

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(30)S
Sales Tax
August 3, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000724A

On July 24, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Citiflight, Inc., Newark International Airport, Hangar 15, Newark, NJ 07114. Petitioner, Citiflight, Inc., submitted additional information with respect to the Petition on July 26, 2000.

The issues raised by Petitioner are:

(1) Whether, under the circumstances described below, its purchases of new aircraft and its use of existing aircraft brought into New York State are exempt from sales and compensating use taxes under Section 1115(a)(21) of the Tax Law.

(2) Whether, under the circumstances described below, the compensation paid to Petitioner by related companies constitutes payment for air transportation services which are exempt from sales and compensating use taxes.

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

Petitioner was incorporated in the State of Delaware in 1981. Petitioner is a first-tier subsidiary of Citibank N.A., which is a subsidiary of Citigroup Inc. Petitioner's principal place of business and only office is located at Hangar 15, Newark International Airport, Newark, New Jersey. Petitioner has approximately 42 employees consisting of airline transport rated pilots, licensed aircraft and power plant technicians, certified dispatchers, flight attendants, and administrative personnel. The employees work at Hangar 15, where Petitioner owns and operates several aircraft. The aircraft are used for providing air transportation services to employees, customers, and potential customers of related companies. Title to the aircraft is held by Petitioner, and Petitioner is the sole owner of the aircraft. None of the related companies has any ownership interests in any of the aircraft. Petitioner is considering relocating its New Jersey air transportation operations to Westchester County, New York.

Petitioner is not required to obtain a FAR 135 Air Carrier Operating Certificate under Part 135 of the Federal Aviation Administration ("FAA") Regulations. Petitioner exercises complete possession, dominion, and control over the aircraft. Petitioner determines where and when the aircraft fly, and is responsible for all maintenance and costs associated with the aircraft operations. Petitioner transports individuals employed by related companies, as well as customers and potential customers of such related companies, on intrastate, interstate, and international flights. The related companies compensate Petitioner for the flights. The compensation charged by Petitioner is based

on the operating costs of the aircraft; and the related companies pay these costs based on their usage of the aircraft. Over ninety percent of the use of Petitioner's aircraft will be devoted to transporting employees, customers, and potential customers of related companies, for a fee. Petitioner will provide its air transportation services to these affiliates pursuant to a written transportation service agreement.

Petitioner is a separate and distinct legal entity that operates independently of the related companies. It has \$93 million in assets and \$75 million in equity capital. Petitioner leases office space and an aircraft hangar at Newark airport from an unrelated company. Rent for the office space and hangar is paid by Petitioner. Petitioner maintains its own bank accounts from which funds are used to pay the operating expenses of its aircraft operations. Petitioner is part of a consolidated group for federal income tax purposes. It files separate income tax returns in New Jersey and payroll tax returns in New Jersey, New York, Pennsylvania and Connecticut for its resident pilots. Petitioner has its own employees, officers and board of directors. Petitioner operates under its own name and holds itself out to the public as a separate legal entity. It has its own business relationships and lines of credit with vendors, who are unique to Petitioner's operations. Petitioner plans to purchase two new aircraft by trading in two existing aircraft and paying cash for the costs in excess of the trade-ins. The new aircraft will be purchased out of Petitioner's own surplus and capital funds.

Applicable Authority

Section 1101(b) of the Tax Law states, 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:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(7) Use. The exercise of any right or power over tangible personal property . . . by the purchaser thereof, and includes, but is not limited to, the receiving, storage

or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. . . .

* * *

(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.

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) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1115(a)(21) of the Tax Law exempts from the sales tax imposed by Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

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 526.7(e)(4) of the Sales and Use Tax Regulations provides, in part:

Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

TSB-A-00(30)S
Sales Tax
August 3, 2000

- (ii) the right to custody or possession of the tangible personal property;
- (iii) the right to use, or control or direct the use of, tangible personal property.

Opinion

Petitioner owns and operates several aircraft used to transport, for compensation, employees, customers and potential customers of related companies on intrastate, interstate and international flights. Under FAA regulations, Petitioner is not required to obtain an air taxi/commercial operator operating certificate. Petitioner is a separate and distinct legal entity operating independently of the related companies, and is the sole owner of the aircraft. The compensation charged to the related companies by Petitioner is based on the operating costs of the aircraft and is pursuant to a written transportation service agreement. Over ninety percent of the use of Petitioner's aircraft is devoted to its air transportation services.

