2015 Tax Update: Private Aviation Legislation and Cases

A summary of statutory and regulatory changes and noteworthy decisions.

FEDERAL

House Bill 3608 [PENDING]: To Exempt Amounts Paid for Aircraft Management Services from Federal Excise Tax

On September 24, 2015, House Bill 3608 was introduced by Rep. Patrick Tiberi (R, OH) to amend the Internal Revenue Code of 1986 to exempt amounts paid for aircraft management services from federal excise tax imposed on transportation by air, including the percentage tax and segment fee imposed on domestic commercial flights and the international travel facilities tax imposed on international travel beginning or ending in the United States (collectively, the "ticket tax").

If the bill is passed as currently drafted, no ticket tax shall be imposed on any amounts paid by an aircraft owner (including a long-term lessee) for aircraft management services related to (1) maintenance and support or (2) flights operated by an aircraft owner.

The term "aircraft management services" includes assisting an aircraft owner with administrative and support services, such as scheduling, flight planning and weather forecasting; obtaining insurance; maintenance, storage and fueling of aircraft; hiring and training of pilots and crew; establishing and complying with safety standards; or such other services necessary to support flights operated by an aircraft owner.

The bill has been referred to the House Committee on Ways and Means.

NetJets Large Aircraft, Inc. et al. v. United States, No. 2:11-cv-1023 (S.D. Ohio 2015).

On January 26, 2015, a federal district court judge ruled on cross-motions for summary judgment that NetJets,[1] the operator of an aircraft fractional ownership program, was not required to collect federal excise tax (26 U.S.C. § 4261) on management fees and variable fuel costs charged to certain fractional program customers.

The court determined that the IRS was barred from retroactively collecting excise tax on these fractional program charges since the IRS had previously issued NetJets' predecessor, Executive Jet Aviation, Inc. ("EJA"), a technical advice memorandum ("TAM") in which the IRS agreed that NetJets was to collect excise tax only on fractional program "occupied hourly fees" (i.e., a per-hour flight fee for operating the aircraft).[2] The court held that the IRS is bound by the TAM, which had not been withdrawn, modified or revoked, and is therefore precluded from retroactively assessing excise tax on the management fees and variable fuel costs associated with NetJets' fractional program.

In the same decision, the court denied NetJets' claims for refund, finding that NetJets provides "taxable transportation" to its fractional program customers and therefore properly charged and remitted excise tax on its occupied hourly fees. In reaching its decision, the court held that it was precluded from reaching a different result because of *Executive Jet Aviation, Inc. v. United States*, 125 F.3d 1463 (Fed. Cir. 1997), in which it was determined that EJA provided "taxable transportation" under 26 U.S.C. § 4261 and that its occupied hourly fees were subject to excise tax. According to the court, the EJA decision, which addressed the same issue raised by NetJets in its refund claims under substantially similar facts, is applicable to NetJets, which, as the successor to EJA, has privity to EJA and to the earlier decision.

1 "NetJets" means, collectively, NetJets Aviation, Inc., NetJets Large Aircraft, Inc. and NetJets International, Inc.
2 See T.A.M. 93-1-002, 1992 WL 465951 (Dec. 22, 1992); IRS Priv. Ltr. Rul. 93-14-002 (Dec. 22, 1992).

On the issue of whether Executive Jet Management's ("EJM") monthly management fees and other variable costs charged to the owners of aircraft that EJM manages and uses in its charter business are subject to excise tax, the court denied the parties' cross-motions for summary judgment. The court held that it could not reach a decision in summary judgment, since there were genuine issues of material fact as to the nature and extent of the services EJM provided to its customers.

Although the court could not reach a decision in summary judgment as to taxation of EJM's monthly management fees and variable costs charged to its customers, it did make a number of potentially important findings. For instance, as a threshold matter, the court found that the IRS's "possession, command and control" test is the accepted test for determining whether an entity is providing "taxable transportation" under section 4261. The court also found that ownership, alone, does not determine whether an aircraft owner possesses, commands and controls his or her own aircraft. Additionally, the court noted that the IRS's test is not limited to the time the aircraft is actually in the air, and that a court must look beyond flight time to determine who has possession, command and control of the aircraft.

