**New York State Department of Taxation and Finance**
**Office of Counsel**
**Advisory Opinion Unit**

TSB-A-11(1)S
Sales Tax
December 20, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S100922B

Petitioner [redacted] asks whether Part N-1 of Chapter 57 of the Laws of 2009, which narrowed the nonresident and commercial aircraft exemptions, would apply to an aircraft that was purchased and delivered out-of-state prior to Part N-1's effective date but first used in the State after the effective date. We conclude that Part N-1 would not apply to the aircraft and that the pre-amendment versions of both exemptions would apply to exempt the aircraft from use tax.

**Facts**

Petitioner acquired an aircraft (the "Aircraft") outside New York in State X in 2003. Since acquisition, the Aircraft has been at all times hangared and based in State X. At no time prior to or since the acquisition of the Aircraft has Petitioner engaged in any manner in carrying on in New York any employment, trade, business or profession. Petitioner is wholly (100%) owned by a limited liability company organized and at all times based in State X ("Parent"). At the time the Aircraft was acquired, the Petitioner entered into a charter services agreement with a United States Federal Aviation Administration licensed air carrier (the "Charter Company") to market and operate the Aircraft in charter service under Part 135 of the Federal Aviation Regulations ("FAR"). Since acquisition, the Aircraft has been operated more than 50% of the time providing charter services for hire to third-parties and to a related party ("Subsidiary"). For the balance of the operating time, which represents less than 50% of the flight hours, the Aircraft has been operated under FAR Part 91 by Petitioner and by Subsidiary (as lessee from Petitioner), respectively.

The compensation received by Petitioner for all charter flights reasonably reflects the cost of operating the Aircraft. On all charter flights, the Charter Company has retained complete possession, command and control of the Aircraft. Among the passengers on Subsidiary charter flights has been an individual (the "Passenger") who is a senior officer of Petitioner, a controlling owner and senior officer of Parent and (indirectly) a controlling owner and senior officer of Subsidiary. Since the time the Aircraft was acquired (2003), Passenger has been a resident of State X. From the date the Aircraft was acquired through December 15, 2005, the Passenger held greater than a 5% interest in profits, but no interest in capital (other than, from time to time, undistributed profits), in several partnerships (each an "Affiliated Person"), which were residents of New York at the time the Aircraft was acquired by Petitioner. As an owner of a mere profits interest, the Passenger did not have the right to sell or transfer the interest, would receive no recurring interest in the profits once his employment from the company was terminated and would receive no capitalized value upon termination.

Petitioner is considering relocating the Aircraft to New York, where the Aircraft will be hangared and based. Upon basing the Aircraft in New York, Petitioner is considering engaging the Aircraft exclusively in for-hire charter services for the benefit of third-parties and Subsidiary. The management/charter company receives no commission for amounts paid by Petitioner or Subsidiary for Part 135 flights. Petitioner would enter into a Management and Pilot Services Agreement with the

New York-based management/charter company, pursuant to which the management/charter company would be authorized and directed by the Petitioner to conduct FAR Part 135 operations for (i) the Petitioner, (ii) the Subsidiary (i.e., an affiliated entity) and (iii) unrelated third-parties from the public. In compliance with Federal Aviation Regulations, only the management/charter company would legally be permitted to have "operational control" of Part 135 flights. This is because only the management/charter company would have a FAA-granted air carrier certificate authorizing such operations. In the event a flight is operated under FAR Part 91 by Petitioner, who is the owner, the Petitioner would have operational control.

The Management and Pilot Services Agreement would not include a lease of the aircraft to the management/charter company. Nor would there be a separate lease. Under FAR Part 135, an owner of an aircraft may allow the aircraft to be engaged in Part 135 operations without leasing the aircraft to the Part 135 air carrier. Possession of the aircraft would be transferred from time to time (i.e., for the duration of each Part 135 flight) to the management/charter company under a bailment and agency arrangement. The management/charter company would temporarily assume possession of the aircraft and perform the Part 135 flights (for all parties) on the Petitioner's behalf.

The management/charter company would pay no rent to the Petitioner for such possession. To the contrary, Petitioner would pay the management/charter company a marketing commission for bringing in third-party charterers. The management/charter company would receive a 10% commission of the amounts collected for the Petitioner for third-party Part 135 flights. The management/charter company receives a $5,000 monthly management fee in consideration for managing the aircraft and its operations. All fixed and variable operating expenses are borne by the Petitioner, with funds therefor provided from Part 135 flight charges and from an operating deposit funded by Petitioner.

