

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

TSB-A-05(38)S
Sales Tax
October 25, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050513A

On May 13, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from NYLIFE LLC, 51 Madison Avenue, New York, New York 10010. Petitioner, NYLIFE LLC, submitted additional information pertaining to the Petition on July 22, 2005, and October 14, 2005.

The issues raised by Petitioner are:

1. Whether the use of an aircraft in New York by Petitioner will be subject to New York sales and use tax.
2. Whether amounts paid to Petitioner for transportation services are subject to New York sales and use tax.

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

Petitioner is a Delaware limited liability company, wholly owned by New York Life Insurance Company (“NYLIC”), a mutual insurance company organized under the laws of New York. Petitioner is the parent company of multiple wholly owned subsidiaries, which subsidiaries are engaged in business activities in various states and countries. Petitioner is a separate and distinct legal entity that operates independently of NYLIC and its affiliates and enters into business relationships and contractual obligations in its own name. Petitioner maintains its own books and records and bank accounts separate from the books and records and bank accounts of NYLIC. Petitioner has its own officers and directors, some of whom also serve as officers and directors of NYLIC and its affiliates.

Petitioner acquired an aircraft from the manufacturer on November 5, 2004, pursuant to a contract entered into with the aircraft manufacturer. Petitioner is, and will continue to be, the sole owner of the aircraft and the owner of all rights under related warranties. Petitioner took delivery of the aircraft in Windsor Locks, Connecticut, and uses hangar space and obtains related services for the aircraft in Teterboro, New Jersey. The aircraft was temporarily hangared in White Plains, New York for portions of November and December 2004. Although Petitioner does not intend to use hangar space in New York in the future, it may do so periodically for purposes of picking up or dropping off passengers. The aircraft is registered with the Federal Aviation Administration under the rules of Federal Aviation Regulations Part 91, Subpart F.

Petitioner provides transportation services to the employees, officials and guests of NYLIC and its affiliates, pursuant to written transportation agreements, for a fee based on the direct and indirect operating costs of the aircraft (the “Transportation Services”). The

Transportation Services agreements were entered into contemporaneously with the purchase of the aircraft. The Transportation Services will comply with Part 91 of the Federal Aviation Regulations. Approximately 80% of the use of the aircraft will be for the provision of Transportation Services. During time periods when the aircraft is not being used for the provision of Transportation Services, Petitioner intends to provide transportation services to the chairman of NYLIC for nonbusiness related trips (the "Nonbusiness Transportation Services") pursuant to an agreement. The agreement establishes an allocation of the operating costs based on the amount of time the services are provided to the chairman. The chairman of NYLIC will reimburse Petitioner for the costs associated with the Nonbusiness Transportation Services in an amount equal to the maximum amount allowed under Part 91 of the Federal Aviation Regulations. In no event will more than 20% of the use of the aircraft be for the provision of services that are not Transportation Services.

Petitioner has contracted for aircraft management services with an independent management company (the "Management Company"). Petitioner, or the Management Company as Petitioner's agent, (1) will determine where and when the aircraft will fly; (2) determine the passengers carried on particular flights; (3) arrange for hangar and storage space; (4) provide flight planning and weather services; (5) provide flight communications; (6) make flight, slot and landing arrangements; (7) arrange for maintenance, repair and inspection; (8) provide qualified crew and pilots; (9) provide in-flight catering services and at all times have possession, command and control of the aircraft.

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:

* * *

(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 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

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

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)

Section 526.7(e)(4) of the Sales and Use Tax Regulations provides, in part:

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

Petitioner acquired an aircraft and registered it with the Federal Aviation Administration under the rules of Federal Aviation Regulations Part 91, Subpart F. Approximately 80% of Petitioner's use of the aircraft will be to provide transportation services for the employees, officials and guests of NYLIC and its affiliates (the "Transportation Services"), pursuant to written transportation agreements. Petitioner will receive fees from NYLIC and its affiliates

based on the direct and indirect operating costs of the aircraft. Petitioner is a separate and distinct legal entity that operates independently of NYLIC and its affiliates. Petitioner has contracted for aircraft management services with an independent management company. Petitioner or the management company as Petitioner's agent will determine where and when the aircraft will fly and the passengers carried on particular flights, and will at all times have possession, command and control of the aircraft.

Whether Petitioner's aircraft is exempt from sales and use tax pursuant to section 1115(a)(21) of the Tax Law depends on whether the aircraft is a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce. The term *commercial aircraft* includes aircraft used primarily to transport persons or property for hire. See section 1101(b)(17) of the Tax Law. An aircraft is *primarily* engaged in qualifying commerce if at least 50% of its use is in transportation of persons or property for hire (see Technical Service Bureau Memorandum entitled *Tax Law Defines Commercial Vessels and Commercial Aircraft*, November 7 1996, TSB-M-96(14)S). Petitioner states that approximately 80% of the use of its aircraft by Petitioner or the management company as Petitioner's agent will be devoted to Transportation Services for compensation based on the operating costs of the aircraft. Assuming the compensation reasonably reflects the cost of operating the aircraft, the aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce within the meaning of section 1115(a)(21) of the Tax Law. 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. Therefore, Petitioner's use of the aircraft in New York State is exempt from the compensating use tax imposed under section 1110 of the Tax Law.

The air transportation services provided by Petitioner to NYLIC and its affiliates and the chairman of NYLIC are not included in the enumerated services taxable under section 1105 of the Tax Law. Therefore, Petitioner's charges for such transportation services are not subject to sales tax.

Whether the compensation paid to Petitioner with respect to the aircraft is considered compensation for nontaxable air transportation services is determined based on which party has dominion and control of the aircraft. Since Petitioner represents that Petitioner or the management company as Petitioner's agent will retain complete dominion and control over the aircraft, it is assumed for purposes of this Opinion that Petitioner is providing a transportation service rather than renting the aircraft and Petitioner's charges for such services are not subject to sales or use tax (see *National Express Company*, Adv Op Comm T& F, July 10, 2002, TSB-A-02(22)S). However, whether Petitioner is providing a transportation service or is renting tangible personal property is determined in accordance with the facts and circumstances of the particular transaction and the provisions of any relevant agreements. Were the transactions described in this Opinion determined to be rentals of tangible personal property, the aircraft would not qualify as a commercial aircraft for purposes of section 1101(b)(17) of the Tax Law.

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In such case, any use or rental of the aircraft by Petitioner, NYLIC or its affiliates would be subject to sales and use tax, to the extent that such use or rental occurred in New York.

The analysis in this Opinion presumes treatment of Petitioner and NYLIC and its affiliates as separate legal entities. However, if the activities of Petitioner were so dominated and controlled by NYLIC or its affiliates, 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 Petitioner and NYLIC and its affiliates should be disregarded as separate legal entities for purposes of sales and use 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, the commercial aircraft exemption would not apply to Petitioner's purchase or use of the aircraft and equipment for the aircraft. However, repair and maintenance services performed on such aircraft by third party service providers could be purchased tax exempt pursuant to the provisions of section 1115(dd) of the Tax Law.

DATED: October 25, 2005

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