EJM has another motion for summary judgment pending before the court, which concerns whether the IRS can retroactively impose federal excise tax on the company based on the argument that the IRS failed to satisfy its duty of clarity and consistency with respect to administering the assessed tax. A trial date of January 11, 2016 has been set, if not continued.

The immediate impact of the *NetJets* decision was largely mitigated by the fact that fractional program flights as of April 1, 2012 were subject to a fuel surtax in lieu of federal air transportation excise tax. However, the temporary exemption from federal air transportation excise tax for fractional programs expired on September 30, 2015.

Bombardier Aerospace Corporation v. IRS, No. 3:12-CV-1586-d (N.D. Texas 2015)

Shortly after the *NetJets* decision, a federal district court judge in Texas, on substantially the same issue, came down in favor of the IRS, finding that Bombardier Aerospace Corporation ("Bombardier"), in its operation of an aircraft fractional ownership program, did owe federal excise tax (26 U.S.C. § 4261) on management and variable fuel charge fees charged to its fractional program clients, and that (contrary to the court's decision in *NetJets*) Bombardier lacked standing to raise its claim for refund.

The court held that (i) Bombardier was providing "taxable transportation" under the IRS's "possession, command and control" test, (ii) "FAA" determinations and regulations as to what constitutes "transportation for hire" are not applicable to federal excise tax, (iii) the IRS had clearly informed Bombardier in a 2004 Technical Advice Memorandum (143115-03, Feb. 17, 2004) that its fractional fees are subject to excise tax, and (iv) such fees are part of Bombardier's taxable costs of transportation.

Additionally, the court held that Bombardier did not have standing to claim a refund for taxes paid by its fractional program customers, since Bombardier had not repaid the tax to its customers or obtained consent to claim a refund on their behalf.

The court distinguished the case from the *NetJets* decision, which ruled in favor of NetJets based on estoppel, as there was no question in Bombardier's case that the IRS had informed Bombardier that its program management fees were taxable. The court also disagreed with the *NetJets* court's decision on the issue of whether Bombardier had standing to claim a refund for excise taxes paid to the IRS, finding that "repayment" or "consent" were statutory preconditions for the court to have jurisdiction to entertain Bombardier's claim for the refund of taxes collected from its clients.

On May 19, 2015, Bombardier filed its notice of appeal of the district court's decision, and the case is currently pending before the United States Court of Appeals for the Fifth Circuit (Docket No. 15-10468).

In light of the *NetJets* and *Bombardier* cases, it is a good time for aircraft owners to review their aircraft management contracts to determine whether such contracts should be modified in order to clearly delineate which party has possession, command and control over the aircraft beyond just flight time. For a deeper discussion of these cases or operation control, in general, please feel free to contact the authors of this bulletin.

STATE

Arizona

American Helicopters, LLC et al. v. Ariz. Dep't of Revenue, 1 CA-TX 14-0001 (Ct. App. Jan. 29, 2015).

In *American Helicopters, LLC*, an unpublished Arizona Supreme Court Rule 111(c) opinion, the Court of Appeals held that Papillon Airways, Inc. ("Papillon") was subject to use tax on various aircraft parts it purchased for use in its business of providing on-demand and scheduled helicopter flights in Arizona and southern Nevada. The court also held that Papillon's lessors were required to collect and remit Arizona transaction privilege tax (sales tax) on rental income earned from leasing helicopters to Papillon.

In their collective defense, Papillon and its lessors argued that the aircraft parts and lease payments were exempt from Arizona sales and use tax under the state's "common carrier" exemption, which applies to the sale and leasing of:

> Aircraft, navigational and communication instruments and other accessories and related equipment sold to: A person holding a federal certificate of public convenience and necessity, a supplemental air carrier certificate under federal aviation regulations (14 Code of Federal Regulations Part 121) or a foreign air carrier permit for air transportation for use as or in conjunction with or becoming a part of aircraft to be used to transport persons, property or United States mail in intrastate, interstate or foreign commerce.[3]

Ariz. Stat. Ann. §§ 42-5061(B)(7)(a), 42-5071(B)(2)(b).