**Analysis**

Section 1105(a) of the Tax Law imposes sales tax on all sales of tangible personal property unless purchased by the customer for resale or otherwise exempt. Tax Law § 1110(a) imposes use tax on, among other things, every use by a New York resident of tangible personal property purchased at retail except to the extent that the property has or will be subject to the sales tax or an exemption applies. Tax Law § 1118(2) exempts from the use tax imposed by section 1110 the use of property or services purchased by the user while a nonresident of this state." Part N-1 of Chapter 57 of the Laws of 2009 ("Part N-1), added the following sentences to section 1118(2), effective June 1, 2009:

> This exemption does not apply to the use of qualified property where the qualified property is purchased primarily to carry individuals, whether or not for hire, who are agents, employees, officers, shareholders, members, managers, partners, or directors of (A) the purchaser, where any of those individuals was a resident of this state when the qualified property was purchased or (B) any affiliated person that was a resident when the qualified property was purchased. For purposes of this subdivision: (i) persons are affiliated persons with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated persons with respect to each other; (ii) "qualified property" means aircraft, vessels and motor

> vehicles; and (iii) "carry" means to take any person from one point to another, whether for the business purposes or pleasure of that person."

In pertinent part, section 1115(a)(21) of the Tax Law exempts "[c]ommercial aircraft primarily engaged in intrastate, interstate or foreign commerce." Prior to its amendment by Part N-1, Tax Law § 1101(b)(17) defined the term "commercial aircraft" as follows:

> 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

Part N-1 added the following sentence to section 1101(b)(17):

> Transporting persons for hire does not include transporting agents, employees, officers, members, partners, managers or directors of affiliated persons. Persons are affiliated persons with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated persons with respect to each other.

"Primarily" means, for the purposes of the commercial aircraft exemption, "more than 50% of the time" (*Tax Law Defines Commercial Vessels and Commercial Aircraft*, TSB-M-96[14]S)

The effective date clause of Part N-1 made that part applicable to sales made and uses occurring after June 1, 2009. Because the Aircraft was purchased in 2003, and thus prior to the effective date of Part N-1, that legislation does not affect the issue whether, upon the Aircraft's relocation to New York, use tax will be due on the use of the Aircraft in New York (*Amendments Affecting the Application of Sales and Use Tax to Aircraft, Vessels and MotorVehicles*, TSB-M-09[4]S).[1] Under the Tax Law as it read prior the amendments made by Part N-1, no use tax would apply to Petitioner's use of the aircraft in New York because Petitioner would qualify as a nonresident for purposes of Tax Law § 1118(2) at the time it purchased the Aircraft. Moreover, under the version of section 1101(b)(17) prior to its amendment by Part N-1, the Aircraft would qualify as a commercial aircraft for purposes of the commercial aircraft exemption in section 1115(a)(21) as long as the Aircraft was used for more hours in connection with transporting persons for hire than for all other purposes and no use tax would be due. As long as the amount Subsidiary pays is equal to or exceeds the costs of operating the Aircraft when the Aircraft is used to provide transportation services

[1] It should be noted that whether the Aircraft, after its relocation to New York, would qualify for the exemption in Tax Law § 1115(a)(21) for specified machinery and equipment installed on a commercial aircraft or the exemption in Tax Law § 1105(c)(3)(v) for specified services to a commercial aircraft would be governed by the definition of commercial aircraft in Tax Law § 1101(b)(17) as amended by Part N-1. Since the Advisory Opinion petition herein did not inquire about those exemptions, this opinion does not further address whether those exemptions would apply to the Aircraft. Moreover, the taxability of a payment on an aircraft lease due after Part N-1's effective date would be governed by Part N-1's amended definition of a commercial aircraft regardless of when the lease was entered into (*see* TSB-M-09[4]S, *supra*).

to Subsidiary, such flights would be "for hire" and no use tax would be due (*see GSO Capital Partners (Texas) GP LLC*, TSB-A-08[20]S) .

DATED: December 20, 2010

/S/
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Deputy Commissioner and Counsel

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