrow's costs of leasing and operating the aircraft. The costs allocated to the users will be in accordance with a formula based on flight hours. Where over fifty percent of an aircraft's use is devoted to transporting customers for compensation, and the compensation reasonably reflects the

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cost of operating the aircraft, such aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce for purposes of section 1115(a)(21) of the Tax Law. Therefore, the purchase (via rental and lease) of the aircraft by Arrow, assuming more than fifty percent of its use of the aircraft is in the provision of air transportation services for hire, would qualify for the exemption provided by section 1115(a)(21) for commercial aircraft. See *Pasquale & Bowers*, Adv Op Comm T & F, August 1, 1996, TSB-A-96(49)S; *CB Applications, LLC*, Adv Op Comm T&F, February 1, 2000, TSB-A-00(6)S; *Philip Morris Management Corp*, Adv Op Comm T&F, October 11, 2000, TSB-A-00(38)S.

CharterCo will utilize the plane for the transportation of third parties for a fee. CharterCo is an air taxi operator authorized to charter aircraft to third parties. It will operate the aircraft under Part 135 of Federal Aviation Regulations when it leases the aircraft from Ventures and will have full dominion and control of the plane while in its possession. It will pay Ventures 85% of the hourly charter fees less direct operating expenses. Where over fifty percent of an aircraft's use is devoted to transporting customers for compensation, and the compensation reasonably reflects the cost of operating the aircraft, such aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce for purposes of section 1115(a)(21) of the Tax Law. Therefore, the purchase (via rental and lease) of the aircraft by CharterCo, assuming more than fifty percent of its use of the aircraft is in the provision of air transportation services for hire, would qualify for the exemption provided by section 1115(a)(21) for commercial aircraft. See *Pasquale & Bowers, supra*; *CB Applications, LLC, supra*; *Philip Morris Management Corp, supra*.

It appears, therefore, that Arrow and CharterCo will each use the aircraft primarily to transport persons for hire. Since the aircraft will qualify as a commercial aircraft under section 1101(b)(17) of the Tax Law, charges paid by Arrow and CharterCo to Ventures will be exempt from sales tax, provided that Arrow and CharterCo submit a properly completed *Exempt Use Certificate*, Form ST-121, to Ventures.

In addition, since Arrow and CharterCo retain complete dominion and control over the operation of the aircraft, Arrow's charges to the employees, officials, and guests of related entities and CharterCo's charges for air taxi services are charges for the provision of nontaxable transportation services.

The above analysis presumes treatment of CharterCo, Arrow, Ventures, and the related companies as separate legal entities. It also presumes that the accounting and administrative functions are performed on behalf and in the name of Arrow. However, if the activities of Ventures, Arrow, or their related companies were so dominated and controlled by the parent or each other, or their activities were so commingled, that they would be considered to be operating as alter egos of each other rather than separate legal entities, then the limited liability company and corporate structures would be disregarded and the conclusions reached in this opinion would not apply. See *Harfred Operating Corporation*, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S.

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If an examination showed that the related entities in the present case should be disregarded as separate legal entities for purposes of sales tax, the aircraft would not be considered to be purchased exclusively for resale but rather purchased for self use by the related limited liability company and/or corporation. Under such circumstances, Ventures' purchase of the aircraft would not qualify as a purchase for resale, and would not qualify for the commercial aircraft exemption. The rental of the aircraft to CharterCo, however, could still qualify for exemption under section 1115(a)(21) of the Tax Law.

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