

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(23)S
Sales Tax
June 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070920B

On September 20, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Chanel, Inc., 9 West 57th Street, New York, New York 10019.

The issues raised by Petitioner, Chanel, Inc., are:

1. Whether the Owner/Trustee's purchase of undivided interests in noncommercial aircraft as described below, where deliveries of the aircraft are taken outside of New York State, is subject to the New York State and local use tax.
2. Whether the rights granted by Owner/Trustee to Petitioner to license, possess, use, and operate Aircraft under the Aircraft Interest Operating Agreement are subject to the New York State and local sales or use tax.

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

Petitioner is organized and headquartered in New York. Petitioner has contracted with Seller to participate in a fractional aircraft ownership program. Petitioner has elected to purchase a 6.25% undivided ownership interest in a Gulfstream Model G-550 Aircraft and an 18.75% undivided ownership interest in a Gulfstream Model G-450 Aircraft (collectively "Aircraft" or "the Aircraft"). In accordance with Federal Aviation Regulation ("FAR") Part 91, Subpart K, the Aircraft will be used for the transportation of Petitioner's employees and guests for business and pleasure purposes. It is anticipated that the fractional aircraft ownership program flights scheduled by Petitioner will frequently depart from and arrive at a New York airport.

Petitioner has created a Grantor Trust (Owner/Trustee) and entered into an Ownership Trust Agreement with the Owner/Trustee. Petitioner contributed the right to purchase the interest in the Aircraft to the Trust, and in accordance with the Ownership Trust Agreement, Owner/Trustee has the duty to hold, protect, and conserve the undivided interest in the Aircraft. Further, Owner/Trustee and Petitioner have entered into an Aircraft Interest Operating Agreement granting Petitioner the right to license, possess, use, and operate the Aircraft under Seller's fractional aircraft ownership program. Legal title to the Aircraft interest remains with the Owner/Trustee. Petitioner is obligated to pay all costs, expenses, fees, and charges incurred in conjunction with the delivery, possession, use, and operation of the Aircraft.

Owner/Trustee has executed the following operating agreements for each of the Aircraft to fulfill its duties under the Ownership Trust Agreement:

- Fractional Interest Purchase Agreement;
- Fractional Ownership Owners Agreement;
- Fractional Ownership Program Management Services Agreement; and
- Master Dry-Lease Aircraft Exchange Agreement.

Relevant terms and conditions contained in the operating agreements are summarized below.

Fractional Interest Purchase Agreement (“Purchase Agreement”) - Seller conveys to Petitioner (owner) an undivided interest in and to the Aircraft subject to the rights of the owners of the remaining interests in the Aircraft. The agreement establishes that Seller has the right to sell up to 16 undivided ownership interests in the Aircraft. Owners have no right to object to the sale of the additional interests by Seller. The individual owners must execute the Management, Owners, and Exchange Agreements for the right to purchase the undivided interests in the Aircraft. The sale of additional ownership interests establishes a tenancy in common among the owners.

Fractional Ownership Owners Agreement (“Owners Agreement”) - This agreement establishes the terms of use of the Aircraft among the owners. The agreement grants Seller the right to repurchase the ownership interest in the Aircraft in order to ensure the continued operation of the fractional aircraft ownership program. Seller has the right to repurchase the Aircraft ownership interest at fair market value upon the termination or expiration of the Management Agreement.

Fractional Ownership Program Management Services Agreement (“Management Agreement”) - Each of the owners must enter into a Management Agreement with Seller under which an affiliate of Seller (“Manager”) will manage the Aircraft for the benefit of the owners. Under the terms of the Management Agreement, Manager will provide management services at Manager’s expense. Management services include arranging for the Aircraft to be inspected, maintained, serviced, repaired, overhauled, and tested in accordance with approved Federal Aviation Administration (“FAA”) standards and guidelines. Manager will train and provide licensed pilots to operate the Aircraft. In some instances, a pilot may be chosen by the owner but subject to the approval of Manager. Manager will pay all operating expenses including but not limited to salary, travel, and lodging expenses for the flight crew; fuel, hangar, and tie-down costs; domestic landing fees; standard Aircraft stocking; flight planning; and weather contract services. Manager will provide aircraft hull and personal liability insurance for passengers and third parties naming Manager and all owners as insureds and providing for any insurance proceeds to be paid to Manager for repair or replacement of the Aircraft. While Petitioner may select the date, time, point of departure, and destination of a particular flight, Manager will make all necessary take-off, flight, and landing arrangements. The pilots select their own routes and use their own discretion in performing flight services. Manager and pilots have the right to

terminate flights at their discretion. Manager will also maintain, on behalf of Petitioner, all records and logs required by the FAA. Aircraft will be repaired and maintained at Manager's facilities located throughout the United States. Payment for the interest in the Aircraft is made directly to Manager on a monthly basis and is based, in part, on passenger-occupied hours multiplied by the occupied hourly rate.

