

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(23)S
Sales Tax
June 5, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090430A

Petitioner, [REDACTED] operates a fractional ownership program in relation to certain aircraft. In a petition received April 30, 2009, Petitioner inquires whether its purchases of aircraft for use in the fractional ownership program are subject to sales tax and whether the receipts paid by those customers participating in the fractional ownership program are subject to sales tax.

We conclude that the aircraft purchased for use in Petitioner's fractional ownership program are eligible for the exemption from sales tax provided in Tax Law section 1115(a)(21) for commercial aircraft, and that the receipts paid by the customers participating in the fractional ownership program are not for the purchase of property or services subject to sales tax.

Facts

Organizational Structure

[REDACTED] is headquartered in [REDACTED] and is a world leader in helicopter design, manufacture, and service. Petitioner is a wholly owned subsidiary of [REDACTED] ("Parent"). Petitioner is organized in Delaware and headquartered in New York. Petitioner operates a helicopter fractional share ownership program ("the Program"), in conjunction with its own subsidiary, [REDACTED] ("Subsidiary"). Subsidiary is organized in Connecticut and headquartered in New York.

The Fractional Shares Program

The Program is provided by an alliance between Petitioner, as seller of the fractional interest in the aircraft, and Subsidiary, as manager of the aircraft and related services.

The terms and parameters of the Program are established in its contracts and agreements. Relevant terms and conditions contained in the operating agreements are summarized below.

1) Aircraft Purchase Agreement

The Aircraft Purchase Agreement establishes between the owner/customer and Petitioner the terms and conditions for the purchase of a fractional interest in a helicopter. The agreement also includes put and call options to effectuate the transfer of the interest back to Petitioner at a future date, and procedures for determining the buy-back price.

2) Aircraft Service Agreement

The Aircraft Service Agreement between the Fractional Share Owners and Subsidiary establishes all the terms under which Subsidiary will provide services to the owner/customer, as well as all the rights, duties, and responsibilities of the owner/customer and Subsidiary with respect to management and maintenance of the helicopter. The agreement specifies such details as the geographical areas in which flight services will be provided, the minimum advance notice required to schedule a flight, the number of Flight Units of service that Subsidiary will provide each

year to the owner/customer, and the Flight Unit rate at which Subsidiary will be compensated by the owner/customer. The agreement requires the payment of a Monthly Management Fee and a Flight Unit Charge, and grants Subsidiary the right to use the helicopter as part of the fractional share program for the benefit of all fractional share program participants.

Interest Holders Agreement

The Interest Holders Agreement is an agreement among all the fractional shares co-owners of a specific aircraft. The agreement provides that each fractional share co-owner is relying on the other co-owners' agreements to enter into and abide by the terms of all the Program Documents.

Under the Program, multiple customers ("Fractional Share Owners") have an interest in an aircraft for use in the transportation of the Fractional Share Owner's employees and guests. The Program offers service in and around metropolitan New York, with service zones extending north to Albany, south to Washington, DC, west to Gettysburg, and east to Nantucket.

Petitioner purchases helicopters from Parent for use in the Program. Legal title on the sale from Parent to Petitioner transfers in Connecticut. The Program provides for Petitioner to sell the fractional interests in the aircraft to the third party owners ("Fractional Share Owners"). These undivided fractional interests in the aircraft have historically ranged from 6.25% to 25%. Petitioner has never sold a fractional interest in Program aircraft to Parent or any other affiliated entity.

Pursuant to the formal Aircraft Purchase Agreement and the Aircraft Service Agreement, the Fractional Share Owners are required to use the services of Subsidiary as manager of the helicopter and provider of helicopter service. Subsidiary provides a bundle of services, including pilots, insurance, fuel, maintenance, hangar storage, maintenance management, scheduling, and access to other aircraft in the Program. The Fractional Share Owners pay a fixed monthly fee as well as a variable fee according to their use of flight services that month. The fee covers all operating expenses of the aircraft.

Part 135 (14 CFR 135) provides the Federal Aviation Administration's ("FAA") certification requirements for commuter and on-demand air carriers. The helicopters are operated by Subsidiary in accordance with Federal Aviation Regulation Part 135 operating standards. Due to the FAA designation of Subsidiary as an air carrier, the Internal Revenue Service requires Subsidiary to collect and remit federal excise taxes on all management fees, fixed and variable. Federal excise taxes have been collected and remitted on all past Subsidiary fixed and variable fees as "transportation for hire."

