

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (49)S
Sales Tax
August 1, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S950721A

On July 21, 1995, a Petition for Advisory Opinion was received from Pasquale & Bowers, 90 Presidential Plaza, Suite 210, Syracuse, New York 13202.

The issues raised by Petitioner, Pasquale & Bowers, are:

1. Whether, under the circumstances described below, the purchase of an aircraft used in the transportation of persons for compensation is exempt from sales and use tax.
2. Whether, under the circumstances described below, the receipts received for air transportation services are exempt from the sales and use tax.

Petitioner presents the following facts. TAD Services, Inc. (TAD) is 100% owned by one individual. The only activity conducted by TAD is the transportation of individuals by air for compensation. TAD is not required to obtain an air taxi/commercial operator (ATCO) operating certificate under Part 135 of the Federal Aviation Administration regulations. TAD transports for compensation mainly customers, potential customers and employees of two related companies. The sole shareholder of TAD and his wife own 100% of these related companies. TAD has possession and control of the aircraft, determines where it flies and is responsible for all maintenance and associated costs. All flights which include interstate and intrastate flights, are for business purposes. The pilot is an independent contractor procured by TAD, but is not an employee of TAD. The related companies (not their customers or employees) compensate TAD for the flights. The compensation charged by TAD is based on the operating costs of the aircraft. The related companies pay these costs to TAD based on their usage of the aircraft.

Section 1115(a)(21) of the Tax Law provides an exemption from sales and use tax for:

(c)ommercial 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.

TSB-M-80(4)S indicates that aircraft used by airlines and air taxi operators and commercial operators holding Air Taxi Certificates may qualify as commercial aircraft. It does not indicate that the exemption is limited to these organizations. TAD's failure to fall within these categories will not preclude the aircraft from qualifying as commercial aircraft primarily engaged in intrastate, interstate or foreign commerce and exempt from New York State and local sales and use taxes.

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Where over fifty percent of the use of TAD's aircraft is devoted to transporting employees, customers and potential customers of related companies for compensation, and the compensation reasonably reflects the cost of operating the aircraft, the aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, within the meaning of section 1115(a)(21) of the Tax Law. See Stephen J. Epstein c/o Richard A. Eisner & Company, Adv. Op. Comm. of Taxation and Finance, November 9, 1987, TSB-A-87(41)S. The purchase of this aircraft by TAD would be exempt from the New York State and local sales and use taxes.

Petitioner represents that TAD retains complete dominion and control over the aircraft. Based on this representation, receipts from the related companies for use of the aircraft would be exempt from tax as the transactions are considered to be the provision of a transportation service. However, whether the a transaction is a transportation service or the rental of tangible personal property must be determined in accordance with the facts and circumstances of the particular transactions and provisions of the agreement between TAD and its customers. Where the transaction is determined to be a rental of tangible personal property, TAD could purchase the aircraft for resale, but would be liable for the collection of sales tax from its related companies on the total rental charges.

We note that the above analysis presumes treatment of TAD and the related companies as separate legal entities. Under certain circumstances in order to prevent fraud or injustice, the corporate structure should be disregarded and a corporation should be considered to be the alter ego of the parent or affiliate. See Harfred Operating Corporation, Adv. Op. Comm. Of Taxation and Finance, July 18, 1986, TSB-A-86(28)S. It cannot be determined from Petitioner's submission of facts whether TAD is an alter ego of the related corporations. If an examination of TAD showed that it should be disregarded as a separate legal entity for purposes of the sales tax, then the aircraft at issue would not qualify for exemption as a commercial aircraft. The aircraft would be considered in that case to be purchased for self use by the related corporations. In that case, the aircraft would not be deemed to have been purchased by TAD to provide transportation services for compensation.

DATED: August 1, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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