

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

TSB-A-03(17)S
Sales Tax
April 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020710A

On July 10, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from IBM Credit Corporation, North Castle Drive, Armonk, New York 10504.

The issue raised by Petitioner, IBM Credit Corporation, is whether, under the circumstances presented, New York State sales and compensating use tax applies to:

1. Purchase or lease of new aircraft,
2. Purchase of machinery or equipment to be installed on new or existing aircraft,
3. Purchase of property to repair or maintain new or existing aircraft,
4. Purchase of services to repair or maintain new or existing aircraft, or
5. Charges paid by IBM Corporation's affiliated companies for air transportation services.

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

Petitioner was incorporated in the State of Delaware on March 4, 1981. Its principal place of business is located in North Castle Drive, Armonk, New York, and it has offices and operations located in Armonk and White Plains, New York. Petitioner is a first tier subsidiary of IBM Corporation ("IBM"). Petitioner is a separate and distinct legal entity that operates independently of its parent, IBM, and IBM's affiliated group (collectively "IBM's Affiliated Companies"). Petitioner is responsible for its own business operations, including finances, administration, and management.

Petitioner either owns or leases aircraft that are used to provide transportation services. Petitioner is the sole owner of the aircraft and the only entity within IBM's affiliated group providing aircraft related services. Neither IBM nor IBM's Affiliated Companies have any ownership interest in any of Petitioner's aircraft. Additionally, Petitioner exercises complete dominion and control over any aircraft that it owns or leases, including all flight services, scheduling, fuel, repairs and maintenance, pilots and flight staff for the aircraft (i.e., operations and maintenance). In this respect, Petitioner determines where and when the aircraft fly and is responsible for all maintenance and costs associated with the aircraft operations.

Petitioner operates its aircraft under Part 91, Subpart F of the FAA Regulations and is not required to obtain an air taxi/commercial operating certificate. Additionally, Petitioner is not required to obtain a FAR 135 Air Carrier Operating Certificate under Part 135 of the FAA Regulations.

Petitioner maintains its own aircraft staff. Petitioner's aircraft division has approximately 50 employees composed of airline transport rated pilots, licensed aircraft technicians, certified

dispatchers, and administrative personnel. Petitioner employees that are dedicated to providing aircraft services work at Westchester County Airport.

Petitioner's aircraft are used primarily (i.e., over 90% of all flights) to transport employees, customers and potential customers of IBM and IBM's Affiliated Companies on intrastate, interstate, and international flights. However, on occasion (i.e., less than five percent of all annual flights), Petitioner may use aircraft to transport its own employees.

Pursuant to a written transportation service agreement, IBM's Affiliated Companies are charged a fee equal to Petitioner's costs of operating and maintaining the aircraft (i.e., total fixed and variable costs). This fee is allocated each month to IBM's Affiliated Companies in proportion to each company's flight hours in relation to total flight hours. This formula is intended to result in an intercorporate allocation of almost all of Petitioner's aircraft costs, as measured by flight hours.

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.

* * *

(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 . . . or maintaining, servicing or repairing tangible personal property . . . whether or not the services are performed directly . . . 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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . . (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five of this part have been performed. . . .

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:

* * *

(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.

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.

Section 528.10(b)(1) of the Sales and Use Tax Regulations provides the following definition of airline:

An airline is:

- (i) an air carrier of persons, property and mail operating under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, or a foreign air carrier holding an equivalent certificate issued by the carrier's respective sovereign government;
- (ii) an air carrier holding a certificate for all-cargo air service issued by the Civil Aeronautics Board; or
- (iii) an air taxi operator, who is classified by the Civil Aeronautics Board as a commuter air carrier, or who (a) performs at least five round trips per week between two or more points, and publishes flight schedules which specify the times and days of the week and places between which such flights are performed, or (b) transports mail by air pursuant to contract with the United States Postal Service. This exemption shall extend to the purchase of fuel for use in such commuter flights.

Opinion

To qualify for the exemption provided by Section 1115(a)(21) of the Tax Law, Petitioner must be providing transportation services, rather than renting its aircraft, and over 50% of the use

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of such aircraft must be devoted to transportation services for compensation. Self-use by Petitioner or IBM's Affiliated Companies in transporting their own personnel would not qualify for the exemption.¹

Petitioner is a separate legal entity which owns, operates and maintains dominion and control of the aircraft. The fact that Petitioner maintains dominion and control over the aircraft indicates that Petitioner's fees are charges for a transportation service rather than the rental of tangible personal property. See Section 526.7(e)(4) of the Sales and Use Tax Regulations. Therefore, Petitioner's charges to the related companies for use of such aircraft are exempt from tax, as the charges are for the provision of a nontaxable transportation service. See Pasquale & Bowers, supra; 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.

Since over 50% of the use of Petitioner's aircraft is devoted to transporting employees, customers, and potential customers of IBM, and IBM's Affiliated Companies, for compensation as described above, and the compensation reasonably reflects the cost of operating the aircraft, 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. See Pasquale & Bowers, supra; Citiflight, Inc., supra; and Philip Morris Management Corp., supra. Accordingly, the purchase and use of such aircraft are exempt from New York State and local sales and compensating use taxes. In addition, machinery or equipment installed on, repair or maintenance services rendered with respect to, and property used or purchased for use for maintenance and repair of Petitioner's commercial aircraft are exempt from New York State sales and compensating use tax, as provided by Sections 1105(c)(3)(v) and 1115(a)(21) of the Tax Law.

DATED: April 4, 2003

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

¹Under certain circumstances in order to prevent fraud or injustice, the corporate structure may be disregarded and a corporation may be considered to be the alter ego of its parent or affiliate. See Harfred Operating Corporation, Adv Op St Tax Comm, July 18, 1986, TSB-A-86(28)S; and Pasquale & Bowers, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S.