

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

TSB-A-02(22)S
Sales Tax
July 10, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010821C

On August 21, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from National Express Company, Stewart International Airport, 1 Express Drive, Newburgh, NY 12550.

The issues raised by Petitioner, National Express Company, are:

(1) Whether the compensation paid to Petitioner by related companies with respect to the aircraft described below will be considered payments for air transportation services that are not subject to sales and compensating use tax.

(2) Whether its purchase and use of the aircraft, machinery or equipment installed on the aircraft, and property used by or purchased for use of the aircraft for maintenance, servicing or repairs, will be exempt from sales and compensating use tax pursuant to Section 1115(a)(21).

(3) Whether Petitioner's payments for services of maintaining, servicing, or repairing such aircraft, machinery or equipment and property, as well as for the service of installing property on the aircraft, will be exempt from tax pursuant to Section 1105(c)(3)(v) of the Tax Law.

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

Petitioner was incorporated in the State of New York in 1957. Petitioner is a first-tier subsidiary of American Express Company ("American Express"), a publicly-traded New York corporation. Petitioner's principal place of business and offices for its aircraft operations are located at a facility in Stewart International Airport. Petitioner has its own board of directors and approximately 39 employees consisting of the Vice President of Flight Operations, airline transport-rated aircraft pilots, licensed aircraft and power plant technicians, a parts and inventory manager, certified dispatchers, flight attendants and administrative personnel. These employees work at the facility in Stewart International Airport and comprise the entire staff for aircraft operations.

Petitioner is the sole owner of, and has title in its name to, three Gulfstream IV aircraft, a Gulfstream V aircraft and a Sikorsky S76B helicopter, for which it has paid New York State sales and use taxes. Presently, one of the aircraft has been leased by Petitioner to related companies. Petitioner intends to terminate the aircraft lease at some point in the future.

Petitioner is not required to obtain an FAR 135 Air Carrier Operating Certificate under Part 135 of the Federal Aviation Administration ("FAA") Regulations for its aircraft. Petitioner will be responsible for ensuring that the aircraft are inspected, tested, maintained, serviced, repaired,

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modified and overhauled in accordance with FAA safety and other requirements. Petitioner will be responsible for authorizing or cancelling aircraft flights and deploying pilots, determining where and when the aircraft will fly, and determining if and how to maintain, repair, modify, overhaul and add improvements to the aircraft, and will otherwise be responsible for the activities of all flight personnel and flight operations and the costs associated with them. The sale or other disposition of the aircraft and the acquisition of new aircraft will be decided upon by Petitioner's officers, and approved, if necessary, by its Board of Directors.

More than 90% of the flight time for Petitioner's aircraft is devoted to transporting employees, customers and potential customers of American Express and other related companies (together the "American Express Group"). These services will be provided in accordance with a written aircraft transportation services agreement between Petitioner and American Express, contracting on behalf of the American Express Group.

Petitioner is part of the consolidated group of corporations, for federal income tax purposes, of which American Express is the common parent. It has substantial assets and a net worth in excess of \$100 million. Petitioner files its own separate sales and use tax returns with the State of New York on a monthly basis. Petitioner is a separate and distinct legal entity that will operate independently of American Express and other companies that are directly or indirectly owned or controlled by American Express. Petitioner maintains its own books and records, operates under its own name and holds itself out to the public as a separate legal entity. It will have its own business relationships and lines of credit with outside vendors and service providers and will enter into and enforce contracts with these and other parties. Petitioner occupies and will lease in its name offices and a hangar at the Stewart Airport facility from an unrelated organization and will pay the rent for these premises. Petitioner maintains its own bank accounts and will pay all the operating expenses of its aircraft operations.

At the end of each year or on a periodic basis during the year, Petitioner will charge out all of the costs of operating the aircraft, based on usage, to all of its affiliates. The charges will be based on flight hours that each affiliate's employees, customers and potential customers used the aircraft for the period then ended. For administrative convenience, American Express will pay all such amounts on behalf of the American Express Group pursuant to the aircraft transportation services agreement described above.

Applicable Law and Regulations

Section 1101(b) of the Tax Law states, 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.

* * *

(7) Use. The exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. . . .

* * *

(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 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other

means, and 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. . . .

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 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.

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 owns and operates several aircraft used to transport, for compensation, employees, customers, potential customers, and guests or other invitees of employees of the American Express

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Group to conduct their global business. Under FAA regulations, Petitioner is not required to obtain an FAR 135 Air Carrier Operating Certificate. Petitioner is a separate and distinct legal entity operating independently of the related companies, and is the sole owner of the aircraft. The compensation charged to the related companies by Petitioner is based on the operating costs of the aircraft and is pursuant to a written transportation services agreement. Over 90% of the use of Petitioner's aircraft is devoted to its air transportation services.

Whether the compensation paid to Petitioner by related companies 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. Where Petitioner retains complete dominion and control over the aircraft, the transactions are considered to be the provision of a transportation service rather than the rental of property and Petitioner's charges to related companies to transport their employees, customers, potential customers, and guests or other invitees are not subject to sales or use tax (see Pasquale & Bowers, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S). Presently one of the aircraft has been leased by Petitioner to related companies. Petitioner intends to terminate all aircraft leases to related companies at some point in the future. Upon termination of all such leases, Petitioner will employ the personnel who maintain and operate the aircraft, including pilots, aircraft and power plant technicians and flight attendants. Petitioner will determine where and when the aircraft fly, and will be responsible for all maintenance and costs associated with operation of the aircraft. Therefore, Petitioner will be furnishing to the related companies a nontaxable transportation service and not a taxable purchase or rental of tangible personal property, provided that Petitioner has terminated all leases with related companies, and Petitioner does not relinquish dominion and control of the aircraft within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations.

Whether Petitioner's purchase and use of the aircraft, machinery and equipment installed on the aircraft, and property used by or purchased for use of the aircraft for maintenance and repairs are exempt from sales and use tax pursuant to Section 1115(a)(21) of the Tax Law depends on whether the aircraft are 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 Services Bureau Memorandum entitled Tax Law Defines Commercial Vessels and Commercial Aircraft, November 7, 1996, TSB-M-96(14)S). Since Petitioner states that upon termination of its aircraft leases to related companies, over 90% of the use of its aircraft will be devoted to intrastate, interstate or foreign air transportation services for compensation based on operating costs, the aircraft will be considered commercial aircraft primarily engaged in intrastate, interstate or foreign commerce within the meaning of Section 1115(a)(21) of the Tax Law. Therefore, Petitioner's purchase or use of the aircraft, machinery or equipment installed on the aircraft, and property used to maintain or repair the aircraft will be exempt from the New York State and local sales and use taxes.

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Whether Petitioner's payments for services of maintaining, servicing, or repairing its aircraft, machinery or equipment installed on the aircraft and property used to maintain or repair the aircraft, as well as for the service of installing property on the aircraft, will be exempt from sales and use tax pursuant to Section 1105(c)(3)(v) of the Tax Law depends on whether the aircraft are commercial aircraft primarily engaged in intrastate, interstate or foreign commerce within the meaning of Section 1115(a)(21) of the Tax Law. As explained above, under the facts presented in this Advisory Opinion Petitioner's aircraft will be considered commercial aircraft primarily engaged in intrastate, interstate or foreign commerce. Therefore, Petitioner's payments for services of maintaining, servicing, or repairing such aircraft, machinery or equipment and property, as well as for the service of installing property on the aircraft, will be exempt from sales and use tax pursuant to Section 1105(c)(3)(v).

DATED: July 10, 2002

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