

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

TSB-A-05(15)S
Sales Tax
May 25, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S041004A

On October 10, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Standard & Poor's Securities Evaluations, Inc., 55 Water Street, New York, New York 10020.

The issues raised by Petitioner, Standard & Poor's Securities Evaluations, Inc., are whether, under the circumstances described below, the New York State sales and compensating use tax applies to the:

1. Purchase of a new aircraft,
2. Purchase of machinery or equipment to be installed on a new or existing aircraft,
3. Purchase of tangible personal property to repair or maintain a new or existing aircraft,
4. Purchase of services to repair or maintain a new or existing aircraft,
5. Purchase of fuel for the aircraft,
6. Purchase of fueling and defueling services for the aircraft,
7. Charges paid to Petitioner by its parent company and its other subsidiaries for air transportation services.

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

Petitioner is a subsidiary of The McGraw-Hill Companies, Inc. ("Parent") with its principal operation in New York. Petitioner is a separate and distinct legal entity that operates independently of Parent and its other subsidiaries (collectively the "Affiliated Companies"). Petitioner is responsible for its own business operations, including finances, administration and management.

Petitioner owns an aircraft that is used to provide transportation services. Petitioner is the sole owner of the aircraft. None of the Affiliated Companies provide air transportation services or have any ownership interest in Petitioner's aircraft. Additionally, Petitioner states that it exercises complete dominion and control over the aircraft, including all flight services, scheduling, fuel, repairs and maintenance, pilots and flight staff for the aircraft. In this respect, Petitioner determines where and when the aircraft flies and is responsible for all maintenance and

other costs associated with the aircraft operations. The aircraft is hangared in New York when not in use.

Petitioner operates its aircraft under Part 91 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 staff dedicated full time to the operation, maintenance and scheduling of the aircraft. Petitioner's aircraft department is comprised of six individuals, including a Chief Pilot/Manager, two airline transport rated pilots, a licensed aircraft maintenance technician, a flight attendant, and a department administrator.

Petitioner's aircraft is used primarily (i.e., over 95% of all flights) to transport employees, customers and potential customers of Petitioner's Parent and Affiliated Companies on intrastate, interstate and international flights. However, on occasion (i.e., less than 5% of all annual flights), Petitioner may use the aircraft to transport its own employees, customers or potential customers.

Pursuant to a written transportation service agreement, Parent and 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 Parent and 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 reimbursement 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. (Emphasis added)*

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 . . . 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 . . . not held for sale in the regular course of business . . . 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; . . . (Emphasis added)

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 two, three and seven 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:

* * *

(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. (Emphasis added)*

* * *

(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. . . .

* * *

(dd)(1) Services otherwise taxable under paragraph three of subdivision (c) of section eleven hundred five or under section eleven hundred ten of this article, and tangible personal property purchased and used by the person who sells such services in performing such services, where such property becomes a physical component part of the property upon which the services are performed or where such property is a lubricant applied to aircraft, shall be exempt from tax under this article where such services are performed on aircraft.

(2) The service of storing an aircraft provided by a person who sells a service exempt under paragraph one of this subdivision, when such storing is rendered in conjunction with, and during the rendering of, such service to such aircraft, shall be exempt from the tax imposed under paragraph four of subdivision (c) of section eleven hundred five of this article.

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 . . . of this article but for the provisions of subdivision (j) of section eleven hundred fifteen . . . of this article. . . .

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.

Technical Services Memorandum, entitled *Exemptions for Commercial Aircraft*, May 15, 1980, TSB-M-80(4)S, states, in part:

The following list contains examples of purchases for qualifying exempt commercial aircraft and their taxable status, designated by "E" for exempt and "T" for taxable:

Purchases for Qualifying Exempt Commercial Aircraft

| | |
|--|---|
| Aircraft for use in transporting persons or property for compensation primarily engaged in intrastate, interstate or foreign commerce. | E |
| Parts and accessories. | E |

| | |
|--|---|
| Helicopters used primarily to transport persons for compensation intrastate, interstate or foreign commerce. | E |
| Equipment and machinery purchased or rented for use in the maintenance of qualifying exempt commercial aircraft. | E |
| Maintenance and line services. | E |
| Fuel, fueling and defueling, oil, grease and other supplies. | E |
| De-icing. | E |
| Initial installation of equipment or accessories on aircraft. | E |
| Refurbishing interior of aircraft. | E |
| Food or drink sold to airlines for in-flight consumption. | E |
| Repairs (labor and parts). | E |

Technical Services Memorandum, entitled *Tax Law Defines Commercial Vessels and Commercial Aircraft*, November 7, 1996, TSB-M-96(14)S, states, in part:

Statutory changes in the definitions of commercial vessels and commercial aircraft have expanded the current sales and use tax exemptions for commercial vessels and aircraft, effective December 1, 1996. The expanded exemptions now also include vessels and aircraft that transport, in qualifying commerce, tangible personal property in the conduct of the business of the purchaser of the vessels or aircraft. (Purchaser includes, for example, a buyer, renter or lessee of the vessel or aircraft.) The exemption covers certain purchases of tangible personal property necessary to operate the exempt vessels and aircraft, and also exempts maintenance and repair services to the exempt vessels or aircraft, and fuel used by the exempt vessels and aircraft.

Previously, only vessels and aircraft used by the purchaser primarily (at least 50% of the time) in the transportation for hire of other persons or their property qualified for the exemption. Thus, self-use of a vessel or aircraft to transport one's own property was not a qualifying use.

* * *

Commercial Aircraft

The expanded definition of a commercial aircraft is an aircraft used primarily:

- to transport persons or property, for hire;
- by the purchaser of the aircraft primarily to transport the purchaser's own tangible personal property in the conduct of the purchaser's business; or
- for both of the above purposes.

