

## **Amendments Affecting the Application of Sales and Use Tax to Aircraft, Vessels and Motor Vehicles**

As a result of recently enacted legislation (Chapter 57 of the Laws of 2009), **certain transactions** involving the sale, purchase and use of aircraft, vessels, and motor vehicles, that were previously exempt from sales and use taxes will now be taxable. In particular, the exemptions applying to commercial aircraft and to nonresident purchasers have been amended to restrict the application of these exemptions in certain situations. The new law applies to sales made and uses occurring on or after June 1, 2009.

### **Background**

Sales and use tax is imposed on the sale and use in New York State of taxable tangible personal property and certain enumerated services. Therefore, unless a sale or use is specifically exempt from sales and use tax for a particular reason (e.g., the purchaser is an exempt organization, or some other exemption under the Tax Law applies), the sale and use of aircraft, vessels and motor vehicles in New York State are generally subject to sales and use tax.

Two sales and use tax exemptions were amended by the new law. One exemption relates only to aircraft. The other relates to aircraft, vessels and motor vehicles. The two exemptions are:

- the exemption from sales and use tax in section 1115(a)(21) of the Tax Law for the retail sale of “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”; and
- the exemption from use tax in section 1118(2) of the Tax Law for “the use of property or services purchased by the user while a non-resident of this state,...”.

These two exemptions have been amended to restrict their application as discussed below.

### **Amended definition of commercial aircraft**

Chapter 57 amended the definition of *commercial aircraft* as provided in section 1101(b)(17) of the Tax Law with respect to the meaning of “transporting persons for hire.” For purposes of the Tax Law section 1115(a)(21) exemption, the definition of *commercial aircraft* is amended to read as follows (the new provisions added by Chapter 57 are underlined):

*Commercial aircraft.* Aircraft used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the aircraft to transport such person’s tangible personal property in the conduct of such person’s business, or (iii) for both such purposes. 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.

In general, for purposes of the new law, the calculation of whether an aircraft is used primarily (i.e., more than 50% of the time) to transport persons or property for hire is made by dividing total flight hours that the aircraft is used to transport persons or property for hire by the total of all flight hours of the aircraft.

### **Result of the amended definition of commercial aircraft**

Under the new law, when calculating whether an aircraft is being used more than 50% of the time to transport persons or property for hire, and therefore constitutes a *commercial aircraft* eligible for exemption from sales and use tax, use of an aircraft by a business entity to transport agents, employees, officers, members, partners, managers or directors of affiliated entities is no longer included. Therefore, under the new definition of *commercial aircraft*, a business entity is no longer eligible for the sales and use tax exemption for commercial aircraft as provided in section 1115(a)(21) of the Tax Law on its purchase or use in New York State of an aircraft that is used more than 50% of the time to transport agents, employees, officers, members, partners, managers or directors of affiliated entities.

Also, use tax is now imposed on an aircraft that does not meet the new definition of *commercial aircraft*, and is:

- purchased outright by and delivered to a New York resident on or after June 1, 2009, outside of New York State, and subsequently used in New York State by the New York resident; or,
- leased outside New York State and subsequently used in New York State by a lessee of the aircraft, who is a New York State resident, on or after June 1, 2009.

In addition, aircraft that **do not** meet the new definition of commercial aircraft because of the new law are also **no longer eligible** for the following exclusions and exemptions on or after June 1, 2009:

- the exclusion from the imposition of sales and use tax for services rendered with respect to commercial aircraft, machinery or equipment and property used by or purchased for the use on or by a commercial aircraft (Tax Law section 1105(c)(3)(v)); and
- the exemption for machinery or equipment to be installed on commercial aircraft and property used or purchased for the use of commercial aircraft for maintenance (including fuel) and repairs purchased by commercial airlines (Tax Law section 1115(a)(21)).

It should be noted that the existing exemption for certain services and property that applies to all aircraft, as provided in section 1115(dd) of the Tax Law, will continue to apply until December 1, 2009. Please see TSB-M-04(8)S, *Summary of 2004 Budget Legislation and Other Recently Enacted Legislation Relating to Sales and Compensating Use Taxes*.

The following example illustrates the application of the newly revised definition of *commercial aircraft*.

**Example:** *The stock of Corporation A and Corporation B is owned entirely by Mr. Z. Corporation B was created for the purpose of purchasing, owning, and operating an aircraft. Corporation A operates an unrelated business. On September 1, 2009, Corporation B purchases an aircraft in New York State that will be used primarily to transport the management personnel and other employees of Corporation A. The aircraft will be operated by a flight crew consisting of employees of Corporation B. Under a written agreement between Corporation A and Corporation B, Corporation A must pay reasonable compensation to Corporation B for any use of the aircraft.*

*In this situation, the aircraft purchased by Corporation B is not used to transport persons for hire, since Corporation A and Corporation B are persons affiliated with each other due to the common ownership by Mr. Z. Therefore, the aircraft purchased by Corporation B is not a commercial aircraft eligible for exemption from state and local sales tax. Sales tax must be collected and paid upon its purchase.*

*If the aircraft had been purchased and delivered outside of New York State, Corporation B would owe use tax on the use of the aircraft in New York State.*

### **Amendment to exemption from use tax for purchases by nonresidents**

Chapter 57 also amended the exemption from use tax in section 1118(2) of the Tax Law for purchases of property or services by nonresidents to read as follows (the new provisions added by Chapter 57 are underlined):

**Section 1118. Exemptions from use tax.** The following uses of property and services shall not be subject to the compensating use tax imposed under this article:

(2) In respect to the use of property or services purchased by the user while a nonresident of this state, except in the case of tangible personal property or services which the user, in the performance of a contract, incorporates into real property located in the state. A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property or services in such employment, trade, business or profession. 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<sup>1</sup> 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 business purposes or pleasure of that person.