The court held that the state's common-carrier exemption was not applicable to Papillon and its lessors, since Papillon at the time did not hold a federal certificate of public convenience and necessity, and, as an on-demand Part 135 air carrier, Papillon did not satisfy the statutory requirement of being a "supplemental air carrier" under 14 C.F.R. Part 121.

Arkansas

Expands "Fly-Away" Exemption.

Effective April 7, 2015, an aircraft sale is exempt from Arkansas sales tax if the aircraft is sold by a person that is not a resident of Arkansas to a person that is also not a resident of Arkansas, and if the aircraft will not be based in the state. The purchaser may take possession of the aircraft in Arkansas, as long as the purchaser takes possession of the aircraft for the sole purpose of removing the aircraft from the state under its own power, or to locate the aircraft at a maintenance facility in Arkansas for maintenance or modifications, and the aircraft is thereafter removed from the state upon completion of such maintenance or modifications. Ark. Code Ann. § 26-52-451. "Person" is generally defined to include individuals, partnerships, limited liability companies, corporations, estates, trusts, etc. Ark. Code Ann. § 26-52-103(16). The state's "fly-away" exemption was previously limited to new aircraft manufactured or substantially completed within Arkansas (see Ark. Code Ann. § 26-52-505(c)).

Colorado (Denver)

On or after January 1, 2015, sales of aircraft parts and aircraft simulator parts are exempt from Denver sales and use tax. Denver, Colo., Code ch. 53-26.2(a), 53-97.2(a).

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[3] For purposes of the exemption, "Aircraft" includes "[t]angible personal property that is permanently affixed or attached as a component part of an aircraft that is owned or operated by a certificated or licensed carrier of persons or property." Ariz. Rev. Stat. Ann. § 42-5061(W)(1).

Indiana

Interim Use of Aircraft Held as Inventory.

Effective July 1, 2015, an aircraft held in inventory (i.e., for resale) that during a year has total time in service exceeding 50 hours will no longer be considered held for resale and will be subject to Indiana aircraft registration fees and all applicable taxes. (Prior to July 1, 2015, an aircraft could be held in a dealer's inventory for up to 18 months before being subject to registration and state taxes.) Ind. § Code § 6-6-6.5-10.6.

For an aircraft held by a dealer on July 1, 2015 and that ceased to be considered inventory on a date occurring before July 1, 2015, and was therefore subject to registration and taxation before the change in law but would not have been subject to registration and taxation under the new 50-hour test, the aircraft dealer may make an election to reclassify the aircraft as inventory. If a timely election is made, the dealer may be entitled to a credit or refund of any taxes, interest and penalties paid under the prior 18-month rule. Ind. § Code § 6-6-6.5-26. The election expires on July 1, 2018.

Indiana Department of Revenue Letter of Finding No. 04-20140321, 01/01/2015.

In Letter of Finding No. 04-20140321, the Department of Revenue determined that the owner and lessor of a claimed one-third interest in an aircraft did not qualify for Indiana's purchase for resale (lease) exemption, even though the owner/lessor was remitting Indiana sales tax on the lease payments received for rentals of the aircraft, because the owner/lessor did not provide sufficient evidence to establish (i) that it was "occupationally engaged" in the business of leasing aircraft (e.g., insurance policies, flight logs, invoices, etc.) and (ii) that it met the minimum revenue threshold to claim a resale exemption for aircraft acquired for lease in Indiana, which requires annual gross lease revenue from the business of leasing aircraft to be equal to or greater than 7.5 percent of the aircraft's book value or net acquisition price (see Ind. Code § 6-2.5-5-8(e)).

Louisiana

Amendment to the Exemption for Aircraft Manufactured or Assembled in Louisiana.

