

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

TSB-A-08(57)S  
Sales Tax  
October 1, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080430B

Petitioner, Romex Examinations, Inc., asks the following questions: (1) whether the sales and compensating use tax applies to petitioner's purchase of a new aircraft and its subsequent lease of the aircraft to an affiliated company under the circumstances described below; (2) whether the aircraft would qualify for the commercial aircraft exemption in Tax Law section 1115(a)(21) after the proposed re-structuring described below; and (3) what costs it would need to take into account in determining the charge for its transportation service to satisfy the "for hire" requirement in the definition of "commercial aircraft" in Tax Law section 1101(b)(17).

We conclude that, under the facts here, (1) the sales and use tax does not apply to either petitioner's purchase of the aircraft or its subsequent leasing of the aircraft to its affiliate, because there was no sale or use in New York; (2) after the proposed restructuring, the aircraft would qualify for the commercial aircraft exemption, assuming petitioner's charges to its affiliate for its transportation service reasonably reflect its costs of operating the aircraft and it retains dominion and control of the aircraft at all times; and (3) in order to satisfy the "for hire" requirement, petitioner must take into account all the expenses of operating the aircraft, including the cost of the aircraft, in determining the charges for its transportation service.

**Facts**

**A. Purchase and Actual Use of the Aircraft**

A corporation (corporation X) owns all the issued and outstanding stock and is the parent company of both petitioner and another corporation (Affiliate). In March, 2008, petitioner purchased an aircraft. Delivery of the Aircraft occurred in the State of Connecticut. At the time of delivery, petitioner entered into a trust arrangement with a bank, under which nominal title to the Aircraft was put into a trust and the trust and petitioner entered into an operating agreement that authorized petitioner to use, possess, and lease the aircraft to third-parties. To date, petitioner has not operated the Aircraft. Rather, immediately upon accepting delivery of the Aircraft, petitioner leased the Aircraft to Affiliate while the Aircraft was still in the State of Connecticut. The lease of the Aircraft from petitioner to Affiliate is of a type commonly referred to in the aviation business industry as a "dry lease," meaning that the Aircraft is leased without a flight crew to operate the Aircraft, and that the lessee is responsible for providing its own flight crew and for maintaining operational control of the Aircraft. Affiliate has separately contracted with an unrelated third-party aircraft management company for the provision of executive aircraft management and flight crew services. The Aircraft is currently based and hangared in the State of Connecticut. Affiliate operates the Aircraft solely for its own business purposes. At no time since petitioner accepted delivery of the Aircraft and leased the Aircraft to Affiliate has the Aircraft been operated within the State of New York. Further, petitioner has no intention of operating the Aircraft within the State of New York during the term of the dry lease.

## B. Proposed Restructuring

At some indeterminate future date, petitioner wants to restructure operations of the Aircraft as follows:

- (1) the lease of the Aircraft to Affiliate would be terminated, and petitioner would commence operating the Aircraft itself;
- (2) Petitioner would relocate the Aircraft to a hangar facility in the State of New York;
- (3) Petitioner would contract with a third party for the provision of executive aircraft management and flight crew services;
- (4) Petitioner would operate the Aircraft *less than 50% of the flight hours* for its own business purposes;
- (5) Petitioner would operate the Aircraft primarily (*i.e., more than 50% of the flight hours*) to provide intrastate, interstate and foreign air transportation services to Affiliate; and
- (6) Petitioner would charge Affiliate for those air transportation services. The amount charged would be based on a formula that apportions the costs of operating the Aircraft to petitioner and Affiliate based on the respective percentages of use of the Aircraft (i) for petitioner's own business purposes, and (ii) to provide intrastate, interstate and foreign air transportation services to Affiliate.

### Analysis

The first question asked by petitioner is whether its purchase and subsequent lease of the Aircraft to Affiliate is subject to sales and use tax in New York. The sales and use tax is a destination tax, and the incidence of tax and the tax rate depends on the point at which possession is transferred (Sales Tax Reg. sec. 525.2[a][3]). Here, because the Aircraft was delivered out-of-state, no sales tax is due. Moreover, because the Aircraft has not been used in New York, there is no use tax due for that aircraft (Tax Law section 1110; Sales Tax Reg. 531.1[a][1]).

The second question concerns the sales and use tax consequences of the restructuring plan discussed above. Under that plan, petitioner would terminate its lease with Affiliate, relocate the Aircraft to a hangar in New York, and use the Aircraft more than 50% of the time to provide air transportation services to Affiliate for hire, while also using it for its own business purposes. Sales tax is imposed on the sale of tangible personal property delivered in New York and use tax is imposed on the use of tangible personal property purchased out-of-state and used by the purchaser in the State (Tax Law sections 1105[a]; 1110[a]). Tax Law section 1115(a)(21) exempts from sales and use tax “[c]ommercial aircraft primarily engaged in intrastate, interstate or foreign commerce.” The Tax Law defines “commercial aircraft” as “[a]ircraft 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” (Tax Law section 1101[b][17]). The Department has interpreted the “for hire” requirement to mean that, when a transportation service is provided to a related company, the charges for the service must reflect the costs of operating the aircraft (see, e.g., Pasquale & Bowers, Advisory Opinion, August 1, 1996, TSB-A-96(49)S; CB Applications, LLC, Advisory Opinion, February 1, 2000, TSB-A-00(6)S; Philip Morris Management Corp, Advisory Opinion, October 11, 2000, TSB-A-00(38)S). Because, upon its entry into New York, over 50% of the aircraft's use will be devoted to providing transportation services, for compensation, to Affiliate, and the compensation will reasonably reflect the cost of operating the Aircraft, the Aircraft will be considered a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, thus qualifying for the exemption in section 1115(a)(21) of the Tax Law. The conclusion that petitioner will be using the Aircraft to provide transportation services to Affiliate assumes that petitioner will maintain dominion and control over the Aircraft at all times.

Finally, petitioner asks what expenses it must take into account to ensure that its charges reasonably reflect the costs of operating the Aircraft, thereby satisfying the “for hire” requirement in the definition of “commercial aircraft” in Tax Law section 1101(b)(17). The charges should reflect all expenses that petitioner incurs in order to provide those services, including (1) direct costs (e.g., fuel costs, landing fees, etc.) of operating the Aircraft to provide transportation services to Affiliate, and (2) a pro-rata portion of its indirect variable costs (e.g., maintenance costs) and indirect fixed costs (e.g., the cost of the Aircraft, hangar rent, insurance, pilot salaries, and aircraft management fees) (see Philip Morris Management Corp, Advisory Opinion, supra).

DATED: October 1, 2008

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Jonathan Pessen  
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Office of 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.