To be exempt, a commercial aircraft must be primarily engaged in intrastate, interstate or foreign commerce. . . .

In addition to the exemption applicable to the aircraft, the exemption also applies to:

- machinery and equipment installed on the aircraft;
- property used by or purchased for the use of the aircraft for maintenance and repairs;
- the services of maintaining, servicing and repairing the aircraft, machinery or equipment installed on the aircraft, and property used by or purchased for the use of the aircraft;
- flight simulators purchased by commercial airlines.

Permanent air cargo containers suitable for repeated use, and specifically designed to facilitate the carriage of goods on aircraft, are exempt from New York State sales and use taxes. Repairs to air cargo containers are likewise exempt.

For more information about the exemptions granted to commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, see TSB-M-80(4)S, *Exemptions For Commercial Aircraft*, and TSB-M-80(4.1)S, *Air Cargo Containers*. In reading TSB-M-80(4)S, please read-in the expanded definition of a commercial aircraft . . . and also substitute 50% for the out-of-date 75% threshold for determining when a commercial aircraft is primarily used in the qualifying commerce.

Opinion

Pursuant to a written transportation agreement, Petitioner provides transportation services to its Parent and Affiliated Companies. Petitioner is a separate and distinct entity from Parent and is responsible for its own business operations. Petitioner is the sole owner of the aircraft and states that it maintains dominion and control of the aircraft as well as staff, and handles all facets of the aircraft's operation. Petitioner will charge the recipients of these air transportation

services based on the operating and maintenance costs of the aircraft in proportion to each company's flight hours in relation to total flight hours.

Petitioner's aircraft is used in over 95% of its flights to transport employees, customers and potential customers of Parent and Affiliated Companies. However, on occasion (i.e., less than 5% of all annual flights), Petitioner may use the aircraft to transport its own employees, customers and potential customers.

The taxability of Petitioner's purchase or use of the aircraft is dependent on whether the aircraft qualifies as a commercial aircraft as defined by section 1101(b)(17) of the Tax Law. If over 50% of an aircraft's use is devoted to transporting customers for compensation, and the compensation reasonably reflects the cost of operating the aircraft, such aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce for purposes of section 1115(a)(21) of the Tax Law. Therefore, the purchase or use of an aircraft qualifies for the exemption provided by section 1115(a)(21) for commercial aircraft, if more than 50% of the use of the aircraft is in the provision of air transportation services for hire. (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.)

Petitioner indicates that it retains complete dominion and control over the aircraft and its operations and maintenance and that approximately 95% of the use of Petitioner's aircraft will be to provide air transportation services for hire to its affiliates. It appears from the facts presented in the Advisory Opinion that the fee charged by Petitioner to its Parent and Affiliates reasonably reflects the cost of operating the aircraft. Therefore, based on these facts Petitioner's aircraft will qualify as a commercial aircraft and qualify for the exemption from sales and use tax pursuant to section 1115(a)(21) of the Tax Law.

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

Purchases of machinery or equipment to be installed on the aircraft, and of tangible personal property or services to be used for the maintenance and repair of the aircraft are exempt under section 1115(a)(21) of the Tax Law. Maintenance costs in connection with Petitioner's use of the commercial aircraft qualify for exclusion from sales tax under section 1105(c)(3)(v) of the Tax Law. See *Federal Express Corporation*, Adv Op Comm T&F, December 26, 1996, TSB-A-96(81)S; *KPMG LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(12)S; *IBM Credit Corporation*, Adv Op Comm T&F, April 4, 2003, TSB-A-03(17)S. Petitioner should submit a properly completed *Exempt Use Certificate*, Form ST-121, to the seller of the aircraft and sellers supplying machinery and equipment or other tangible personal property or services that qualify for exemption.

Fuel, fueling and defueling services used in the flight operations of a commercial aircraft are eligible for exemption when purchased for use in conjunction with a commercial aircraft. See Technical Services Bureau Memorandums, *Exemptions for Commercial Aircraft*, May 15, 1980, TSB-M-80(4)S; and *Tax Law Defines Commercial Vessels and Commercial Aircraft*, November 7, 1996, TSB-M-96(14)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. In addition, 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 Petitioner's aircraft is primarily engaged in qualifying commerce, the purchases by Petitioner of fuel, fueling and defueling services for its commercial aircraft are exempt from sales tax under sections 1105(c)(3)(v) and 1115(a)(21) of the Tax Law. See *KPMG LLP, supra*; *IBM Credit Corporation, supra*.

However, purchases of aviation gasoline by airlines or for commercial aircraft 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. 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. See sections 1115(a)(9), 1115(j) and 1120(d) of the Tax Law. It should be noted that sales of fuel to noncommercial aircraft operators are subject to sales tax without any right to a refund. See *KPMG LLP, supra*.

The conclusions in this Opinion are based on Petitioner's representation that it retains complete dominion and control over the aircraft and is providing air transportation services to its Parent and Affiliates. 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 the agreement between Petitioner and its Parent and Affiliates. Were the transaction determined to be a rental of tangible personal property, the aircraft would not qualify as a commercial aircraft for purposes of section 1101(b)(17) of the Tax Law. In such case, Petitioner's purchase of the aircraft and rental of the aircraft to its Parent and Affiliates would be subject to sales and use tax.

The analysis in this Opinion presumes treatment of Petitioner and its Parent and Affiliates as separate legal entities. However, if the activities of Petitioner were so dominated and controlled by its Parent or 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 the related entities in this case should be disregarded as separate legal entities for purposes of sales 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, Petitioner's purchase or use of the aircraft and equipment for the aircraft would not qualify for the

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commercial aircraft exemption. 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.

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