Effective July 1, 2015, the term "sale at retail" for purposes of Louisiana sales and use taxes, does not include the sale of passenger aircraft manufactured or assembled in Louisiana having a maximum capacity of eight persons if the aircraft is ultimately received by the purchaser outside of Louisiana. The place at which the aircraft is ultimately received shall be considered as the place at which the aircraft is stored after all such transportation has been completed. La. Rev. Stat. Ann. § 47:301(10)(m). Prior to July 1, 2015, this exemption applied to aircraft with a capacity in excess of 50 persons.

Minnesota

New Procedures for Reporting Sales and Use Taxes for Aircraft Sales.

Starting July 1, 2015, aircraft owners must report taxes due on the sale or purchase of an aircraft (including leases and rentals) differently on their Minnesota sales and use tax returns. Minnesota Department of Revenue *Aircraft 101 Sales Tax Fact Sheet* (July 2015).

Beginning July 1, 2015, aircraft owners will report (i) sales tax collected on the sale or lease of aircraft on the tax line identified as "Aircraft Sales," (ii) use tax accrued on the purchase or lease of aircraft on the "Aircraft Purchases" tax line, and (iii) any local sales or use taxes accrued on the appropriate local tax line. Aircraft owners will no longer use the "General Rate Sales Tax" or "Use Tax Purchases" tax lines to report tax on aircraft sales. Additional information can be found on the Minnesota Department of Revenue's website.

This procedural change is to allow the Minnesota Department of Revenue to comply with a new law requiring the Department to deposit sales and use taxes collected from aircraft sales into the state's "airports fund" (Minn. Stat. § 297A.82, subdiv. 4a, 360.017, subdiv. 1).

Missouri

"Fly-Away" Exemption for Nonresidents and Out-of-State Corporations.

Effective August 28, 2015, there is a sales and use tax exemption for any new or used aircraft sold or delivered in Missouri to a nonresident or to a corporation that is not incorporated in Missouri, when the aircraft will (i) not be based in Missouri and (ii) not remain in Missouri more than ten business days subsequent to the later of (a) transfer of title to the aircraft in Missouri or (b) the date the aircraft is returned to service in accordance with 14 C.F.R. § 91.407 for any maintenance, preventive maintenance, rebuilding, alterations, repairs or installations which is completed contemporaneously with the transfer of title to the aircraft. Mo. Rev. Stat. § 144.030(2)(43).

Purchase for Resale and Common Carrier Exemptions.

In *Five Delta Alpha, LLC v. Director of Revenue*., No. SC94224 (2015), the Missouri Supreme Court held that an aircraft purchased for lease to a common carrier qualifies for the state's "sale for resale" exemption (Mo. Rev. Stat. § 144.018.1(4)), since the right to use the aircraft was fully transferred to the lessee and is therefore a "sale" for tax purposes.

In the tribunal decision (*Five Delta Alpha, LLC v. Director of Revenue*., No. 11-1721 RS (May 13, 2014)), the Missouri Administrative Hearing Commission held that a contract carrier operating pursuant to 14 C.F.R. part 135 qualifies as a "common carrier" for purposes of the state's sales and use tax laws. The Director of Revenue cross-appealed this finding to the Missouri Supreme Court, but ultimately dismissed its appeal and conceded to the court that the Part 135 carrier, in this instance, was a "common carrier" for purposes of the state's common-carrier exemption (Mo. Rev. Stat. § 144.030(21)).

Nevada

Partial Tax Abatement on Aircraft Parts and Services.

Certain qualified businesses in Nevada (or businesses that intend to locate in or expand into the state) that own, operate, manufacture, service, maintain, test, repair, overhaul or assemble an aircraft, or any component of an aircraft, can apply to the Office of Economic Development ("OED") for a partial abatement from (1) personal property taxes on an aircraft and on the personal property used to own, operate, manufacture, service, maintain, test, repair, overhaul or assemble an aircraft or any component of an aircraft and or (2) local sales and use taxes imposed on the purchase of tangible personal property used to operate, manufacture, service, maintain, test, repair, overhaul or assemble an aircraft or any component of an aircraft. The OED may grant a partial tax abatement for a period of not more than 20 years. Under the new law, local sales and use tax is now imposed on the business, as opposed to the customer, to allow for the abatement of taxes for businesses that have been granted a partial abatement. The new law also finally repeals the state's common-carrier exemption, which was found to be unconstitutional years ago by the Nevada Supreme Court in *Worldcorp. v. Dep't of Taxation*., 113 Nev. 1032 (1997).