Manager has the right to use the Aircraft to provide charter air service to the public and for recurrent flight training of Manager's pilots. Manager retains moneys earned from the use of the Aircraft. Pursuant to the Exchange Agreement (below) Manager is authorized to substitute another aircraft in the event Petitioner's Aircraft is being used by another owner or Manager is using the Aircraft to provide public charter service or pilot flight training, or the Aircraft is receiving maintenance services or otherwise unavailable for Petitioner's use.

Master Dry-Lease Aircraft Exchange Agreement ("Exchange Agreement") - Under this agreement, each owner agrees to participate in the Exchange Program (i.e., the fractional aircraft ownership program) and to share the Aircraft and pilots with other persons who are also parties to the agreement. An affiliate of Seller ("Administrator") provides Manager access to an alternate aircraft in the event use of the Aircraft is unavailable for any reason.

The Aircraft will be based in Ohio. Program operating documents will be executed outside of New York. Due to the nature of Seller's fractional aircraft ownership program, the Aircraft will be in continual motion. Petitioner will have no control over the locations to which other owners fly Aircraft. There is no guarantee that Petitioner will be using the Aircraft on flights scheduled under the program.

Petitioner has submitted copies of the Ownership Trust Agreement, Aircraft Interest Operating Agreement, bill of sale, and the Purchase, Owners, Management, and Exchange Agreements with its Petition.

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.

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 tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1110 of the Tax Law provides, in part:

(a) 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 on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . .

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 Bureau Memorandum entitled *Bus Company Transactions -- Transportation Service vs. Equipment Rental*, April 19, 1984, TSB-M-84(7)S, provides, in part:

1. Where a bus company conducts a tour for which it determines the time and destination and sells tickets at a predetermined price, the company is providing a transportation service which is exempt.

2. Where a bus company charters a bus to a group, and the bus company retains dominion and control* over the bus, the bus company is engaged in providing a transportation service and, therefore, the charges are exempt from sales tax. A chartering party's rights are limited to boarding the bus and riding to the agreed destination.

* * *

*Dominion and control remains with the owner of a vehicle when pursuant to an agreement or contract:

1. there is no transfer of possession, control and/or use of the vehicle during the terms of the agreement or contract; and
2. the owner maintains the right to hire and fire the drivers; and
3. the owner uses his own discretion in performing the service (even though the customer may designate the area where passengers will be picked up and delivered) and generally selects his own routes; and
4. the owner retains the responsibility for the operation of the vehicle; and
5. the owner directs the operation, pays all operating expenses, including drivers' wages, insurance, tolls and fuels.

Opinion

Petitioner has created a Grantor Trust (Owner/Trustee) and contributed to the Trust the right to purchase an undivided ownership interest in the Aircraft. Owner/Trustee is purchasing from Seller an interest in what appears to be two specified aircraft. Seller's obligations to Owner/Trustee are subject to Owner/Trustee becoming a party with Seller in the Purchase Agreement, Owners Agreement, Management Agreement, and Exchange Agreement as described below. Interest in the Aircraft is to be shared by up to 16 other purchasers or owners. Each owner has entered into the following agreements with Seller and each other:

(1) In the Purchase Agreement, Seller, as owner of the Aircraft, sells an interest in the Aircraft to Owner/Trustee and other purchasers.

(2) The Owners Agreement sets forth the relationship among all the owners with an interest in the Aircraft.

(3) Under the Management Agreement, Owner/Trustee and other owners engage Manager to provide management services in connection with the operation of the Aircraft.

(4) The Exchange Agreement between Manager and all persons participating in the Exchange Program, including Owner/Trustee, enables Owner/Trustee to share the Aircraft with other persons taking part in the exchange arrangement and enables Manager to use other aircraft should use of the subject Aircraft be unavailable.

Issue 1

Petitioner asks if purchase of interests in the Aircraft is subject to use tax.

Transportation is not one of the enumerated services upon which sales and use tax is due (see section 1105(c) of the Tax Law and *Matter of Firelands Sewer & Water Construction Co., Inc.*, State Tax Commission, November 17, 1983, TSB-H-83(184)S). However, sales or use tax is due on purchases, including rentals, of tangible personal property under section 1105(a) or 1110 of the Tax Law. Whether Owner/Trustee's purchase of an interest in the Aircraft constitutes a taxable rental of tangible personal property rather than the purchase of an exempt transportation service turns upon the question of dominion and control. See *Klondike Cruises, Inc.*, Adv Op Comm T&F, July 29, 1998, TSB A 98(46)S; *Henry F. Geerken*, Adv Op Comm T&F, August 25, 1997, TSB-A-97(52)S. The documents furnished by Petitioner show that the interest in the Aircraft conveyed by Seller to each owner is subject to the rights of all of the owners. All of the owners have entered into the Exchange Agreement, whereby another aircraft may be substituted by Manager if the subject Aircraft is not available. When the Aircraft is not in use by one of the owners, Manager retains the right to use it. The agreements among each of the owners and between each owner and Manager significantly limit the control any single owner may exercise over the Aircraft. Therefore, the interest that is to be conveyed to Owner/Trustee by the bill of sale does not appear to effect a transfer of possession of the Aircraft. The word "owner" as used in the context of the agreements does not denote ownership in the typical sense which involves holding title to property.