### **Result of amended use tax exemption**

As a result of this amendment, use tax now applies to the use in New York State of an aircraft, vessel (which includes any type of watercraft, e.g., sport boat, leisure craft, pontoon boat, yacht) or motor vehicle purchased out of state by a purchaser who is a nonresident for sales tax purposes, if the aircraft, vessel, or motor vehicle is used primarily (more than 50% of the time) to carry individuals who are:

- agents, employees, officers, shareholders, members, managers, partners, or directors of the purchaser, if any of those individuals were residents of New York State at the time that the aircraft, vessel, or motor vehicle was purchased; or
- agents, employees, officers, shareholders, members, managers, partners, or directors of a person that is affiliated with the purchaser, if the affiliated person was a New York State resident at the time that the aircraft, vessel, or motor vehicle was purchased.

For purposes of this new rule, persons are affiliated with each other where one of the persons has an ownership interest of more than five percent (5%), whether direct or indirect, in the other, or where an ownership interest of more than five percent (5%), whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated with respect to each other.

The following examples illustrate the application of the limitation to the newly revised exemption from use tax.

**Example 1:** *Mr. K, who is a resident of White Plains, Westchester County in New York State, plans to purchase a yacht from a dealer located in Cape May, New Jersey. In planning his purchase, Mr. K forms Corporation Z in Delaware and Corporation Z purchases the yacht from the dealer in New Jersey. The yacht is then brought into New York State and moored at a yacht club on the Hudson River near Tarrytown, New York. Mr. K will use the yacht primarily for recreational purposes out of the*

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<sup>1</sup> A New York State resident for sales tax purposes includes, but is not limited to: (1) any individual who maintains a permanent place of abode in New York State; and (2) any corporation, association, partnership, limited liability company or other entity doing business or maintaining a place of business, or operating a hotel, place of amusement or social or athletic club in New York State.

*Tarrytown yacht club. Corporation Z will owe state and local use tax for the use of the yacht in New York State.*

**Example 2:** *Corporation X is a resident of New York State for sales tax purposes. Corporation X is the sole shareholder of Corporation Y. Accordingly, Corporation X is considered affiliated with Corporation Y based on its status of being its sole shareholder. Corporation Y purchases an aircraft outside of New York State that will be used in New York State primarily to transport Mr. T, a resident of New York State, who is the Chief Executive Officer (CEO) of Corporation X. Since the aircraft is primarily used in New York State to transport Mr. T, Corporation Y will owe state and local use tax for the use of the aircraft in New York State.*

### **Reporting and paying use tax**

As a general rule, use tax on motor vehicles and vessels required to be registered is reported and paid to the New York State Department of Motor Vehicles. For other property, use tax is reported and paid in the following ways:

- If you are registered for New York State sales tax purposes, report your use tax on your sales tax return.
- If you are a business, that is not registered for New York State sales tax purposes, report your use tax on Form ST-130, *Business Purchaser's Report of Sales and Use Tax*; and
- If you are a sole proprietor operating a business in New York State, that is not registered for New York State sales tax purposes, report your use tax on:
  - your New York State personal income tax return; or
  - New York State Form ST-140, *Individual Purchaser's Periodic Report of Sales and Use Tax*; or
  - New York State Form ST-141, *Individual Purchaser's Report of Sales and Use Tax*.

### **Effective date and transitional rules**

#### ***Sales other than leases***

The amendments described in this memorandum generally apply to sales (other than leases and rentals), made or uses occurring on or after June 1, 2009. The amendments also apply to sales made or rendered under contracts entered into prior to June 1, 2009, except where all of the following conditions apply:

- The sales are pursuant to a prior written contract entered into before February 1, 2009.

- The property sold was segregated, before February 1, 2009, from any similar property in the possession of the vendor and identified as having been appropriated to the sale under such prior written contract.
- The purchaser paid at least 10% of the selling price to the vendor prior to June 1, 2009.

***Leases and rentals***

Under the new law, for leases or rentals of aircraft which are now subject to tax because they no longer meet the definition of commercial aircraft, sales or use tax applies to each lease or rental payment made or that becomes due on or after June 1, 2009. In addition, for aircraft, vessels, and motor vehicles which are now subject to tax, sales or use tax also applies to each lease or rental payment made or that becomes due on or after June 1, 2009. These rules apply regardless of whether the lease or rental agreement was entered into before June 1, 2009. (**Note:** Lease or rental payments under a lease or rental agreement that was entered into before June 1, 2009, that become subject to tax based on the amendments described in this memorandum, **are not subject to** the provisions of section 1111(i) of the Tax Law that otherwise require, in certain situations, the imposition of sales and use tax on the total rental payments at the inception of a lease.)

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