New York

New Sales and Use Tax Exemption for General Aviation Aircraft.

Effective September 1, 2015, general aviation aircraft and machinery or equipment to be installed on such aircraft, are exempt from New York sales and compensating (use) tax. The term "general aviation aircraft" is defined as an aircraft that is used in civil aviation and that is not a commercial aircraft, military aircraft, unmanned aerial vehicle or drone. *See, e.g.*, N.Y. Tax Law § 1115(21-a); N.Y. Technical Service Bureau Memorandum TSB-M-15(3)S, 7/24/2015. "Commercial aircraft" (defined at N.Y. Tax Law § 1101(b)(17)) remain generally exempt from New York sales and use tax. N.Y. Tax Law § 1115(21).

South Carolina

Aircraft and Supplies.

Effective January 1, 2016, parts and supplies used by persons engaged in the business of repairing or reconditioning aircraft are exempt from South Carolina sales and use tax. S.C. Code Ann. § 12-36-2120(52). This exemption does not extend to tools and other equipment not attached to or that do not become a part of the aircraft.

Tennessee

Large Aircraft Repair and Service Exemption.

Effective July 1, 2015, there is a sales and use tax exemption for the sale, use, storage or consumption of parts, components, software, systems, accessories, materials, equipment and supplies sold to or sold by an authorized large aircraft service facility (or affiliate). Tenn. Code Ann. § 67-6-302(c).

Additionally, as of July 1, 2015, repair and refurbishment service labor performed with respect to large aircraft mainframes, large aircraft engine equipment and large aircraft accessories, when the repair and refurbishment services are initiated, contracted, performed or completed in or by an authorized large aircraft service facility, including guaranty, warranty or service contracts, is exempt from Tennessee sales and use tax. Tenn. Code Ann. § 67-6-302(c).

Large Aircraft "Fly-Away" Exemption.

Effective July 1, 2015, all sales, leases and purchases of large aircraft and related equipment, and their use, storage or consumption within Tennessee following the sale, lease or purchase, are exempt from sales and use tax, if the large aircraft and related equipment (i) have a situs outside of Tennessee and (ii) remain within the state after the sale, lease or purchase solely for purposes of repair and refurbishment services by an authorized large aircraft service facility, and are removed from the state within 15 days after the completion of the repair and refurbishment services. Tenn. Code Ann. § 67-6-302(c).

"Large aircraft" is defined to mean an aircraft that has a maximum certified take off weight of 12,500 pounds or greater. Tenn. Code Ann. § 67-6-302(c)(3)(C).

Texas

New Chapter 163 Relating to Sales and Use Tax and Aircraft.

Effective September 1, 2015, the provisions within chapter 163 of the Texas Tax Code, concerning sales and use tax on aircraft sold, leased and used within the state, will generally trump the state's general sales and use tax laws under chapter 151. Chapter 163 was enacted, in part, to provide tax clarity and consistency with respect to certain common aircraft transactions/uses occurring in Texas.

Below are a few of the statutory changes/clarifications effective as of September 1, 2015.

Certified or Licensed Carriers. A "certified or licensed carrier" is defined as a person authorized by the FAA to operate an aircraft to transport persons or property in compliance with the certification and operations specifications requirements of 14 C.F.R. Part 121, 125, 133 or 135. Additionally, the new law states that the "common carrier exemption" (Tex. Tax Code Ann. § 151.328(a)(1)) applies to a carrier's acquisition of an aircraft, regardless of whether the carrier acquires the aircraft by purchase, lease or rental. Tex. Tax Code Ann. § 163.001(b).

Aircraft Sales for Resale. The state's resale exemption applies to a purchase of an aircraft if the purchaser, in addition to leasing or renting the aircraft to another person, uses the aircraft if, for a period of one year beginning on the date of purchase, more than 50 percent of the aircraft's departures are made under the operational control (as defined by the FAA) of the lessee(s) pursuant to a written agreement. Tex. Tax Code Ann. § 163.002.

