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Sales & Use Tax Generally

Most states impose a sales tax or a use tax of between 3% and 10% of the value of an aircraft at the time that the aircraft is purchased. Aircraft purchasers and owners need to be familiar with the sales and use tax provisions of the state where an aircraft will be delivered and hangared, the state in which the purchaser resides and/or has its principal place of business or owns or stores other property, and any other state where the aircraft may be frequently used or stored. Several types of exemptions may be available to permit an aircraft purchaser to acquire, use and store an aircraft free of a particular state's sales and use tax.

In many instances, aircraft owners who are retaining an aircraft charter management company to oversee the management and charter operation of their aircraft at an airport in New Jersey have questions regarding the specific sales and use tax treatment of the arrangement between the aircraft owner and the charter management company, particularly with respect to payments of charter rent/revenue to be made by the charter management company to the aircraft owner. The exact tax treatment of a particular aircraft charter management arrangement will turn on the specific structure being utilized. Therefore, each aircraft charter and management structure must be individually analyzed to know how the arrangement will be treated for state sales and use tax purposes. Set forth below is a brief general description of New Jersey sales and use tax and applicable exemptions from those taxes that could apply to the lease of aircraft to an aircraft management company for operation in charter under FAR Part 135.

Sales & Use Tax Law in New Jersey

Absent an applicable exemption, New Jersey imposes a 7% sales tax on receipts from sales of tangible personal property purchased at retail in New Jersey and a complementary

7% use tax on the value of tangible personal property used in New Jersey.¹ The state's use tax is imposed on property *used in the state*, rather than the more common formulation of property *purchased for use in the state*.² Thus, the statute is broad enough to apply to property brought into the state after it was acquired, and there is no inquiry into whether the purchaser intended to use the property in New Jersey at the time of purchase. The definition of "use" includes storage (e.g., hangaring), among other items.³

Provided that certain conditions are met, an aircraft owned exclusively for leasing purposes may be acquired or used in New Jersey exempt from New Jersey sales and use tax pursuant to the sale for resale exemption. In that case, New Jersey sales tax is owed on the rent payments collected under the lease. If New Jersey sales or use tax is paid on a lease or rental based on the original purchase price of the aircraft, a subsequent lease or rental of the aircraft is not subject New Jersey sales and use tax.

New Jersey also has a sales and use tax exemption for sales of aircraft (including leases thereof) to an air carrier for use by such air carrier *provided that such air carrier has its principal place of operations in New Jersey* and engages in interstate, foreign, and intrastate commerce.⁴ The New Jersey tax court has interpreted the term "utilized by an air carrier" as imposing a requirement that "the aircraft actually be used for common carriage as opposed to merely being held out for hire," and to meet this requirement, the court held that based on an FAA advisory circular, the "predominant use" of the aircraft must be to provide common carriage to unrelated parties.⁵

Thus, by combining the sale for resale exemption with the exemption for the sale of the aircraft to an eligible air carrier, an aircraft owner can avoid paying all or a portion of the New Jersey sales or use tax owed on its aircraft purchase and use. However, the limitations of the air carrier exemption make it unavailable to many aircraft owners who lease their aircraft to an air carrier whose principal place of operations is outside New Jersey.

Planning Strategies/Conceptual Issues

There are strategies to mitigate the unavailability of the air carrier exemption in connection with FAR Part 135 leases of aircraft which include:

1. Netting – if an owner leases the aircraft to an air carrier, one common methodology that could be used to minimize the amount of charter revenue subject to New Jersey sales tax would be to net aircraft operating expenses against charter revenue paid to the aircraft owner/lessor. By doing so, the ultimate amount of the "sale" proceeds received by the aircraft owner/lessor from the air carrier can be substantially reduced together with the resulting New Jersey sales tax liability thereon.

¹ N.J.S.A. § 54:32B-3, -6.

² N.J.S.A. § 54:32B-6.

³ N.J.S.A. § 54:32B-2(h).

⁴ Id.

⁵ *KSS Transportation Corp. v. Baldwin*, 9 N.J. Tax 273 (Tax 1987), aff'd, 11 N.J. Tax 89 (App. Div. 1989).

2. Owner Previously Paid NJ Sales/Use Tax on Aircraft – Per the description of New Jersey law described above, if an aircraft owner pays New Jersey sales or use tax on a lease or rental of the aircraft based on the original purchase price of the aircraft, a subsequent lease or rental of the same property shall not be subject to the sales or use tax. Thus, if such an owner of aircraft is planning to lease the aircraft to an air carrier for use in FAR Part 135 operations, the application of the air carrier exemption would be irrelevant as no New Jersey sales or use tax would be owed on any lease rent paid by the air carrier to the owner under the lease of the aircraft.

As stated above, it is always essential to consult with your attorney or other tax advisor regarding the specific tax treatment of a particular arrangement prior to entering into such arrangement. GKG Law's business aircraft attorneys are experts in this area. This memorandum is being provided for your general information and is not to be construed as constituting legal advice or legal opinion regarding any specific facts or circumstances.



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