

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

TSB-A-00(6)S
Sales Tax
February 1, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990701A

On July 1, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from CB Applications, LLC, c/o Keith Rollins, Ernst & Young, LLP, 125 Chubb Avenue, Lyndhurst, N.J. 07071.

The issue raised by Petitioner, CB Applications, LLC, 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.

Petitioner owns a jet aircraft and enters into a three year renewable lease for fixed monthly lease payments with Jet Aviation Business Jets, Inc. (Jets). Under the lease, Jets is responsible for all applicable taxes, insurance, maintenance and other aspects of operating the aircraft.

Jets, as agent for New World Jet Corporation (NWJ) 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 Ernst & Young, LLP (E & Y) for the provision of air transportation to E & Y. The Charter Agreement provides that with respect to the parties to the agreement, i.e., NWJ and E & Y, NWJ will have exclusive control over the aircraft. Jets will operate the aircraft in accordance with FAA regulations as agent for NWJ. The Charter Agreement also provides that the aircraft is to be used exclusively to provide transportation for E & Y.

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

Jets is not related to any of the other parties to the agreements except as agent for NWJ. E & Y owns a large part of Petitioner 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:

TSB-A-00(6)S
Sales Tax
February 1, 2000

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 will lease its aircraft to Jets for a three year period for fixed monthly payments. Jets will then act as an agent for NWJ who holds an Air Carrier Operating Certificate. NWJ will then enter into a three year Aircraft Charter Agreement with E & Y. E & Y will have the exclusive use of the aircraft. The charter payments are equal to direct and indirect costs incurred by Jets 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 Jets will be devoted entirely to providing transportation for compensation to E & Y under NWJ's agreement with E & Y. The compensation will reflect Jets' costs of operating the aircraft. The lease by Jets of the aircraft from Petitioner for use exclusively in providing charter service to E & Y, 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. See John J. Bischoff, Adv Op Comm T & F, April 8, 1999, TSB-A-99(20)S.

DATED: February 1, 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.