

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

TSB-A-08(43)S
Sales Tax
October 2, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070618B

On June 18, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Invemed Securities, Inc., 375 Park Avenue, Suite 2205, New York, New York 10152. Petitioner, Invemed Securities, Inc., provided additional information pertaining to the Petition on February 28, 2008.

The issues raised by Petitioner are:

1. Whether its lease of an aircraft is exempt from sales tax as the lease of a commercial aircraft.
2. Whether the transfer of an aircraft in connection with a corporate merger is excluded from the definition of retail sale for sales tax purposes.
3. Whether use of the aircraft by the surviving entity as described below qualifies the aircraft as a commercial aircraft for sales tax purposes.

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

Petitioner is a corporation organized and existing under the laws of the state of New York.

Petitioner owns 100% of the issued and outstanding membership interests in Invemed Aviation Services LLC (“Aviation”), a New York limited liability company.

On or about May 14, 2007, Aviation acquired a Bombardier Aerospace Global 5000 (the “Aircraft”), and accepted delivery of the Aircraft at Bradley International Airport in Windsor Locks, Connecticut. The Aircraft was subsequently flown from Bradley International Airport into New York, and thereafter has been permanently hangared and based in New York.

Aviation does not operate the Aircraft. Rather, Aviation acquired the Aircraft solely for the purpose of holding the Aircraft for lease to, and operation by, other parties. Consistent with the foregoing, Aviation initially entered into an agreement with Richmor Aviation (the “Richmor Agreement”), effective from the date Aviation acquired the Aircraft until June 30, 2007, pursuant to which Richmor operated the Aircraft exclusively, or nearly so, in on-demand intrastate, interstate, and foreign charter operations for hire under Part 135 of the Federal Aviation Regulations (FAR).

Immediately upon termination of the Richmor Agreement, and pursuant to the terms of a lease between Aviation and Petitioner dated as of the date of the termination of the Richmor Agreement, Aviation leased the Aircraft to Petitioner. Pursuant to this lease, Petitioner currently remits to Aviation on a monthly basis rent in the amount of \$291,666.67 per month (i.e., \$3.5 million per year).

Petitioner operates the Aircraft under Part 91 of FAR and utilizes the Aircraft primarily to provide intrastate, interstate, and foreign air transportation services to its wholly-owned affiliate, Invemed Associates LLC, a New York limited liability company (“Associates”).

Pursuant to a Transportation Services Agreement between Petitioner and Associates, Associates pays Petitioner \$8,000.00 per flight hour for the transportation provided by Petitioner to Associates. Petitioner estimates that it will operate the Aircraft approximately 250 flight hours per year in connection with the transportation services it provides to Associates. Petitioner also estimates that it will operate the Aircraft a limited number of flight hours each year in non-revenue operations to transport its own personnel and property.

Petitioner asserts that the hourly rate charged to Associates is comparable to the rates charged by commercial charter operators in the New York market for charters of similar aircraft, and reasonably reflects Petitioner's direct and indirect costs of operating the Aircraft. However, the hourly rate charged to Associates does not cover both the operating costs and the rent currently payable by Petitioner to Aviation.

Prospectively, Petitioner and Aviation intend to cause Aviation to merge with and into Petitioner, such that Aviation will cease to exist as a separate entity, and Petitioner will remain as the surviving entity. As a result of such merger, Petitioner will acquire title to the Aircraft as the successor in interest to Aviation, and the requirement to pay rent under Petitioner's lease will terminate. By eliminating the lease payments under its lease, the hourly rate charged to Associates by Petitioner for air transportation services will equal or exceed Petitioner's direct and indirect costs of operating the Aircraft.

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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, . . .

* * *

(iv) The term retail sale does not include:

(A) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction.

* * *

(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.

* * *

(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 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . whether or not the services are performed directly . . . or by any other means, and 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 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 . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . . (D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described in paragraphs (2), (3) and (7) of subdivision (c) of section eleven hundred five of this part have been performed, . . .

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(21) 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 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(d) Exclusions relating to corporate and partnership transactions. (1)The following transfers of property are not retail sales:

(i) The transfer of property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction.

Opinion

Issue 1

Whether Petitioner's rental of the Aircraft from Aviation is exempt from sales and use tax pursuant to section 1115(a)(21) of the Tax Law depends, in this case, on whether the Aircraft is a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce. The term "commercial aircraft" includes aircraft used primarily to transport persons or property for hire. See section 1101(b)(17) of the Tax Law. An aircraft is primarily engaged in qualifying commerce if at least 50% of its use is in transportation of persons or property for hire. See Technical Services Bureau Memorandum entitled *Tax Law Defines Commercial Vessels and Commercial Aircraft*, November 7, 1996, TSB-M-96(14)S. Petitioner will use the Aircraft approximately 250 hours per year to provide transportation services for compensation that it asserts is comparable to the rates charged by commercial charter operators in the New York market for charters of similar aircraft, and is estimated to reasonably reflect Petitioner's direct and indirect costs of operating the Aircraft. Petitioner estimates that it will use the Aircraft for a limited number of flight hours each year for its own use. Based on these facts, and assuming the Aircraft is used primarily to provide transportation services for compensation, 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 *Pasquale & Bowers*, Adv Op Comm T&F, August 1, 1996, TSB-A-96(49)S; *CB Applications, LLC*, Adv Op Comm T&F, February 1, 2000, TSB A 00(6)S; *Philip Morris Management Corp*, Adv Op Comm T&F, October 11, 2000, TSB A-00(38)S. Therefore, based on the above facts and assumptions, Petitioner's payments for the rental of the Aircraft in New York State are exempt from the sales tax imposed under section 1105(a) of the Tax Law and the compensating use tax imposed under section 1110 of the Tax Law. Petitioner should provide Aviation with a properly completed *Exempt Use Certificate* (Form ST-121) to avail itself of the exemption provided for commercial aircraft.

The above analysis presumes treatment of Petitioner as a separate legal entity. However, if the activities of Petitioner were so dominated and controlled by the parent or affiliates or 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 *Cleveland Browns*

Transportation LLC, Adv Op Comm T & F, March 6, 2006, TSB-A-06(8)S; *Harfred Operating Corporation*, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S.

Issue 2

Petitioner proposes to merge with Aviation, such that Aviation will cease to exist as a separate entity and Petitioner will remain as the surviving entity. As a result of such merger, Petitioner will acquire title to the Aircraft as the successor in interest to Aviation. If the transfer of the Aircraft from Aviation to Petitioner occurred solely in consideration for the issuance of Petitioner's stock, pursuant to a merger effected under the law of New York or any other jurisdiction, such transaction would not be a retail sale as contemplated under section 1101(b)(4) of the Tax Law, and if such were the case, the merger transaction would not be subject to sales tax.

Issue 3

Petitioner, as the surviving entity after the merger, is in possession of property that was purchased for use in leasing and rental to others. The Aircraft was purchased and used by Aviation for resale. The subsequent use of such property by Petitioner (as the surviving entity after the merger) other than for resale as such to other persons could result in a liability on Petitioner's behalf for use tax. However, if Petitioner's Aircraft qualifies as a commercial aircraft for sales tax purposes and Petitioner, as the surviving entity after the merger, continues to use the Aircraft primarily to provide transportation services for compensation as described in Issue 1, the Aircraft will continue to qualify for exemption from tax under section 1115(a)(21) of the Tax Law as a commercial aircraft.

DATED: October 2, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

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.