

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

TSB-A-10(48)S
Sales Tax
September 29, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080820A

Petitioners ██████████ (“LLC2”) and ██████████ (“LLC1”), ██████████ request an Advisory Opinion about whether their purchase of an interest in an aircraft is subject to New York State and local sales and use taxes. We conclude that it is. We further conclude that LLC1’s purchase of an interest in the aircraft is an exempt purchase for resale, but LLC2’s lease of the aircraft from LLC1 is not, because it is not leased exclusively for resale. Finally we conclude that the Manager’s lease or purchase of the aircraft may be exempt as the purchase of a commercial aircraft.

Facts

Petitioners are both Delaware limited liability companies and both have offices located in New York State. LLC2 owns 100% of the membership interests in LLC1. Petitioners have separate books and records and separate bank accounts.

Petitioners participate in ██████████’s (“Manager”) “Flexjet One Program” (Program). The Program is similar to Manager’s conventional fractional ownership program, but with two differences: (1) the participants in the Program typically acquire an entire aircraft, whereas participants in conventional fractional ownership programs typically acquire an undivided fractional interest in an aircraft and hold that undivided interest as tenants-in-common with other participants; and (2) participants in the Program typically have the option upon the expiration or termination of the contract to either retain the aircraft and remove it from the program, or to require Manager to repurchase the aircraft.

LLC1, along with two other individuals unrelated to Petitioners, jointly entered into an agreement to purchase a 100% interest in the Aircraft from Manager. The purchasers have title to, and are the registered owners of, the Aircraft. Upon acquiring the Aircraft, Purchasers also entered into a co-ownership agreement, which, among other things, provides that each purchaser will own approximately a one-third undivided interest in the Aircraft as tenants-in-common. The co-ownership agreement also governs matters such as scheduling and use of the Aircraft, and termination of the Program agreements.

Upon acquiring its one-third interest in the Aircraft, LLC1 leased its interest to LLC2. LLC1 neither has made nor intends to make any use of the Aircraft other than to lease its interest to LLC2.

The Aircraft was delivered by Manager to the purchasers outside New York State. The Aircraft will be operated to and from many airports in many states, and will be unlikely to be based and/or hangared permanently in any specific jurisdiction. LLC2 and the other lessees will not have any control over the locations to which Manager causes the Aircraft to be flown when the Aircraft is not in use by LLC2 or the other lessees.

The various agreements between the parties are described below:

(1) Purchase Agreement – This agreement conveys 100% of the Aircraft to LLC1 and the two other purchasers. The Purchase Agreement gives the purchasers the option to sell the Aircraft back to Manager,

upon giving 6 months notice, at any time after 24 months. However, after 36 months and upon giving 6 months notice, purchasers may terminate the program agreements, remove the Aircraft from the Dry Lease Exchange Program and may retain or otherwise dispose of the Aircraft. The purchasers may sell the aircraft within the 36 month period; however, Manager is entitled to a 10 day right of first refusal. After 60 months, if the purchasers do not request repurchase by Manager and do not terminate the agreements and remove the Aircraft from the Dry Lease Exchange Program, the purchasers may, upon 6 months notice, negotiate a 24 month extension, or terminate the agreements and remove the Aircraft from the Dry Lease Exchange Program. If the Aircraft is removed from the Dry Lease Exchange Program, purchasers are responsible for the costs of removal, including repainting, repositioning, crew, inspections, Federal Aviation Administration (FAA) regulatory actions, and an administrative fee for the removal process.

(2) Aircraft Co-Ownership Agreement – This agreement is between the purchasers of the Aircraft and governs the purchasers’ rights and obligations with respect to ownership and operation of the Aircraft. This agreement also provides the terms upon which each Purchaser can buy or sell their interest in the Aircraft to a third party. The agreement includes a provision that allocates to each purchaser one third of the 300 flight hours per year of air transportation services to be provided under the Management Agreement.

(3) Aircraft Interest Lease Agreement – Under this agreement, LLC1 leased its undivided ownership interest in the Aircraft to LLC2. LLC2 is required to make fixed monthly lease payments to LLC1, and is solely responsible for all costs associated with the use, operation, and maintenance of the Aircraft during the lease period.