Use Tax on Aircraft Brought into Texas for Repairs. An aircraft that is brought into Texas for the sole purpose of being completed, repaired, remodeled or restored is not deemed to have been brought into the state for storage, use or other consumption in Texas. Tex. Tax Code Ann. § 163.003.

No Presumption of Use in Texas. There is no presumption that an aircraft was purchased for storage, use or consumption in Texas if the person bringing the aircraft into the state did not acquire the aircraft directly from a seller by means of a purchase. Tex. Tax Code Ann. § 163.004.

Exemption from Use Tax for Aircraft Purchased and Used Predominantly Outside of Texas for One Year. Any aircraft purchased outside of Texas that is used predominantly outside of Texas for more than a year before being brought into Texas is generally not subject to Texas use tax when brought into the state. An aircraft is "used predominantly outside of Texas if more than 50 percent of the aircraft's departures are from locations outside of Texas. Tex. Tax" Code Ann. § 163.005.

Divergent Use of an Aircraft Held for Resale. Section 151.154 of the Texas Tax Code, which provides that "[i]f a purchaser who gives a resale certificate makes any use of the taxable item other than retention, demonstration, or display while holding it for sale, lease or rental in the regular course of business . . . the purchaser shall be liable for payment of the sales tax on the value of the taxable item for any period during which the taxable item is used other than for retention, demonstration, or display," does not apply to the purchaser of an aircraft. Tex. Tax Code Ann. § 163.002(d).

Aircraft Operated under a Fractional Ownership Program. No sales tax is imposed with respect to the purchase, sale or use of an aircraft that is operated pursuant to a fractional program under 14 C.F.R. part 91, subpart K. Tex. Tax Code Ann. § 163.007.

Aircraft Transaction between Related Persons. Aircraft transactions between related persons are taxable (or not taxable) to the same extent as transactions between unrelated persons. Additionally, no sales or use tax is imposed with respect to the use of an aircraft by an owner or member of the purchaser of the aircraft, by an entity that is an affiliate of the purchaser of the aircraft, or by an owner or member of an affiliate of the purchaser of the aircraft if (1) with respect to the purchase of the aircraft, the purchaser paid Texas sales or use tax on the aircraft or (2) the purchaser's purchase of the aircraft was exempt from Texas sales or use tax, unless the purchase was exempt as (i) a sale for resale or (ii) an occasional sale (unless the occasional-sale exemption would also apply to the affiliate using the aircraft). Tex. Tax Code Ann. § 163.006(a), (b).

Washington State

The Washington State Department of Revenue has clarified the state's tax-avoidance provisions (Wash. Rev. Code § 82.32.655) to create a safe harbor for a common aircraft lease arrangement, wherein title to an aircraft is held in a controlled (special purpose) entity, and the entity leases the aircraft to affiliates and/or other lessees not related to the aircraft owner. See, e.g., Wash. Admin. Code §§ 458-20-280, 458-20-28003(2)(i). Under the state's tax-avoidance rules, in considering whether an arrangement has been made for potential tax avoidance,

The department will not disregard the title in or ownership by a controlled entity when substantially all use of the property is under a lease, at a reasonable rental value or for a timesharing fee, by a substantive operating business for bona fide business purposes, or by a person who is not related to the taxpayer, or a combination of these, provided that retail sales tax is collected and remitted on the lease payments. Similarly, the department will not disregard bailment arrangements under which substantially all use of the property is by a substantive operating business for bona fide business purposes or by a person who is not related to the taxpayer.

Wash. Admin. Code § 458-20-28003(2)(i).

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- Aircraft maintenance and refurbishment
- Engine and airframe support and maintenance overhauls
- Pilot services
- Hangar leases
- Aircraft parts and ground support equipment

If you have any questions regarding the laws or issues discussed in this bulletin, federal or state taxes with respect to aircraft, or Federal Aviation Administration rules and procedures, please contact the authors of this bulletin or any Vedder Price attorney with whom you regularly work.

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