

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-17(1)S
Sales Tax
February 3, 2017

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S151203B

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (Petitioner) asking whether the sales tax exemption for a general aviation aircraft applies to the sale of a fractional ownership in an aircraft. Petitioner also asks whether that exemption applies when Petitioner sells an aircraft that was once used in the Petitioner's fractional aircraft ownership program.

We conclude that Petitioner's sale or lease of a fractional share of an aircraft is the sale of a non-taxable service. We also conclude that the sale of an aircraft that is retired from the fractional share ownership program is exempt from State and local sales and use tax under Tax Law § 1115(a)(21-a) if the sale occurred on or after September 1, 2015.

Facts

Petitioner operates a fractional aircraft ownership program. Participation in the program requires the Fractional Share Owner to pay Petitioner an amount equal to the cost of a portion of a single airplane or the cost of a portion of a long-term lease of an airplane. In exchange, the Fractional Share Owner receives title to or a lease of an undivided fractional interest in an airplane.

A Fractional Share Owner may purchase an interest in an aircraft of between 1/16th and 16/16^{ths}. By purchasing an interest in an aircraft, the Fractional Share Owner is entitled to a specific number of flight hours per year based on the size of the interest purchased. For instance, a 1/16th share in an aircraft equates to 50 hours of use annually. An aircraft can have up to 16 Fractional Share Owners. If a Fractional Share Owner purchases an interest in an aircraft and later wants to purchase an additional interest in the same aircraft, or even a different type or size of aircraft, the purchases would be considered cumulative and the Fractional Share Owner would be entitled to an increased number of flight hours annually.

Petitioner completes the sale of a fractional share in an aircraft in a three-step process that entails: (1) a contract signing; (2) a positioning flight; and (3) a closing.

The first step is the completion of the contract, which consists of the signing of four agreements. The first agreement is the Fractional Interest Purchase Agreement, which sets forth the particulars of the sale, including but not limited to the aircraft model, engine model, manufacturer's serial number, engine serial numbers, and the Federal Aviation Administration registration number. The second agreement is the Owner's Agreement, which sets the aircraft's terms of use including the allotted number of hours that the Fractional Share Owner may use the plane and a requirement that the aircraft will be used exclusively in the fractional ownership program.

The third agreement is the Management Agreement, where the Fractional Share Owner gives Petitioner the exclusive right to manage the aircraft. In addition to the aircraft's maintenance and inspection, Petitioner's management responsibilities include arranging flights, providing crew members, and transferring the Fractional Share Owner's interest in one aircraft to another aircraft of equal or greater value when necessary. As part of this agreement, the Fractional Share Owner gives Petitioner the right to use the aircraft when it is not in use by the Fractional Share Owner.

The fourth agreement is the Dry Lease Agreement. This agreement specifies what will happen when a scheduling conflict occurs and multiple fractional owners request use of the same aircraft at the same time. Under the terms of the agreement, the Fractional Share Owner agrees that Petitioner may substitute another plane from its fleet when the Fractional Share Owner's plane is unavailable.

Once the contract is signed, the aircraft specified in the Purchase Agreement is flown to the designated closing location for delivery. Upon the aircraft's arrival, title to the fractional interest is transferred. Documents pre-signed by Petitioner's FAA counsel are released from escrow, effectuating the delivery of the fractional aircraft interest. Petitioner's counsel then files the documents with the FAA and sends the Fractional Share Owner copies of the countersigned Purchase Agreement and Bill of Sale.

In addition to the fees paid for the purchase of a fractional interest in the aircraft, the Fractional Share Owner pays three additional fees. The first fee is an occupied hourly fee, which reflects a per-hour flight fee and compensates Petitioner for costs, such as fuel, associated with operating the aircraft. The second fee is a monthly management fee, which is a fixed expense that covers costs associated with owning the aircraft, such as insurance and crew salaries. Fractional Share Owners must pay this fee regardless of how much they use the aircraft. The third fee is a variable fuel surcharge, which applies if fuel prices rise above the fuel price set in the agreement.

After a contractually agreed upon period of ownership, the Fractional Share Owner has the right to cause Petitioner to repurchase their fractional share interest. The Fractional Share Owner must provide Petitioner with 90-day written notice to exercise this right and, at that time, the Fractional Share Owner and Petitioner will agree upon the fair market value of the aircraft. Generally, the Fractional Share Owner will sell its ownership interest in the aircraft back to Petitioner. However, subject to Petitioner's right of first refusal and with its written consent, a Fractional Share Owner may transfer its interest to a financially qualified third-party U.S. citizen.

When the useful life of an aircraft has been completed, the aircraft is "retired" from Petitioner's program and is sold. Petitioner sells used aircraft through a wholly-owned subsidiary.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property and the sale, except for resale, of certain services (*see* Tax Law § 1105[a], [c]). The term "sale," as used in Article 28 of the Tax Law, includes "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise" (Tax Law § 1101[b][5]). Section 526.7(c)(1) of the Sales and Use Tax Regulations provides that: "[t]he terms rental, lease, license to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property."

The issue of whether the sale of a fractional share of an aircraft constitutes the sale of tangible personal property turns on whether the Fractional Share Owner obtains dominion and control of the aircraft. Dominion and control does not pass to the Fractional Share Owner when pursuant to an agreement or contract:

1. There is no transfer of possession, control and/or use of the aircraft to the Fractional Share Owner during the terms of the agreement or contract; and
2. Petitioner maintains the right to hire and fire the pilots; and
3. Petitioner uses its own discretion in performing the service (even though the Fractional Share Owner may designate the area where passengers will be picked up and delivered) and generally selects its own routes; and
4. Petitioner retains the responsibility for the operation of the aircraft; and
5. Petitioner directs the operation and pays all operating expenses, including pilots' wages, insurance, and fuel.

Here, it appears that Petitioner does not transfer possession, command, and control of the aircraft to the Fractional Share Owner. Under the Management Agreement, Petitioner has the exclusive right to arrange flights and provide pilots and crew, and is responsible for maintenance of the aircraft. Petitioner also has the right to transfer the Fractional Share Owner's interest to another aircraft of equal or greater value. Accordingly, the sale of the fractional share is not a sale of tangible personal property. Rather, the Fractional Share Owner actually has purchased the service of air transportation, which is not among the services subject to sales tax *See, e.g.*, TSB-A-09(23)S; *Chanel, Inc.*, TSB-A-08(23)S; *The Gap, Inc.*, TSB-A-02(3)S. Note that, even if the possession, command, and control of an aircraft were transferred to a Fractional Share Owner, it would be exempt from sales tax as the sale of a general aviation aircraft, provided that delivery of the aircraft occurred on or after September 1, 2015. *See* Tax Law § 1115(a)(21-a).

Further, we conclude that "occupied hourly fee," "monthly maintenance fee" and "variable fuel surcharge" paid by the Fractional Share Owner are all charges to recoup Petitioner's costs of maintaining and operating the aircraft. As such, they are not receipts subject to sales tax. Finally, we conclude that Petitioner's sale of an aircraft that is retired from the fractional ownership program is a sale of tangible personal property that is exempt from tax on and after September 1, 2015 as the sale of a general aviation aircraft under Tax Law § 1115(a)(21-a).

DATED: February 3, 2017

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.