With respect to Issue (1), the exemption for commercial aircraft is not limited to aircraft owned or purchased by commercial airlines (see Matter of Aero Instruments & Avionics, Inc., Dec Tax App Trib, October 5, 1995, TSB-D-95(43)S). Although aircraft used by airlines or by air taxi/commercial operators holding FAA operating certificates generally qualify as commercial aircraft for purposes of sales and use tax exemption, the fact that Petitioner does not fall within these categories does not preclude its aircraft from qualifying as commercial aircraft exempt from New York State and local sales and use taxes. However, use of the aircraft by or on behalf of other entities which are not separate legal entities for sales tax purposes would be considered self use by the related companies and the aircraft at issue would not qualify for exemption as commercial aircraft. See Pasquale & Bowers, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S.

Petitioner represents that it and the related companies are separate and distinct legal entities. It operates under its own name and holds itself out to the public as a separate legal entity. Petitioner operates independently of the related companies, with aircraft that are owned, registered to and operated by Petitioner under its own name. None of the related companies holds any ownership interests in the aircraft. Petitioner has its own assets; leases its own office space and aircraft hangar; pays its own rent; maintains its own bank account and funds its own operating expenses. It has its own employees including pilots, dispatchers and flight attendants, its own officers and its own board of directors. The totality of these circumstances establishes the character of Petitioner as a validly existing corporation, separate and distinct from its parent and related companies (see Spencer Gifts, Inc., Adv Op St Tx Comm, September 18, 1986, TSB-A-86(37)S). Therefore, Petitioner's aircraft are not considered to be purchased for self use by the related companies and will be deemed to have been purchased to provide transportation services for compensation.

Commercial aircraft is regarded as primarily engaged in qualifying commerce if over fifty percent of its use is in such activity (see Technical Services Bureau Memorandum, Tax Law Defines

TSB-A-00(30)S
Sales Tax
August 3, 2000

Commercial Vessels and Commercial Aircraft, November 7, 1996, TSB-M-96(14)S). Accordingly, since over fifty percent of the use of Petitioner's aircraft is devoted to transporting employees, customers, and potential customers for compensation, and since the compensation reflects the costs of operating the aircraft, such aircraft are considered commercial aircraft within the meaning of Section 1115(a)(21) of the Tax Law; and the purchase of new aircraft and the use of existing aircraft by Petitioner are exempt from sales and compensating use taxes (see CB Applications, LLC, Adv Op Comm T&F, February 1, 2000, TSB-A-00(6)S; Pasquale & Bowers, supra). Petitioner must render to its supplier, within 90 days of the date of sale, a properly completed Form ST-121, *Exempt Use Certificate*, when purchasing new or used commercial aircraft. See Section 1132(c) of the Tax Law.

With regard to Issue (2), whether payments to Petitioner by the related companies constitute payments for the purchase of an exempt air transportation service, as opposed to the taxable rental of the aircraft, turns upon the question of dominion and control. If Petitioner retains complete dominion and control over the aircraft, the transactions are considered to be the provision of a transportation service and Petitioner's charges to the related companies to transport their employees, customers, and prospective customers would not be subject to sales or use tax (see The Gap, Inc., Adv Op Comm T&F, January 28, 2000, TSB-A-00(3)S; Pasquale & Bowers, supra). In this case, Petitioner employs the personnel who maintain and operate the aircraft, including pilots, aircraft and power plant technicians and flight attendants. Petitioner determines where and when the aircraft fly, and is responsible for all maintenance and costs associated with operation of the aircraft. Therefore, Petitioner does not relinquish dominion and control of the aircraft within the meaning of Section 526.7(e) of the Sales and Use Tax Regulations; and what is being furnished to the related companies is a nontaxable transportation service and not a taxable purchase or rental of tangible personal property pursuant to Sections 1101(b)(5) and 1105(a) of the Tax Law (see The Gap, Inc., supra).

DATED: August 3, 2000

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

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