

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

TSB-A-04(2)S
Sales Tax
January 28, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031120B

On November 20, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ernst & Young, LLP, 1400 Key Tower, 50 Fountain Plaza, Buffalo, New York, 14202.

The issues raised by Petitioner, Ernst & Young, LLP, relating to the purchase, use, and maintenance of, and related equipment purchases for, an aircraft under the circumstances described below, are:

1. Whether the purchase price paid to acquire the aircraft will be subject to New York sales and use tax.
2. Whether charges to affiliated companies for transportation services will be subject to New York sales and use tax.
3. Whether maintenance costs and related equipment purchases in connection with the use of the aircraft will be subject to New York sales and use tax.

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

Holdings LLC ("Holdings"), a Delaware limited liability company, owns all the membership interests in Subsidiary One LLC ("Sub 1") and Subsidiary Two LLC ("Sub 2"). Both Sub 1 and Sub 2 are also Delaware limited liability companies.

Sub 1 has organized Transportation LLC ("Transportation"), also a Delaware limited liability company, and will hold all the membership interests in Transportation. Transportation will have a name that is different from each of its affiliates, and will maintain its own books and records and bank accounts, which will be separate from the books and records and bank accounts of Holdings, Sub 1 and Sub 2. Transportation's Certificate of Organization and its Operating Agreement will set out organizational purposes different from those of its affiliates. Transportation will also have its own officers, who may overlap with, but who will also differ from, the officers of its affiliated entities.

Transportation will, like each of its affiliates, hold itself out to the public as a separate legal entity and will enter into business relationships and contractual obligations in its own name. Transportation will have substantial equity capital, approximately \$20,000,000, and no debt. Transportation will be responsible for providing transportation services to Holdings, Sub 1 and Sub 2, such as contracting for charter airline, bus and limousine services from unrelated third parties. Transportation will also own and operate, outside of the State of New York, the fleet of

approximately 80 automobiles presently held by one or more of its affiliates. In addition, Transportation will acquire and operate an executive jet aircraft, which it will register with the Federal Aviation Administration (“FAA”) under the rules found in Federal Aviation Regulations (“FAR”) Part 91.

Transportation will be the sole owner of the aircraft, will set the specifications for and will contract for modifications to the aircraft, and will be the owner of all rights under all related warranties. Transportation will determine where and when the aircraft will fly, will determine the passengers carried, and will at all times have possession, command and control of the aircraft. Transportation will lease hangar space and retain related services for the aircraft in Suffolk County in New York, and will obtain insurance on the aircraft.

Transportation is considering hiring a person to coordinate the scheduling and use of the aircraft and automobiles and provide bookkeeping and other administrative services, including billing affiliates for usage. Alternatively, Transportation will purchase these services from its affiliates or unrelated third parties. Transportation will pay fair value for the use of any service or property of its affiliates. In addition, Transportation will contract for and pay fair value for the costs of all other aspects of the aircraft’s operation, maintenance, inspection, repairs and overhauls. Finally, Transportation will contract with an independent publicly held company that will provide, as Transportation’s agent, any necessary related aviation services that Transportation will not perform itself. This agreement will be based upon a standard air transportation industry form that is accepted under FAA regulations for the provision of aviation management services.

Approximately 90 percent of the use of Transportation’s aircraft will be for services for hire for Holdings, Sub 1 and Sub 2. Transportation will provide these services pursuant to a written agreement. These services will consist of the transport of officers and employees of the affiliated companies and their customers, or prospective customers, vendors and business colleagues. Transportation will charge the recipient of these air transportation services (i.e., Holdings, Sub 1 or Sub 2) for these services based on the direct and indirect operating costs of the aircraft under the applicable FAA regulations and precedents.

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:

* * *

(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 1105(c) of the Tax Law imposes sales tax, in part, on the receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or *maintaining, servicing or repairing tangible personal property* . . . not held for sale in the regular course of business . . . whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(v) such services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use of such aircraft as such aircraft, machinery or equipment, and property are specified in paragraph twenty-one of subdivision (a) of section eleven hundred fifteen of this article; . . . (Emphasis added)

Section 1115(a)(21) of the Tax Law exempts from the sales tax imposed by section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110:

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. (Emphasis added)

Technical Services Memorandum, entitled *Tax Law Defines Commercial Vessels and Commercial Aircraft*, November 7, 1996, TSB-M-96(14)S, states in part:

Statutory changes in the definitions of commercial vessels and commercial aircraft have expanded the current sales and use tax exemptions for commercial vessels and aircraft, effective December 1, 1996. The expanded exemptions now also include vessels and aircraft that transport, in qualifying commerce, tangible personal property in the conduct of the business of the purchaser of the vessels or aircraft. (Purchaser includes, for example, a buyer, renter or lessee of the vessel or aircraft.) The exemption covers certain purchases of tangible personal property necessary to operate the exempt vessels and aircraft, and also exempts

maintenance and repair services to the exempt vessels or aircraft, and fuel used by the exempt vessels and aircraft.

