

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

TSB-A-08(20)S
Sales Tax
April 28, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071108A

On November 8, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from GSO Capital Partners (Texas) GP LLC, 11 Greenway Plaza, Suite 3050, Houston, Texas 77046.

The issues raised by Petitioner, GSO Capital Partners (Texas) GP LLC, are:

1. Whether an aircraft leased by Petitioner, if based in New York, would be exempt from sales and use tax as a commercial aircraft under section 1115(a)(21) of the Tax Law.
2. Whether Petitioner's charges to its affiliates for flight services would be exempt from sales and use tax.
3. Whether Petitioner's purchases of aircraft maintenance and related equipment from a New York vendor would be exempt from sales and use tax.

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

Petitioner is a general partner of GSO Capital Partners (Texas) LP which is a Texas-based limited partnership (hereinafter "Texas LP"). Petitioner is solely owned by GSO Capital Partners LP ("Parent"), a Delaware limited partnership based in New York. On or about June 4, 2007, Petitioner entered into a lease with Utah-based Wells Fargo National Association (as trustee for Parent) and Parent, pursuant to which Petitioner obtained a leasehold interest in an aircraft. Petitioner took possession of the aircraft in Connecticut. Prior to taking possession, Petitioner entered into the following two agreements regarding the management and operations of the aircraft:

- A. An aircraft management agreement (the "Management Agreement"), pursuant to which an aircraft management company ("the Manager") agreed to provide management, maintenance, insurance, pilot, and other services required to support the operation of the aircraft; and
- B. A charter service agreement ("the Charter Services Agreement"), pursuant to which a licensed air carrier (the "Charter Company") agreed to market and operate the aircraft for charter services, and to contract for, invoice, and collect charter fees.

It is anticipated that the aircraft will be operated 400 hours per year, including 300 hours in charter service for compensation and 100 hours to support the business activities of Petitioner

and affiliated companies, including Texas LP, Parent, and Parent's affiliated companies. Of the 100 non-charter hours, more than 75% of those hours will be operated for Petitioner's affiliated companies. The 300 charter service hours will be operated under Part 135 of the Federal Aviation Regulations ("FAR"). The remaining 100 hours will be operated under FAR Part 91.

Petitioner will be reimbursed by Texas LP, Parent, or Parent's affiliated companies, for the costs incurred by Petitioner to provide non-charter flight services to the respective entities.

Of the anticipated 300 annual charter hours, 200 hours will be flown for the benefit of the individual owners of Parent, under charter contracts entered into between the individuals and the Charter Company. The hourly charter rate charged to the individual owners of Parent will be 92.5% of that charged to the public with respect to the other 100 annual charter hours. The charter rate charged to the public is equal to or greater than the relevant market rate.

Petitioner is a Texas-based single member LLC and is a disregarded entity for federal income tax purposes. However, Petitioner holds itself out to the public as a legal entity separate from Parent and Texas LP. Petitioner enters into business relationships and contractual obligations in its own name; maintains its own books, records, and bank accounts; and has its own officers, some of which are also officers of Parent. For all flights, Petitioner decides when, where, and for whom the aircraft will be flown.

As a party to the Management Agreement and the lease, Petitioner is directly and exclusively responsible for paying all fixed and variable costs incurred in connection with the operation of the aircraft. As a party to the Charter Services Agreement, Petitioner is the sole beneficiary of net revenues from all charter flights.

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.

TSB-A-08(20)S
Sales Tax
April 28, 2008

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)(3) of the Tax Law imposes sales tax on the receipts from every sale, except for resale, of the following services, in part:

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; . . .

Section 1115(a)(21) of the Tax Law provides an exemption from the sales tax imposed by section 1105(a) of the Tax Law and from the compensating use tax imposed under section 1110 for:

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.

Section 1115(dd)(1) of the Tax Law provides:

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.

