

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

TSB-A-05(16)S
Sales Tax
May 25, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050125A

On January 25, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Verizon Corporate Services Group Inc., 1095 Avenue of the Americas, New York, New York 10036.

The issues raised by Petitioner, Verizon Corporate Services Group 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. Charges paid to Petitioner by its Affiliated Companies, as described below, and its other unrelated companies for air transportation services;
3. Maintenance costs and purchases of machinery or equipment to be installed on the aircraft.

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

Petitioner was incorporated in New York in 1932. Its principal place of business and offices are located in New York City. Petitioner is wholly owned by GTE Corporation, which in turn is wholly owned by Verizon Communications Inc.

Petitioner is a separate and distinct legal entity that operates independently of its parent, GTE Corporation, grandparent, Verizon Communications Inc., and affiliated group (collectively Affiliated Companies). Petitioner has its own business operations, books and records, officers and directors, and employees, which include pilots, crew and aircraft maintenance personnel.

Petitioner has purchased a new aircraft from Gulfstream Aerospace Corporation (“Gulfstream”), with payment made through a series of progress payments. It has been agreed that Gulfstream will deliver the aircraft to Petitioner at a location outside New York, after which Petitioner will hangar the aircraft at a New York airport.

Title to the aircraft is to be held by Petitioner and it will be the sole owner of the aircraft. None of the Affiliated Companies will have any ownership interest in the aircraft. Petitioner will exercise complete dominion and control over the operations and maintenance of the aircraft, including flight services, scheduling, fuel, repairs, maintenance, pilots and crew. It will be responsible for all maintenance and costs associated with the aircraft’s operation.

Petitioner will operate the aircraft under Part 91, Subpart F of the Federal Aviation Administration (“FAA”) Regulations. It is not required to obtain a FAR 135 Air Carrier Operating Certificate under Part 135 of the FAA regulations.

Ninety percent or more of the aircraft’s use will be by officers, directors, employees, former officers, guests, customers and other persons transacting business with the Affiliated Companies. On occasion, Petitioner may use the aircraft for the transportation of its own officers, directors, employees, guests and customers, but such self use is anticipated to be less than 10%.

The Affiliated Companies will compensate Petitioner for flights through an inter-company charge based on the following formula. All costs of operating and maintaining the aircraft are to be allocated to the Affiliated Companies in proportion to each affiliate’s flight hours in relation to the aircraft’s total flight hours (not including training and maintenance flights).

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 . . . 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(a)(21) of the Tax Law exempts commercial aircraft from the sales tax imposed by section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110, as follows:

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)

Section 1115(dd) of the Tax Law exempts services to aircraft from the sales tax imposed by section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110, as follows:

(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 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 *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;* (Emphasis added)
- 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

Petitioner is a separate and distinct entity from the Affiliated Companies and is responsible for its own business operations. Petitioner is the sole owner of the aircraft in question and maintains dominion and control of the aircraft as well as staff with respect to all facets of the aircraft's operation. Petitioner will charge the Affiliated Companies based on the operating costs of the aircraft in proportion to each affiliate's flight hours in relation to total flight hours (not including training and maintenance flights).

Petitioner's aircraft is used in 90% or more of its flights to transport officers, directors, employees, former officers, guests, customers and other persons transacting business with the Affiliated Companies. On occasion, Petitioner may use the aircraft for the transportation of its own officers, directors, employees, guests and customers, but such self use is anticipated to be less than 10%.

The taxability of Petitioner's purchase 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 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 90% of the use of Petitioner's aircraft will be to provide air transportation services to its Affiliated Companies. Petitioner's charges to the Affiliated Companies reasonably reflect the costs of operating and maintaining 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 the Affiliated Companies are not included in the enumerated services taxable under section 1105 of the Tax Law. Therefore, Petitioner's charges to its affiliates for such transportation services are not subject to sales tax.

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. Purchases of machinery or equipment to be installed on the aircraft, and of tangible personal property to be used for the maintenance and repair of the aircraft, are exempt under section 1115(a)(21) 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*

TSB-A-05(16)S
Sales Tax
May 25, 2005

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 to sellers supplying machinery and equipment, or other tangible personal property or services, which qualify for exemption.

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 the Affiliated Companies. 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 any agreement between Petitioner and the Affiliated Companies. 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 use of the aircraft and rental of the aircraft to the Affiliated Companies would be subject to sales and use tax.

The analysis in this Opinion presumes treatment of Petitioner and the Affiliated Companies as separate legal entities. However, if the activities of Petitioner were so dominated and controlled by the parent or other 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 Petitioner and the Affiliated Companies should be disregarded as separate legal entities for purposes of sales and use 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, the commercial aircraft exemption would not apply to Petitioner's purchase or use of the aircraft and equipment for the aircraft. 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.

DATED: May 25, 2005

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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