Previously, only vessels and aircraft used by the purchaser primarily (at least 50% of the time) in the transportation for hire of other persons or their property qualified for the exemption. Thus, self-use of a vessel or aircraft to transport one's own property was not a qualifying use.

* * *

Commercial Aircraft

The expanded definition of a commercial aircraft is an aircraft used primarily:

- to transport persons or property, for hire;
- by the purchaser of the aircraft primarily to transport the purchaser's own tangible personal property in the conduct of the purchaser's business; or
- for both of the above purposes.

To be exempt, a commercial aircraft must be primarily engaged in intrastate, interstate or foreign commerce. . . .

In addition to the exemption applicable to the aircraft, the exemption also applies to:

- machinery and equipment installed on the aircraft;
- property used by or purchased for the use of the aircraft for maintenance and repairs;
- *the services of maintaining, servicing and repairing the aircraft, machinery or equipment installed on the aircraft, and property used by or purchased for the use of the aircraft;* (Emphasis added)
- flight simulators purchased by commercial airlines.

Permanent air cargo containers suitable for repeated use, and specifically designed to facilitate the carriage of goods on aircraft, are exempt from New York State sales and use taxes. Repairs to air cargo containers are likewise exempt.

For more information about the exemptions granted to commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, see TSB-M-80(4)S, *Exemptions For Commercial Aircraft*, and TSB-M-80(4.1)S, *Air Cargo Containers*. In reading TSB-M-80(4)S, please read-in the expanded definition of a commercial aircraft discussed in this memorandum and also substitute 50% for the out-of-date 75% threshold for determining when a commercial aircraft is primarily used in the qualifying commerce.

Opinion

Transportation will acquire and operate an executive jet aircraft, which it will register with the FAA under the rules found in FAR Part 91. Transportation will be the sole owner of the aircraft, will be the owner of all rights under all related warranties, and will at all times have possession, command and control of the aircraft. Transportation will lease hangar space and retain related services for the aircraft in Suffolk County in New York, and will obtain insurance on the aircraft.

Pursuant to a written agreement with Holdings, Sub 1 and Sub 2, Transportation will transport officers and employees of such affiliated companies and their customers, prospective customers, vendors and business colleagues. Transportation will charge the recipients of these air transportation services (i.e., Holdings, Sub 1 or Sub 2) for these services based on the operating costs of the aircraft.

The taxability of Transportation's purchase of the aircraft is dependent on whether the aircraft qualifies as a commercial aircraft as defined by section 1101(b)(17) of the Tax Law. Where over 50 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 of the aircraft by Transportation qualifies for the exemption provided by section 1115(a)(21) for commercial aircraft if more than 50 percent of the use of the aircraft is in the provision of air transportation services for hire. (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.)

Petitioner indicates that approximately 90 percent of the use of Transportation's aircraft will be to provide air transportation services for hire to its affiliates. Therefore, since the aircraft will qualify as a commercial aircraft and qualify for the exemption from tax pursuant to section 1115(a)(21) of the Tax Law, the purchase price paid by Transportation will be exempt from sales tax. Transportation should submit a properly completed *Exempt Use Certificate*, Form ST-121, to the seller of the aircraft.

In addition, since Transportation retains complete dominion and control over the operations and maintenance of the aircraft, Transportation's charges to its affiliates are charges for the provision of nontaxable transportation services. Maintenance costs in connection with Transportation's use of the commercial aircraft qualify for exclusion from tax under section 1105(c)(3)(v) of the Tax Law. Purchases of machinery or equipment to be installed on the aircraft, and purchases of property to be used for the maintenance and repair of the aircraft, are exempt under section 1115(a)(21) of the Tax Law. See *Federal Express Corporation*, Adv Op Comm T&F, December 26, 1996, TSB-A-96(81)S; *KPMG LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(12)S.

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The above analysis presumes treatment of Transportation, Holdings, Sub 1 and Sub 2 as separate legal entities. It also presumes that any scheduling, accounting, billing and administrative functions performed by affiliates are done so on behalf of and in the name of Transportation. However, if the activities of Transportation, Holdings, Sub 1 or Sub 2 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 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.

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 a commercial aircraft but rather would be purchased for self use by the related entities. Under such circumstances, Transportation's purchase of the aircraft, as well as any repair, maintenance or equipment purchases, would not qualify for the commercial aircraft exemption.

DATED: January 28, 2004

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