

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

TSB-A-06(8)S
Sales Tax
March 6, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S051031A

On October 31, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cleveland Browns Transportation LLC, 76 Lou Groza Boulevard, Berea, Ohio 44017.

The issues raised by Petitioner, Cleveland Browns Transportation LLC, are:

1. Whether an aircraft acquired by Petitioner is exempt from sales and use tax under section 1115(a)(21) of the Tax Law.
2. Whether Petitioner's charges to its affiliates for transportation services are subject to sales tax.
3. Whether maintenance costs and related equipment purchased in connection with Petitioner's use of the aircraft are subject to sales tax.

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

Cleveland Browns Holdings Co. LLC ("Holdings"), a Delaware limited liability company, owns all the membership interests in Cleveland Browns Stadium Co. LLC ("Sub 1") and Cleveland Browns Football Co. LLC ("Sub 2"). Both Sub 1 and Sub 2 are also Delaware limited liability companies and are disregarded entities for federal income tax purposes.

Sub 1 has organized Petitioner, also a Delaware limited liability company, and holds all the membership interests in Petitioner. Petitioner is also a disregarded entity for federal income tax purposes. Petitioner has a name that is different from each of its affiliates and maintains its own books, records, and bank accounts, which are separate from the books, records, and bank accounts of Holdings, Sub 1 and Sub 2. Petitioner's Certificate of Organization and its Operating Agreement set out organizational purposes different from those of its affiliates. Petitioner also has its own officers, who overlap with, but differ from, the officers of its affiliates.

Petitioner, like each of its affiliates, holds itself out to the public as a separate legal entity and enters into business relationships and contractual obligations in its own name. Petitioner has substantial equity capital, approximately \$50 million, and no debt. Petitioner presently owns one jet aircraft and will be acquiring an additional aircraft in 2006. Petitioner is responsible for providing transportation services to Holdings, Sub 1 and Sub 2. The additional aircraft acquired and operated by Petitioner will be registered under Federal Aviation Regulations (FAR) Part 91. Petitioner is not required to obtain a FAR 135 Air Carrier Operating Certificate.

Petitioner will be the sole owner of the newly acquired aircraft, will set the specifications for and will contract for modifications to the aircraft, and will be the sole owner of all rights under all related warranties. Petitioner will determine where and when the aircraft will fly, will determine the passengers carried, and will at all times have possession, command and control of the aircraft. Petitioner will lease hangar space and retain related services for the aircraft in Suffolk County, New York, and will obtain insurance on the aircraft.

Petitioner has hired three full-time pilots and one full-time mechanic to operate and maintain the aircraft. Petitioner uses the services of an affiliate to coordinate scheduling and use of the aircraft, along with bookkeeping and other administrative services, including billing affiliates for use of the aircraft. Petitioner will pay the affiliate fair value for its services. In addition, Petitioner will directly contract for and pay the costs of all other aspects of the aircraft's operation, maintenance, inspection, repairs and overhauls.

Approximately 90% of the use of Petitioner's aircraft will be for transportation services for hire to Holdings, Sub 1 or Sub 2. Petitioner will provide these services pursuant to a written agreement. These services will consist of the transport of officers and employees of the affiliated companies and their customers, vendors, prospective customers and business colleagues. Petitioner will charge the recipient of the air transportation services (i.e., Holdings, Sub 1 or Sub 2) for these services based on the direct and indirect operating costs of the aircraft under the applicable FAA Regulations and precedents. During the year, affiliates will be billed based on an estimated cost (direct and indirect) per hour of flight time. After year end, the billings will be adjusted to capture all actual direct and indirect costs, plus a profit margin.

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 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 provides:

(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.

(This exemption expires December 1, 2009, pursuant to Chapter 60 of the Tax Laws of 2004.)

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 Service Bureau 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's Certificate of Organization and its Operating Agreement set out organizational purposes different from those of its affiliates. Petitioner has a name that is different from each of its affiliates; holds itself out to the public as a separate legal entity; enters into business relationships and contractual obligations in its own name; maintains its own books, records, and bank accounts; and has its own officers. Petitioner presently owns one jet aircraft and will be acquiring an additional aircraft in 2006. This Opinion is limited to the purchase and modification of, as well as related services performed on, the additional aircraft.

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. Where at least 50% of an aircraft's use is devoted to transporting customers or property 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 from sales and use tax provided by section 1115(a)(21) for commercial aircraft if at least 50% of the use of the aircraft is in the provision of air transportation services for hire. (See TSB-M-96(14)(S); *supra*; and *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 will retain complete dominion and control over the aircraft and its operations and maintenance, and approximately 90% of the use of the aircraft will be to provide air transportation services for hire to its affiliates. Therefore, Petitioner's aircraft will qualify for the commercial aircraft exemption provided by section 1115(a)(21) of the Tax Law. Petitioner's charges to its affiliates are for the provision of nontaxable transportation services.

Maintenance services 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 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 each seller supplying machinery and equipment or services used in the aircraft that qualify for exemption.

The above analysis presumes treatment of Petitioner as a separate legal entity. However, if the activities of Petitioner were so dominated and controlled by the parent or affiliates or their activities were so commingled that they would be considered to be operating as alter egos of

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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 its affiliates 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 of the aircraft and equipment for the aircraft would not qualify for the commercial aircraft exemption. However repair and maintenance services performed on such aircraft could be purchased tax exempt (through November 30, 2009) pursuant to the provisions of section 1115(dd) of the Tax Law.

DATED: March 6, 2006

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