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* * * **FEDERAL EXCISE TAX ALERT** * * *

VICTORY FOR EXECUTIVE JET MANAGEMENT IN FEDERAL EXCISE TAX CASE LIKELY WILL NOT MEAN AN END TO FEDERAL EXCISE TAX AUDITS

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Over the last couple of weeks, we have received a number of inquiries from clients concerning the impact on the aircraft management industry of the decision in the Executive Jet Management ("EJM") Federal Excise Tax ("FET") case handed down by the U.S. District Court for the Southern District of Ohio on November 12. The case involved a claim by the IRS that EJM was responsible for collecting FET taxes on all monthly management fees and pass-through costs (*e.g., fuel costs*) paid by EJM's aircraft management customers during the period under audit (April 1, 2005 to June 30, 2009). Specifically, the IRS asserted the obligation to collect and remit FET taxes exists in situations where the aircraft owners had authorized EJM to utilize their aircraft in EJM's FAR Part 135 charter business at times when the aircraft were not otherwise in use by their various owners. In that case, the IRS did not raise the issue of whether FET taxes could also apply to Part 91-only management where the management company did not also utilize the aircraft under FAR Part 135.

The court held in favor of EJM because, prior to the period under audit, the IRS had failed to provide EJM with precise, not speculative, guidance concerning EJM's obligation to collect and remit the FET taxes. In other words, because there were no cases or revenue ruling in existence during the April 1, 2005 to June 30, 2009 period that unambiguously stated that aircraft management companies offering services similar to those offered by EJM were subject to FET taxes, EJM cannot now be held liable for failure to collect and remit such taxes.

So, what does this mean for the industry – will FET audits of management companies now end? Unfortunately, that is not likely. The case did not resolve once and for all the issue of whether monthly management fees or any other amounts paid by aircraft owners to aircraft management companies are subject to FET taxes – the resolution of that issue is still elusive, and may require legislative action. In short, the only thing this case stands for is the proposition that before the IRS can hold an aircraft management company liable for failure to collect FET taxes, the IRS must first publish some form of non-speculative guidance that precisely indicates what sort of activities will subject an aircraft management company to the obligation to collect and remit FET taxes. The IRS arguably may have already done so, after the audit period in question, when it issued IRS Chief Counsel Advice 2012-10026 on February 15, 2012. Whether Chief Counsel

Advice 2012-10026 is sufficient to constitute precise, not speculative, guidance with respect to FET audits for audit periods after February 15, 2012, remains to be determined.

It also remains to be seen whether or not the IRS will apply the ruling in the EJM case to FET audits of other aircraft management companies for audit periods preceding February 15, 2012. Since the ruling in the EJM case is from a Federal District court, the IRS potentially could appeal the ruling to 6th U.S. Circuit Court of Appeals. Even if the IRS does not appeal the decision to the 6th Circuit, the decision would not necessarily be binding on, or followed by, the IRS in other jurisdictions.

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