

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

TSB-A-03(12)S  
Sales Tax  
March 25, 2003

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011227A

On December 27, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from KPMG LLP, 3001 Summer Street, Stamford, CT 06905. Petitioner, KPMG LLP, provided additional information with respect to the Petition on February 26, 2002.

The issues raised by Petitioner regarding its client XYZ, Inc. (XYZ) are:

- (1) Whether the purchase of fuel by XYZ for its aircraft is subject to New York State sales and compensating use tax.
- (2) Whether the purchases of fueling and defueling services by XYZ are subject to New York State sales and compensating use tax.
- (3) Whether the purchases of grease and other petroleum based goods by XYZ for use in maintaining and repairing its aircraft are subject to New York State sales and compensating use tax.

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

XYZ owns and operates several aircraft used in XYZ's air transportation services.

The aircraft services division of XYZ provides air transportation services to employees, customers, and potential customers of related companies for compensation, on intrastate, interstate and international flights. XYZ is a separate and distinct legal entity operating independently of any related companies, and the compensation charged to the related companies by XYZ is based on the operating costs of the aircraft pursuant to a written transportation services agreement. XYZ employs the following types of employees in the aircraft operations group: airline transport rated pilots; licensed aircraft technicians; certified dispatchers; and administrative personnel. XYZ is the sole owner of the aircraft primarily used to provide aircraft transportation services. XYZ is not required to obtain a FAR 135 Air Carrier Operating Certificate under Part 135 of the Federal Aviation Administration (FAA) Regulations. XYZ operates its aircraft under Part 91, Subpart F of the FAA regulations. According to Petitioner XYZ exercises complete dominion and control over all aircraft, including operations and maintenance, it determines where and when the aircraft fly, and is responsible for all maintenance and costs associated with the aircraft operations. XYZ's hangar, employees and its aircraft operations are based within New York State.

In New York State, XYZ purchases fuel directly from a vendor located at the airport where the aircraft is hangared. XYZ does not have its own fuel storage facilities. XYZ purchases fuel

directly from its vendor. XYZ also purchases fueling and defueling services, as well as oil, grease, and other petroleum-based supplies used on its aircraft for operation and/or maintenance.

**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 a tax on 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 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

(9) Fuel sold to an air line for use in its airplanes.

\* \* \*

(21) 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.

\* \* \*

(j) The exemptions provided in this section shall not apply to the tax required to be prepaid pursuant to the provisions of section eleven hundred two of this article nor to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article with respect to receipts from sales and uses of motor fuel or diesel motor fuel, except that the exemption provided in paragraph nine of subdivision (a) of this section shall apply to the tax required to be prepaid pursuant to the provisions of section eleven hundred two of this article and to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article with respect to sales and uses of kero-jet fuel. . . .

Section 1120(d) of the Tax Law provides, in part:

Purchase of motor fuel or diesel motor fuel at retail by an exempt organization. A refund or credit equal to the amount of tax imposed pursuant to section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter upon the sale of motor fuel or diesel motor fuel and paid by a purchaser shall be allowed such purchaser if the purchase, use or consumption of such fuel would have otherwise been exempt pursuant to section eleven hundred fifteen or eleven hundred sixteen of this article but for the provisions of subdivision (j) of section eleven hundred fifteen or paragraph five of subdivision (b) of section eleven hundred sixteen of this article. . . .

**Opinion**

The aircraft service division of XYZ owns and operates several aircraft, which are used to provide transportation services to employees, customers, and potential customers of related

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companies for compensation on intrastate, interstate and international flights. XYZ is a separate and distinct legal entity operating independently of any related companies. XYZ exercises complete dominion and control over its aircraft, including operations and maintenance.

Provided more than 50 percent of the use of XYZ's aircraft is devoted to transporting employees, customers, and potential customers of related companies for compensation, and the compensation reasonably reflects the cost of operating the aircraft, the aircraft will be considered commercial aircraft, within the meaning of Section 1101(b)(17) of the Tax Law. See Philip Morris Management Corp., Adv Op Comm T&F, October 11, 2000, TSB-A-00(38)S; Citiflight, Inc., Adv Op Comm T&F, August 3, 2000, TSB-A-00(30)S; Pasquale & Bowers, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S.

Section 1115(a)21 of the Tax Law provides an exemption from tax on purchases of 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. A commercial aircraft is regarded as primarily engaged in qualifying commerce if over fifty percent of its use is in such activity (see Technical Services Bureau Memorandum, Tax Law Defines Commercial Vessels and Commercial Aircraft, November 7, 1996, TSB-M-96(14)S). Therefore, XYZ's purchases of commercial aircraft, 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 will be exempt where over fifty percent of the use of such aircraft is devoted to transporting employees, customers and potential customers of related companies for compensation. See Pasquale & Bowers, supra.

XYZ purchases fuel used in the flight operations of its commercial aircraft. As explained in Technical Services Bureau Memorandum, Exemptions for Commercial Aircraft, May 15, 1980, TSB-M-80(4)S, the purchase of fuel for use in a commercial aircraft is a qualifying exempt purchase pursuant to Section 1115(a)(21) of the Tax Law. Therefore, provided XYZ's aircraft are primarily engaged in qualifying commerce, the purchases by XYZ of fuel for its commercial aircraft are exempt from sales and use tax under Section 1115(a)(21).

However, purchases of aviation gasoline by airlines or for commercial aircraft other than airlines are subject to sales tax at the time of purchase. The purchaser may then apply to the New York State Department of Taxation and Finance for a refund of the sales tax paid. See Sections 1115(j) and 1120(d) of the Tax Law. Commercial aircraft operators, other than airlines, must also pay sales tax on purchases of kero-jet fuel at the time of purchase, and may then apply for a refund of the tax paid. Sales of kero-jet fuel to airlines for use in their aircraft are exempt from sales and use taxes at the time of purchase. See Sections 1115(a)(9) and 1115(j) of the Tax Law. The purchaser should furnish Form FT-1020, Exemption Certificate for Certain Taxes Imposed on Diesel Motor Fuel and Propane, to the vendor within 90 days of the date of sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations. It should be noted that sales of fuel to noncommercial aircraft operators are subject to sales tax without any right to a refund.

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XYZ purchases fueling and defueling services used in the flight operations of its commercial aircraft. As explained in TSB-M-80(4)S, supra, fueling and defueling services purchased for use in a commercial aircraft as specified in Section 1115(a)(21) of the Tax Law are qualifying exempt purchases pursuant to Section 1105(c)(3)(v) of the Tax Law. Therefore, provided XYZ's aircraft are primarily engaged in qualifying commerce, the purchases by XYZ of fueling and defueling services for its commercial aircraft are exempt from sales tax under Section 1105(c)(3)(v).

XYZ purchases grease and other petroleum based goods used in the maintenance, repairs and flight operations of its commercial aircraft. As explained in TSB-M-80(4)S, supra, purchases of grease and other petroleum based goods used in the maintenance, repairs and flight operations of commercial aircraft are qualifying exempt purchases pursuant to Section 1115(a)(21) of the Tax Law. Therefore, provided XYZ's aircraft are primarily engaged in qualifying commerce, XYZ's purchases of grease and other petroleum based goods used in the maintenance, repairs and flight operations of its commercial aircraft are exempt from sales and use tax under Section 1115(a)(21).

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