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

Technical Services 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;

TSB-A-08(20)S
Sales Tax
April 28, 2008

- 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 discussed in this memorandum 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 is a Texas-based LLC that is leasing an aircraft from Parent, which is a New York-based Delaware partnership, and Wells Fargo National Association as trustee for Parent. Prior to taking possession of the aircraft, Petitioner entered into an aircraft Management Agreement in which an aircraft management company (the Manager) agreed to provide management, insurance, pilots and other services required to support the operation of the aircraft. In addition, Petitioner entered into a Charter Services Agreement with a licensed air carrier that will market and operate the aircraft for charter services. The aircraft will operate under Part 135 of the Federal Aviation Regulations ("FAR") 75% of the time providing charter aircraft services. For the remaining 25% of the time, Petitioner will operate under FAR Part 91 providing flight services to Texas LP, Parent, and Parent's affiliated companies.

The taxability of the receipts for the lease of the aircraft will depend on whether the aircraft qualifies for the exemption for commercial aircraft as provided in section 1115(a)(21) of the Tax Law. If the primary use of the aircraft is transporting customers for compensation, where the compensation received reflects the cost of operating the aircraft, the aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce for purposes of section 1115(a)(21). See section 1101(b)(17) of the Tax Law.

Petitioner states that the aircraft will be used 25% of the time to provide non-charter air transportation services to Texas LP, Parent, and affiliated companies and used 75% of the time to provide charter air transportation services to the public and individual owners of Parent. Charter flight services to the public will be billed at rates equal to or greater than the relevant market rate, and services to individual owners of Parent will be billed at 92.5% of the rate charged to the public. Assuming that Petitioner is providing the charter air services with Charter Company acting as Petitioner's agent under the Charter Agreement, and provided that Petitioner's charges to the individual owners of Parent reasonably reflect the cost of operating and maintaining the aircraft, the aircraft will be considered as being used in the transportation of persons for

TSB-A-08(20)S
Sales Tax
April 28, 2008

compensation. Since at least 50% of Petitioner's use of the aircraft is in the transportation of persons for compensation, the aircraft qualifies as a commercial aircraft primarily engaged in interstate, intrastate, or foreign commerce. Therefore, the receipts paid by Petitioner for the lease of the aircraft qualify for exemption from sales and use tax as the purchase of a commercial aircraft pursuant to section 1115(a)(21) of the Tax Law. (See *Ernst & Young, LLP*, Adv Op Comm T & F, January 28, 2004, TSB-A-04(2)S; *Cleveland Browns Transportation LLC*, Adv Op Comm T & F, March 6, 2006, TSB-A-06(8)S).

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.)

It appears from the facts in this Opinion that Petitioner, and Charter Company acting on behalf of Petitioner, retain complete dominion and control over the aircraft. Therefore, it is concluded that Petitioner is providing a transportation service rather than renting the aircraft. Charges for transportation services are not subject to sales or use tax (See *National Express Company*, Adv Op Comm T& F, July 10, 2002, TSB-A-02(22)S).

However, whether Petitioner is providing a transportation service or is renting tangible personal property is determined in accordance with the facts and circumstances of the particular transaction and the provisions of any relevant agreements. Were some of the transactions described in this Opinion determined to be rentals by Petitioner of tangible personal property, Petitioner's lease payments for the aircraft might not qualify for the exemption for commercial aircraft provided in section 1115(a)(21) of the Tax Law. In such case, any use or rental of the aircraft by Petitioner, its affiliates, or others might be subject to sales and use tax to the extent that such use or rental occurred in New York.

The analysis in this Opinion assumes Petitioner, Texas LP, and Parent and its affiliates are separate legal entities. However, if the activities of Petitioner were so dominated and controlled by Texas LP, Parent, or its affiliates or if their activities were so commingled that they would be considered to be operating as alter egos of 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, Texas LP, and Parent and its affiliates were to be disregarded as separate legal entities for purposes of sales and use tax, the aircraft would not be considered to be a commercial aircraft but rather would be purchased primarily for self use by the related entities. Under such circumstances, the commercial aircraft exemption would not apply to Petitioner's

TSB-A-08(20)S
Sales Tax
April 28, 2008

purchase or use of the aircraft and equipment for the aircraft. However, repair and maintenance services performed on such aircraft by third-party service providers could be purchased tax exempt (through November 30, 2009) pursuant to the provisions of section 1115(dd) of the Tax Law.

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/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.