Operational control of the aircraft must be retained by Subsidiary as the Part 135 Certificate holder. These operational restrictions include:

- The Fractional Share Owners make no decisions relative to scheduling, weather considerations, aircraft, pilots, or route. Subsidiary makes all such takeoff, flight, and landing arrangements. The only decisions made by the Fractional Share Owners are the times and pickup/destination points.
- Subsidiary is solely responsible for determining the need and arranging for all inspection, maintenance, service, repair, overhaul, or testing required for any aircraft in the Program.
- Subsidiary pays all standard out-of-pocket operating expenses such as fuel, hangar costs, landing fees, and insurance.
- Subsidiary maintains all records, logs, and other materials required by the FAA.
- All manuals used in connection with the service remain the exclusive property of Subsidiary.

The Fractional Share Owner may or may not get the particular aircraft in which the Fractional Share Owner purchased a fractional interest when taking a flight. A substitute aircraft (other Program aircraft, other aircraft owned by Subsidiary, aircraft managed by Subsidiary for other entities and chartered by Subsidiary for use in providing program service, etc.) may be used.

Subsidiary may use Program aircraft to transport other Fractional Share Owners or charter customers. Subsidiary retains any revenue earned in this manner. The aircraft may also be used by Subsidiary on FAA proving flights, and for pilot training.

The Aircraft Service Agreement provides that Subsidiary may use the Program aircraft to provide services to the Fractional Share Owner, additional Interest Holders, and any other owner of a fractional share in the Program. During such periods of time that the aircraft is not being utilized by the Fractional Share Owners, additional Interest Holders, or any other Program participants, Subsidiary may utilize the helicopter for pilot training flights, FAA proving flights, charter flights, and demonstrations. Subsidiary has the overall responsibility to manage and operate the helicopter and pay all operating expenses, including (i) FAA and manufacturer's correspondence and directives, (ii) administration and enforcement of warranty claims, (iii) administration and enforcement of insurance matters, (iv) parts replacement, service and maintenance agreements, and (v) preparation and filing of FAA and FCC mandatory reports or registrations.

Petitioner has the right to repurchase the Fractional Share Owner's fractional interest. Petitioner thus, does not recognize for accounting purposes the payments received from the Fractional Share Owner's purchase of the fractional shares as a sale of the aircraft. Additionally, over the term of the Program, for tax purposes, Petitioner takes the depreciation deduction with respect to the aircraft.

Analysis

Pursuant to sections 1105(a) and 1110 of the Tax Law, unless otherwise exempt, sales or use tax is due on sales, rentals, and leases of tangible personal property. Pursuant to section 1105 of the Tax Law, tax is also imposed upon the receipts from the sales of certain enumerated services. While sales tax (commencing on and after June 1, 2009) is imposed on transportation services provided using limousines, black cars, and certain other motor vehicles (See Tax Law §§1101(b)(34) and 1105(c)(10) as added by Chapter 57 of the Laws of 2009) the provision of transportation services using aircraft is not an enumerated service upon which sales tax is imposed. (See Tax Law §1105(c) and *Matter of Firelands Sewer & Water Construction Co., Inc.*, State Tax Commission, November 17, 1983, TSB-H-83(184)S).

The documents furnished by Petitioner show that the interest in the aircraft conveyed by it to each Fractional Share Owner is subject to the rights of all of the other owners. All of the Fractional Share Owners agree that another aircraft (other than the aircraft in which the Fractional Share Owner purchased an interest) may be substituted by Subsidiary if the subject aircraft is not available. When the aircraft in which a Fractional Share Owner purchased an interest is not in use by any one of the owners, Subsidiary retains the right to use it. The agreements among each of the Fractional Share Owners and between each owner and Subsidiary significantly limit the control any single owner may exercise over an aircraft.

Therefore, the interest that is conveyed to the Fractional Share Owner pursuant to the Aircraft Purchase Agreement does not appear to effect a transfer of ownership and possession of the aircraft for purposes of Article 28 of the Tax Law.

Whether the purchase of an interest in the aircraft by the Fractional Share Owners under the Program constitutes a taxable rental or lease of tangible personal property or the purchase of an exempt transportation service turns upon the question whether dominion and control (i.e., possession) of the aircraft is transferred to the Fractional

Share Owners. 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. (See also Technical Services Bureau Memorandum entitled *Bus Company Transactions -- Transportation Service vs. Equipment Rental*, April 19, 1984, TSB-M-84(7)S, for a discussion of the criteria used in determining whether a transfer of dominion and control within the meaning of section 526.7(e) of the Sales and Use Tax Regulations has occurred.)

