

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

TSB-A-87(41)S
Sales Tax
November 9, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO: S870520A

On May 20, 1987, a petition for Advisory Opinion was received from Stephen J. Epstein c/o Richard A. Eisner & Company, 380 Madison Avenue, New York, New York 10017.

The issue raised is whether an aircraft which is used more than 55% of the time by its owner for corporate purposes and the remainder of the time is used for charter purposes qualifies for exemption from sales tax under § 1115(a)(21) of the Tax Law.

Petitioner has presented a statement of facts whereby the owner of an aircraft, which owner may be either a corporation or a partnership, will maintain the aircraft at an airport in New York State and will either obtain an FAA FAR 135 Air Carrier Operating Certificate entitling it to charter the aircraft for compensation, or, alternatively, will execute a Charter Management Agreement with an independent charter agent, who will obtain FAA amendment to include the aircraft in question in its FAR 135 Air Carrier Operating Certificate. In either case, the aircraft will be chartered for compensation to independent parties for use in transporting individuals. In 1986, this use amounted to 193 hours or 45% of the total hours used. In 1987, Petitioner's expectations are for 150 hours of such charter use, which is expected to approximate 32% of the total hours used. Petitioner believes that this approximate breakdown of use will continue in future years as well. In any event, such usage should not drop below 25%.

The remainder of the aircraft's use will be by the principal shareholder or partner of the owning entity, either for himself or on behalf of other entities he controls or in which he has a significant ownership interest. This shareholder or partner will finance any net aircraft expenses through capital contributions.

Section 1115(a)(21) exempts "[c]ommercial 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."

Property is generally regarded as primarily engaged in a particular activity if over fifty percent of its use is in such activity. However, Petitioner contends that in determining whether the aircraft here at issue is a commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, the determination of its primary use should be accomplished by comparing income from intrastate, interstate or foreign commerce to total income. Petitioner contends that use of the aircraft by its owner for his own purposes should be disregarded even though such use represents more than one-half of the total use of the aircraft.

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Petitioner cites Technical Services Bureau Memorandum TSB-M-80(4)S as support for his position. However, the memorandum cited by Petitioner does not address the precise situation described by Petitioner.

The ruling proposed by Petitioner is clearly at odds with the plain meaning of section 1115(a)(21). More than fifty percent of the use of the aircraft in question is self use by its owner. The charter of the aircraft by its owner in this case appears to be nothing more than a means of reducing its operating expenses. Thus, the aircraft is not a "commercial aircraft primarily engaged in intrastate, interstate or foreign commerce".

Additionally, Technical Services Bureau Memorandum TSB-M-80(4)S provides:

Although the term "commercial aircraft" has not been defined in the Tax Law, Sales Tax Regulation 528.10(b) defines an airline to include an air taxi operator, described as follows:
...classified by the Civil Aeronautics Board as a "commuter air carrier" or who (a) performs at least five round trips per week between two or more points and publishes flight schedules which specify the times and days of the week and places between which such flights are performed or (b) transports mail by air pursuant to contract with the United States Postal Service.

Consequently, aircraft used by an "airline" as defined above, would constitute "commercial aircraft" qualifying for sales tax exemption. In addition, aircraft purchased by air taxi operators and commercial operators of small aircraft holding Air Taxi Certificates issued by the Federal Aviation Agency, although not qualified for "airline" status, will qualify as commercial aircraft for purposes of sales tax exemption.

Petitioner has submitted no information which would indicate that the aircraft in question qualifies as a "commercial aircraft" or that the owner qualifies as an "airline" pursuant to the above - described provision of the TSB-M.

Accordingly, it is determined that the aircraft at issue is not exempt from sales and use tax under section 1115(a)(21) of the Tax Law.

DATED: November 9, 1987

s/ANDREW F. MARCHESE
Chief of Advisory Opinions
Technical Services Bureau

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