(4) Management Agreement – Under this agreement between Manager, LLC2, and the two unrelated owners, Manager provides management services related to the operation of the Aircraft at its expense. LLC2 and the two unrelated owners are required to pay a fixed monthly management fee, plus hourly rates for each hour flown. The agreement provides that LLC2 and the two unrelated purchasers are collectively entitled to 300 flight hours per year of use of the Aircraft or other aircraft in the program. The Management Agreement also provides that Manager is responsible to arrange for the Aircraft to be used, operated, inspected, maintained, serviced, repaired, overhauled, and tested in accordance with all applicable laws and regulation, and other standards and guidelines established by the FAA. Manager is also responsible for paying operating expenses (including fuel, pilots and crew salaries, and travel expenses), providing and paying for hangar space, tie down, and similar expenses. Manager must provide qualified pilots, maintain all required records and logs, and make all necessary take off, flight slot, and landing arrangements. While LLC2 and the two unrelated purchasers may select the date, time, point of departure, and destination of particular flights, pilots may select their own routes, and use their own discretion in performing flight services. Both Manager and the pilots have the right to terminate flights at their discretion. Manager is responsible for obtaining hull insurance and third-party passenger liability insurance, naming both Manager and the purchasers as loss payees. In the event of damage or less than total loss of the Aircraft, proceeds of the insurance will be paid to Manager, in trust, to repair or restore the aircraft to good working order. In the event of a total loss, Manager has the option to replace the Aircraft with the same make and model. If Manager opts not to replace the aircraft, the Program will terminate and the insurance proceeds will be paid to LLC2 and the two unrelated purchasers, net of any unpaid amounts due.

(5) Lease Agreement – Under this agreement, and without limiting ██████████’s Management duties under the Management Agreement, LLC2 and the two unrelated purchasers agree to lease their undivided interests in the Aircraft to Manager for up to 299 occupied flight hours per year, which may be used to fly the Aircraft under the Dry Lease Exchange Program or used as part of Manager’s conventional fractional share program. Manager must make fixed monthly lease payments, in the form of credits to LLC2 and the two unrelated purchasers’ account.

(6) Program Benefits Agreement – This agreement establishes the policy and procedures governing the purchaser’s use of the Aircraft. It sets forth the primary and secondary service areas and the different amount of lead times required for flights to each. This agreement also establishes the rules for days when more than one of the purchasers or their lessees require use of the Aircraft, upgrade and downgrade requests, and other program details. This agreement also provides LLC2 and the other two lessees a method to sell unused program hours or purchase extra hours above the 300 flight hour limitation provided for in the Management Agreement.

(7) Dry Lease Exchange Agreement – In this agreement, LLC2 and the other two lessees agree that the Aircraft can be shared with other persons who participate in the Program, or the conventional fractional ownership program.

(8) Sideletter Agreement – This agreement includes negotiated modifications to the Program. Among the provisions in this agreement is a requirement that all flights for or on behalf of the LLC2 or the other lessees shall be operated under FAA regulations governing on-demand commercial air charters. This requires Manager to have possession, command and control of the Aircraft at all times and during all phases of flights conducted for or on behalf of LLC2 or the unrelated purchasers, and that Manager will be providing transportation services to LLC2 and/or unrelated purchasers.

Petitioners ask the following questions:

(1) Is Petitioners’ participation in the Program excluded from New York State and local sales and use taxes as the sale of a nontaxable transportation service?

(2) If the transaction between Petitioners and Manager is considered to be the sale of tangible personal property:

(a) Is Petitioners’ purchase of an interest in the Aircraft exempt from sales and use tax as a purchase for resale?

(b) Does Manager’s use of the Aircraft to transport persons and property for hire qualify its lease or purchase of the aircraft for exemption under Tax Law section 1115(a)(21) as the purchase of a commercial aircraft?

Analysis

We conclude that Petitioners’ participation in the Program constitutes the purchase of tangible personal property for sales and use tax purposes. Tax Law sections 1105(a) and 1110 impose sales and use tax on sales, rentals and leases of tangible personal property. Sales and use tax is also imposed on certain enumerated services. The provision of an air transportation service is not an enumerated service upon which sales or use tax is imposed.

