

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

TSB-A-00(38)S
Sales Tax
October 11, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000525B

On May 25, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Philip Morris Management Corp., 120 Park Ave., New York, New York 10017-5592.

The issue raised by Petitioner, Philip Morris Management Corp., is whether its purchase and use of an aircraft, as described below, are exempt from sales and compensating use tax pursuant to Section 1115(a)(21) of the Tax Law.

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

Petitioner, a wholly owned subsidiary of Philip Morris Companies Inc. (“MO”), entered into a contract (the “Contract”) with the Gulfstream Aerospace Corporation (“GAS”) on November 16, 1999 to purchase a new Gulfstream IV aircraft for \$30,497,000. Under the terms of the Contract, GAS will deliver the aircraft to Petitioner in Bradley Field, Windsor Lock, Connecticut. It is expected that title to the aircraft will pass to Petitioner in Connecticut in the fourth quarter of 2000.

The Contract provides for a series of progress payments and permits Petitioner to render an old Gulfstream IV in exchange as follows. Upon execution of the Contract on November 16, 1999, Petitioner paid \$12,227,000; on December 31, 1999, Petitioner paid \$7,000,000; and on preliminary acceptance of the new aircraft in February 2000, Petitioner paid \$1,770,000. Petitioner will pay \$7,000,000 on June 30, 2000 and will make a final payment of \$2,500,000 plus the value of any work change requests upon delivery of the completed Gulfstream IV aircraft. Petitioner elected in February, 2000, to trade its old aircraft, and will transfer its old aircraft to GAS no later than 30 days after the final acceptance of the new aircraft for a credit of \$19,000,000. Since this credit exceeds the remaining balance of the payments required to be paid by Petitioner, GAS has agreed to refund to Petitioner the difference between that agreed \$19,000,000 credit and the remaining balance owed by Petitioner.

After it takes title to the new Gulfstream IV, Petitioner expects that it will hangar this aircraft at the White Plains airport, where it will be available for use predominantly by employees of affiliates of Petitioner, and perhaps customers, suppliers and other persons transacting business with such affiliates. All of these affiliates are subsidiaries of MO. Petitioner’s corporate policy is to charge the costs of operating the aircraft to its affiliates that use the aircraft.

Use of Airplane

Petitioner is a service company that provides aircraft services to its parent, MO, and to MO’s subsidiaries and affiliates. Petitioner also owns two other aircraft for which it has recently paid New

TSB-A-00(38)S
Sales Tax
October 11, 2000

York sales and use tax. Petitioner intends to operate the new Gulfstream IV aircraft in a manner similar to its operation of its old aircraft. Thus it plans to continue operating under Part 91 of the Federal Aviation Administration (“FAA”) Regulations, and will be responsible for all flight services, scheduling, fuel, maintenance, pilots and flight staff for the new aircraft, as it was for its old aircraft. Petitioner will retain complete dominion and control over the new aircraft, including operations and maintenance. It has and will continue to maintain its own staff, and is and will be responsible for its own finances and administration. Petitioner has operated all of its other aircraft in a similar manner.

Petitioner’s corporate policy encourages all of MO’s eligible employees, including employees of its affiliates, to use its corporate aircraft in lieu of commercial flights, where possible, and charges the user’s corporate employer an intercompany charge based on Internal Revenue Service (“IRS”) prescribed Standard Industry Fare Level (“SIFL”) rates. The SIFL charge is also used for budgetary reasons to quantify how much each affiliate’s employees have consumed of their annual travel budget allowance. Virtually all of the use of Petitioner’s aircraft is charged out in this manner, and Petitioner expects to maintain this policy, or a substantially similar policy with regard to the new Gulfstream IV aircraft. In the past, an insubstantial portion of the use of Petitioner’s old aircraft was made by former employees of MO; in addition, elected officials have used the old aircraft and have paid the appropriate charges as mandated by the Federal Election Laws. Similar usage of the new aircraft may occur in the future but it is expected to be minimal.

At the end of the year, Petitioner charges out all of its expenses relating to the aircraft it owns, including both fixed and variable costs (other than the SIFL charge described above), to its affiliates. The charge is allocated between the affiliates in proportion to the flight hours that each affiliate’s employees used the aircraft. This formula has resulted in an intercorporate allocation of almost all of the aircraft’s costs as measured by flight hours and this policy is expected to be continued with regard to the cost of the new Gulfstream IV aircraft.

Applicable Law

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:

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.

TSB-A-00(38)S
Sales Tax
October 11, 2000

Opinion

Where over fifty percent of the use of Petitioner's new Gulfstream IV aircraft is devoted to transporting employees, customers and potential customers of related companies for compensation as described above, and the compensation reasonably reflects the cost of operating the aircraft, 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. The purchase and use of this aircraft in such case will be exempt from New York State and local sales and compensating use taxes.

Petitioner represents that it will retain complete dominion and control over the operations and maintenance of the new Gulfstream IV aircraft. Petitioner will be responsible for all flight services, scheduling, fuel, pilots, and flight staff for the new aircraft. Based on this representation, the charges to the related companies for use of the new aircraft will be exempt from tax as charges for the provision of a nontaxable transportation service. See Pasquale & Bowers, supra.

DATED: October 11, 2000

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

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