With respect to a Fractional Share Owner's purchase of an interest in an aircraft for the purpose of the provision of transportation service for a Fractional Share Owner's officers, employees, and guests, none of the requirements listed in TSB-M-84(7)S, *supra*, for the Fractional Share Owner to obtain dominion and control over the aircraft appears to have been met.

Pursuant to the terms of the Aircraft Service Agreement, Subsidiary is responsible for providing the pilots, insurance, fuel, maintenance and maintenance management, hangar storage, and scheduling. While the Fractional Share Owner may select the date, time, point of departure, and destination of a particular flight, Subsidiary makes all necessary take-off, flight, and landing arrangements. Subsidiary has the overall responsibility to manage and operate the aircraft and pays all operating expenses such as fuel, hangar and tie-down costs, and landing fees. Subsidiary has the right to use the aircraft to provide charter air service to the public and for recurrent flight training of Subsidiary's pilots, and Subsidiary retains moneys earned from these types of use of the aircraft. Subsidiary is authorized to substitute another aircraft pursuant to the Aircraft Service Agreement if a Fractional Share Owner's aircraft is being used by another owner, or by Subsidiary to provide charter air service or for pilot training, is receiving maintenance service, or is otherwise unavailable for use.

Other factors set forth in the agreements supporting the view that custody over the aircraft with the right to exercise the direction and control of its use has not been transferred to Fractional Share Owners are:

1. Subsidiary 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. Subsidiary maintains all records, logs, and other materials required by the FAA to be maintained with respect to the aircraft.
3. Petitioner has the right to repurchase the aircraft ownership interest at fair market value upon the termination or expiration of the Aircraft Purchase Agreement.

Therefore, possession, command, and control of the aircraft have not been transferred to Fractional Share Owners.

There is no taxable sale or rental of the aircraft to the Fractional Share Owner 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 possession. See *Limousine Operators of Western New York, Inc.*, *supra*.

Since possession, command, and control of the aircraft have not been transferred to the Fractional Share Owner, what the Fractional Share Owner has purchased and what is being furnished to the Fractional Share Owner is a nontaxable transportation service. (See *Executive Jet Aviation v. United States of America*, US Ct App Fed Cir (Sept 18, 1997) 97-2 USTC 70,085, 96-5093.) Though not determinative of the issues herein, it is noteworthy that, according to Petitioner, for purposes of the federal excise tax imposed pursuant to the provisions of IRC Section 4261 on the provision of air transportation of persons, the Internal Revenue Service considers Subsidiary to be a person engaged in the provision of services subject to the federal excise tax.

The rights granted by Petitioner to the Fractional Share Owners concerning the possession, use, and operation of the aircraft under the Aircraft Interest Operating Agreement amount to merely a right to obtain air transportation services from Subsidiary (as part of its alliance with Petitioner in the provision, management, and operation of the

Program). The charges by Petitioner and Subsidiary to the Fractional Share Owner for the provision of the air transportation services are not a receipt subject to the sales tax. (See also *The Gap, Inc.*, Adv Op Comm T&F, January 28, 2000, TSB-A-02(3)S and *Chanel, Inc.*, Adv Op Comm T&F, June 6, 2008, TSB-A-08(23)S.)

Tax Law §1115(a)(21) provides an exemption from sales and use tax for commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce. *Commercial aircraft* are defined in Tax Law §1101(b)(17) as aircraft used primarily to transport persons or property for hire. However, effective June 1, 2009, the transporting of persons for hire does not include transporting agents, employees, officers, members, partners, managers or directors of affiliated persons. See Tax Law section 1101(b)(17) as amended by Chapter 57 of the Laws of 2009. See also Technical Services Bureau Memorandum, *Amendments Affecting the Application of Sales and Use Tax to Aircraft, Vessels and Motor Vehicles*, May 12, 2009, TSB-M-09(4)S.

In the present case, Subsidiary is the entity engaged in the provision of air transportation services to the Fractional Shares Owners and their guests, etc., and in the provision of charter air service to the public. (See *Chanel, Inc, supra*; *The Gap, Inc., supra*; and *Executive Jet v USA, supra*.) To the extent that the passengers to whom the air transportation services are provided are not officers, members, directors, etc. of Subsidiary or an entity that is affiliated with Subsidiary, the exception from the commercial aircraft exemption for aircraft used in providing services for affiliated entities and personnel is not applicable. If the aircraft is used primarily (50% or more of the time) in the provision of transportation services to unaffiliated entities and personnel, the purchase or use of the aircraft would appear to qualify for the exemptions from sales and use tax for commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce as provided in section 1115(a)(21) of the Tax Law.

DATED: June 5, 2009

/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.