

Corporate Aircraft Tax Deductions – Focus On Commuting Expenses

By

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The American Jobs Creation Act of 2004 (“Act”) and IRS Notice 2005-45 (“Notice”) were discussed in our article published in the October 2005 issue of World Aircraft Sales Magazine. That article described the general disallowance rules and suggested planning opportunities to mitigate the harsh effects of the new rules created by the Act and Notice, which disallow expenses incurred after October 22nd, 2004 for entertainment, amusement or recreational (“recreation”) use of a business aircraft.

In this article we focus on one specific planning area – how to determine what travel on corporate aircraft by an employee constitutes “commuting” and how an employer’s costs relating to such travel are handled under existing law, including the Act and Notice. A planning opportunity exists because it appears from the language of the Notice and statements made by the IRS in follow-up meetings with the NBAA that the use of business aircraft by employees to commute to and from an employer’s offices might be treated as personal non-recreational use so that an employer’s aircraft operating expenses will not be disallowed. Thus, the method for determining what uses of business aircraft are considered “commuting” uses has become of paramount importance.

A typical example of a commuting use is a flight by an executive on a company aircraft from the executive’s Florida home to the executive’s office at the employer’s New York headquarters. The executive also has a New York residence. Provided that the employer treats the value of the flight as a “fringe benefit”, which means that the

employer includes in the employee's income the value of the flight (usually handled under the SIFL methodology) in general, the employer will normally be permitted to deduct the employer's expenses associated with such flight.

On the other hand, if the executive uses the company aircraft to travel from the employer's New York offices to the executive's Florida home in order to engage primarily in a recreational activity, such as golfing, such use will not be treated as a commuting use of the Aircraft. In such case, the employer's costs relating to the flight will be subject to the limitations set forth in the Act and Notice. Yet, one could imagine that if the company maintained a local office in Florida, and the executive had necessary meetings in the office for more than half of the days while in Florida, it could be argued that the purpose of the flight was for business purposes, not recreation.

Clearly the distinctions between commuting use, recreational use and business use are based on subjective determinations and subtle differences in the facts. As exemplified, there are many uses, such as flights with multiple purposes, which will fall into a "gray" area where the determination of the purpose for such use is unclear. Proactive planning will allow for the greatest opportunity to maximize corporate tax deductions. In other words, consider whether it is possible to plan an employee's travel on company aircraft so that it will be treated as a business or personal non-recreational commuting flight to which the limitations contained in the Act and Notice do not apply.

Business aircraft owners must keep detailed records on a flight segment basis relating to each individual traveling on-board such aircraft that support the characterization of the purpose of the flight as a personal non-recreational use such as commuting or as business use. It is imperative that the person responsible for keeping

such records know the type of facts that will need to be recorded to support the conclusion that a flight was conducted for a personal non-recreational use such as commuting or for a legitimate business use, and be able to discuss these issues with the executives traveling on the aircraft, ideally, prior to the flights.

The records needed for a tax audit will be difficult to reconstruct after the fact, so it has become important that you promptly review your situation with a qualified aviation tax professional. Business aircraft owners may obtain additional information and guidance pertaining to these issues from the attorneys in the Aviation Group at Galland, Kharasch, Greenberg, Fellman & Swirsky.