Whether the purchase of an interest in the Aircraft under the Program constitutes a taxable purchase, rental or lease of tangible personal property or the purchase of an exempt transportation service depends on whether dominion and control of the Aircraft is transferred to the program participants. *See* TSB-A-09(23)S; *Chanel, Inc.*, TSB-A-08(23)S; *In the Gap, Inc.*, TSB-A-00(3)S; *see also* *Bus Company Transactions – Transportation Service v. Equipment Rental*. TSB-M-84(7)S.

Under the various agreements governing the use and operation of the Aircraft, Manager is responsible for providing pilots, maintaining all required records and logs, and obtaining insurance. Although LLC2 has the right to select the time, date, point of departure and destination of a particular flight, Manager is responsible for all necessary take-off, flight slot, and landing arrangements, and pilots may select their own routes, and use their own discretion in performing flight services. Under the Management Agreement, Manager is compensated for these management services for a fixed monthly fee. In addition, under the Dry Lease Exchange Agreement, Manager may use the Aircraft to provide air transportation services to other participants of the Program and the conventional fractional ownership program, and may substitute another aircraft for use by LLC2 or the other lessees if the Aircraft is unavailable.

However, the purchasers here have the right to sell the aircraft before the expiration of the 36 month period, subject to Manager's right of first refusal. At the end of the 36 month period, the purchasers may elect to retain or otherwise dispose of the aircraft, or require Manager to repurchase the aircraft. These facts distinguish the Petitioners' situation from the fractional ownership programs described in the Advisory Opinions referred to above. Because the purchasers have the right to sell the aircraft before the end of the 36 month period, and the right to retain or otherwise dispose of the aircraft at the end of that period, we conclude that the purchasers have sufficient dominion and control of the aircraft to constitute the purchase of tangible personal property subject to sales and use tax.

LLC1's purchase of an interest in the Aircraft qualifies as a purchase for resale, but LLC1's lease of the Aircraft to LLC2 does not. Section 1105(a) of the Tax Law imposes sales tax on every retail sale of tangible personal property. As relevant here, "retail sale" does not include sales of tangible personal property for resale as such. See Tax Law § 1101(b)(4)(i). Sales and Use Tax Regulation section 526.6(c) further provides:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as a purchase for resale and therefore not subject to tax until he has transferred the property to his customer.

In order to qualify as an exempt purchase for resale, the tangible personal property must be purchased exclusively for resale. See *M Ventures, LLC & Arrow Operations, LLC*, TSB-A-04(11)S. According to Petitioners, LLC1 purchased its interest in the aircraft for the sole purpose of leasing its interest to LLC2. LLC1 has not made, and does not intend to make, any use of the aircraft. Because LLC1's purchase of the aircraft is exclusively for resale, it is exempt from sales tax. Conversely, LLC2's lease of an interest in the aircraft is not exclusively for resale. Although LLC2 leases its interest in the Aircraft to Manager, the Aircraft is used for LLC2's own use. Accordingly, LLC2's lease of an interest in the Aircraft from LLC1 is subject to sales and use tax. Because the aircraft will be delivered to Petitioners outside New York State, use tax will become due when the Aircraft is first used in New York State, and will be computed according to the provisions of section 1111(b) of the Tax Law.

Manager's lease of LLC2's interest in the Aircraft may qualify for exemption from sales tax as the purchase of a commercial aircraft under Tax Law section 1115(a)(21). That section exempts commercial aircraft "primarily engaged in intrastate, interstate or foreign commerce." "Commercial aircraft" means:

Aircraft used primarily:

- (i) to transport persons or property for hire;

- (ii) by the purchaser of the aircraft to transport such person's tangible personal property in the conduct of such person's business; or
- (iii) for both such purposes.

Tax Law §1101(b)(17). We cannot conclude on the basis of the facts provided by Petitioner if Manager's lease of the aircraft would qualify for this exemption. However, if Manager's use of the Aircraft meets this definition, and it primarily uses the Aircraft in intrastate, interstate or foreign commerce, its lease of the Aircraft from LLC2 would be exempt under Tax Law section 1115(a)(21). Similarly, if the definition and exemption criteria are met, Manager's repurchase of the aircraft, whether by exercise of its right of first refusal within 36 months or at the purchasers' option after the expiration of the 36 month period, would also be exempt under Tax Law section 1115(a)(21). Petitioners will not be required to collect sales tax on the sale or lease of their interest to Manager, provided that they timely accept in good faith a properly completed *Exempt Use Certificate*, Form ST-121 from Manager.

DATED: September 29, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.