

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

TSB-A-99(20)S  
Sales Tax  
April 8, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981130A

On November 30, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from John J. Bischoff, 15 Highlander Drive, Scotch Plains, New Jersey 07076.

The issue raised by Petitioner, John J. Bischoff, is whether the lease of an aircraft under the following circumstances is subject to sales and compensating use tax.

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

Company A, an LLC, owns a jet aircraft and enters into a three year renewable lease for fixed monthly lease payments with Company B. Under the lease, Company B is responsible for all applicable taxes, insurance, maintenance and other aspects of operating the aircraft.

Company B, as agent for Company C who holds an Air Carrier Operating Certificate under Part 135 of the Federal Aviation Administration (FAA) regulations, enters into an Aircraft Charter Agreement for three years with Company D for the provision of air transportation to Company D. The Charter Agreement provides that with respect to the parties to the agreement, i.e., Company C and Company D, Company C will have exclusive control over the aircraft. Company B will operate the aircraft in accordance with FAA regulations as agent for Company C. The Charter Agreement also provides that the aircraft is to be used exclusively to provide transportation for Company D.

The charter fee is computed as the total of the following: monthly payments to cover estimated usage, insurance, rental payment to Company A and quarterly adjustments to make total payments equal to direct and indirect costs incurred by Company B to maintain and fly the aircraft.

Company B is not related to any of the other parties to the agreements except as agent for Company C. Company D owns a large part of Company A and the two entities are otherwise related through common ownership.

**Applicable Law and Regulations**

Section 1101(b)(17) of the Tax Law defines the term "commercial aircraft" as:

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

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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(c)(1) of the Sales and Use Tax Regulations provides:

Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to resell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer.

### **Opinion**

Petitioner has presented a transaction in which Company A will lease its aircraft to Company B for a three year period for fixed monthly payments. Company B will then act as an agent for Company C who holds an Air Carrier Operating Certificate. Company C will then enter into a three year Aircraft Charter Agreement with Company D. Company D will have the exclusive use of the aircraft. The charter payments are equal to direct and indirect costs incurred by Company B to maintain and fly the aircraft.

Where over fifty percent of an aircraft's use is devoted to transporting employees, customers and potential customers for compensation, and the compensation reasonably reflects the costs of operating the aircraft, such 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. In this case, the aircraft leased by Company B will be devoted entirely to providing transportation for compensation to Company D under Company C's agreement with Company D. The compensation will reflect Company B's costs of operating the aircraft. The lease by Company B of the aircraft from Company A for use exclusively in providing charter service to Company D, therefore, qualifies for the exemption provided by Section 1115(a)(21) of the Tax Law. It is immaterial that the aircraft is for the exclusive use of one customer.

DATED: April 8, 1999

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

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