The provisions of Technical Services Bureau Memorandum entitled *Bus Company Transactions -- Transportation Service vs. Equipment Rental*, April 19, 1984, TSB-M-84(7)S, do not specifically apply to the chartering of an aircraft, but the criteria set forth in TSB-M-84(7)S are useful in determining whether Owner/Trustee has obtained dominion and control of the Aircraft within the meaning of section 526.7(e) of the Sales and Use Tax Regulations. See *Limousine Operators of Western New York, Inc.*, Adv Op Comm T&F, October 27, 1988, TSB-A-88(55)S; *Klondike Cruises, Inc.*, *supra*; *Henry F. Geerken*, *supra*. In this case, the Management Agreement provides that Manager will furnish qualified pilots to operate the Aircraft. The pilots are paid by Manager, who also provides recurrent pilot training at its own expense and pays for all salaries, travel, and lodging expenses for the pilot and flight crew. Owner/Trustee may, at times, choose a pilot, but only subject to the approval of Manager. While Owner/Trustee may select the date, time, point of departure, and destination of a particular flight, Manager makes all necessary take-off, flight, and landing arrangements, and the pilots use their own discretion in performing the flight services and selecting routes. Manager has the overall responsibility to manage and operate the Aircraft and pays all operating expenses such as fuel, hangar and tie-down costs, domestic landing fees, standard aircraft stocking, flight planning, weather contract services, and aircraft hull insurance (which names Manager and all owners as insureds and provides for any insurance proceeds to be paid to Manager for repair or replacement

of the Aircraft). Payment for the interest in the Aircraft is made directly to Manager by Owner/Trustee on a monthly basis and is based, in part, on passenger-occupied hours multiplied by the occupied hourly rate. Manager has the right to use the Aircraft to provide charter air service to the public and for recurrent flight training of Manager's pilots, and Manager retains moneys earned from the use of the Aircraft. Manager is authorized to substitute another aircraft pursuant to the Exchange Agreement in the event Petitioner's Aircraft is being used by another owner or by Manager to provide charter air service or for pilot training or is receiving maintenance service or is otherwise unavailable for Petitioner's use.

With respect to Owner/Trustee's purchase of an interest in the Aircraft for the purpose of transportation of Petitioner's officers, employees, and guests, Owner/Trustee has fulfilled none of the requirements listed in TSB-M-84(7)S, *supra*, to obtain dominion and control over the Aircraft. Some additional factors set forth in the agreements that support the view that custody over the Aircraft with the right to exercise the direction and control of its use have not been transferred to Owner/Trustee are:

1. Manager arranges at its own expense for the aircraft to be inspected, maintained, serviced, repaired, overhauled, and tested in accordance with approved Federal Aviation Administration (FAA) standards and guidelines.
2. Manager maintains all records, logs, and other materials required by the FAA to be maintained with respect to the aircraft.
3. Seller has the right to repurchase the Aircraft ownership interest at fair market value upon the termination or expiration of the Management Agreement.

Therefore, possession, command, and control of the Aircraft have not been transferred to Owner/Trustee. What has been purchased by Owner/Trustee is a nontaxable transportation service. There is no taxable sale or rental to Owner/Trustee of tangible personal property pursuant to sections 1101(b)(5) and 1105(a) of the Tax Law in this case, regardless of where delivery or use of the Aircraft occurs, since there is no transfer of title or possession. See *Limousine Operators of Western New York, Inc., supra*. (For a discussion of the topic of the provision of air transportation services by an owner of an aircraft to related entities, see Internal Revenue Service Rev. Rul. 76-394, 1976-2 C.B. 355).

It should be noted that this Opinion does not address whether Seller's purchase or use of the Aircraft is subject to New York State and local sales and use tax.

Issue 2

Since possession, command, and control of the Aircraft have not been transferred to Owner/Trustee and what is being furnished to Owner/Trustee is a nontaxable transportation service, the rights granted by Owner/Trustee to Petitioner to license, possess, use, and operate the Aircraft under the Aircraft Interest Operating Agreement are merely rights to obtain transportation services purchased by Owner/Trustee from Seller. Charges by Owner/Trustee to Petitioner for such transportation services are not subject to sales tax. See *Limousine Operators of Western New York, Inc., supra*.

DATED: June 6, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.