

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

TSB-A-02(47)S
Sales Tax
September 18, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020111A

On January 11, 2002, 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. Petitioner, Ernst & Young, LLP, provided additional information with respect to the Petition on May 17, 2002.

The issue raised by Petitioner on behalf of its client, ABC, is whether, under the circumstances presented, ABC's acquisition and use of the interim aircraft and the new aircraft in New York State are exempt from sales and compensating use tax under Section 1115(a)(21) of the Tax Law.

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

Petitioner's client, ABC, a wholly owned subsidiary of Parent Co. (Parent), is a service company responsible for providing ground and air transportation services to Parent and its subsidiaries and affiliates. ABC also provides transportation services to unrelated third party dealers, customers, suppliers and various other parties doing business with Parent and its subsidiaries and affiliates.

ABC is a separate legal entity from Parent and Parent's other subsidiaries and affiliates. ABC operates under its own name and has its own officers and Board of Directors (which includes a director who is not an employee of either ABC or Parent). ABC has its own business relationships and has established credit under its own name with vendors that are unique to its operations.

ABC maintains a separate general ledger and maintains its own bank account for day-to-day operations. The account is used for depositing receipts from transportation fees and making check disbursements for all operational expenses, including payroll.

ABC has four employees dedicated to flight services, consisting of three aircraft pilots and one aircraft maintenance person. ABC has its own payroll separate from any related parties. ABC has its own employer identification number. ABC contracts with an unrelated third party payroll processing company to distribute payroll, withhold and remit payroll taxes and file all payroll returns. Payroll and payroll tax expenses are paid from ABC's bank account.

ABC will acquire a previously owned aircraft ("Interim Aircraft") from an aircraft dealer to be used for a short period until a new aircraft ("New Aircraft") is available from the manufacturer. ABC will acquire the New Aircraft from the aircraft manufacturer and trade in the Interim Aircraft.

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Delivery of the Interim Aircraft and the New Aircraft to ABC will occur outside of New York State. ABC will bring the aircraft into New York State, where the aircraft will reside when not in use.

ABC's Chief Pilot is responsible for the acquisition, including negotiations with the aircraft dealer and manufacturer, as well as selection of the Aircraft, additional equipment and accessories.

Neither Parent nor any of the subsidiaries or affiliates will have an ownership interest in the aircraft. A third party finance company will provide financing for the acquisition of both aircraft. As security, the finance company will hold title to the aircraft and "lease" such aircraft to ABC until the loan is paid in full via the "lease" payments and the exercise of ABC's purchase option.

ABC operates its air transport services from an airport hangar facility in New York State at a separate location from Parent and its affiliates. The hangar is leased from an unrelated party. ABC will operate the Aircraft under Part 91 of the FAA regulations. ABC also owns motor vehicles to provide ground transportation services to its subsidiaries and affiliates. ABC insures these vehicles and aircraft under its corporate name.

ABC will use the Aircraft to transport individuals employed by Parent, related companies and their customers, third party dealers and their customers, suppliers and other parties transacting business with Parent and subsidiaries. ABC will transport such individuals, for a fee, on intrastate, interstate, and international flights. If the individuals are employees of Parent, its subsidiaries and affiliates, ABC will charge the individual's corporate employer an inter-company charge at a pro rata flat rate per hour. The rate is intended to approximate the per hour operating cost of the Aircraft. Parent, its subsidiaries and affiliates will also pay ABC a periodic retainer in an amount that reflects fixed costs of the Aircraft.

Unrelated third parties (primarily Parent's dealers) who may use the Aircraft to transport customers to Parent's manufacturing facilities for plant tours will be charged for flight services at rates reflective of the Aircraft's operating costs. ABC issues fee invoices for transportation services to all customers, both third parties and related parties. Checks for payment of invoices are made out to ABC. Some customers, particularly related parties, may make payments by wire or electronic transfer from bank to bank.

ABC will be responsible for all flight services and operation of the Aircraft, including scheduling, fueling, maintenance and repairs, flight and maintenance record keeping, providing pilots, obtaining flight clearance and making appropriate landing arrangements. ABC personnel handle all purchasing of goods and services related to the transportation operations. The Chief Pilot, an employee of ABC, approves all expenses for payment. ABC has a definitive arrangement with a related party to provide accounts payable processing services and bookkeeping.

ABC will at all times exercise possession, dominion and control over 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:

* * *

(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 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.

Opinion

Since over fifty percent of the use of ABC's aircraft is devoted to transporting employees, dealers, customers, suppliers of Parent, its subsidiaries and affiliates for compensation as described above, and the compensation reasonably reflects the cost of operating the aircraft, 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. See Pasquale & Bowers, Adv Op Comm T & F, August 1, 1996, TSB-A-96(49)S; Citiflight, Inc., Adv Op Comm T & F, August 3, 2000, TSB-A-00(30)S; and Philip Morris Management Corp., Adv Op Comm T & F, October 11, 2000, TSB-A-00(38)S. Accordingly, the purchase and use of the Interim Aircraft and New Aircraft are exempt from New York State and local sales and compensating use taxes.

The finance company will provide financing for the acquisition of both aircraft and will hold title to the aircraft. If the "lease" by the finance company to ABC is merely a financing arrangement, the payments made would not be subject to sales and compensating use tax as they

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would not be considered receipts from the rental or lease of tangible personal property. If the lease transaction is truly a rental of tangible personal property by the finance company to ABC, the exemption provided by Section 1115(a)(21) of the Tax Law would apply to the lease payments. See CNY Equipment Rental and Sales Corp., Adv Op Comm T&F, July 23, 1996, TSB-A-96(47)S; and Matter of Aero Instruments & Avionics, Inc., Dec Tax App Trib, October 5, 1995, TSB-D-95(43)S. In either case, the payments made by ABC to the finance company are not subject to sales and compensating use tax.

DATED: September 18, 2002

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