



## No Federal Air Transportation Excise Tax is Due For Certain Small Aircraft and Air Tour Operations -By Keith G. Swirsky & Troy A. Rolf-



The Internal Revenue Code imposes an excise tax on the sale of air transportation. Effective January 1, 2002, the rate of such tax is equal to the sum of 7.5% of the amount paid for the transportation, plus \$3.00 per person for each flight segment flown. A few exemptions from the air transportation excise tax exist. One such exemption, commonly referred to as the “Small Aircraft Exemption,” applies to transportation aboard aircraft having a maximum certificated takeoff weight of 6,000 pounds or less when the aircraft is not being operated on an established line. Aircraft operators can easily determine the maximum certificated takeoff of their aircraft. Determining whether a flight is operated on an established line is more difficult, and is a common source of frustration for small aircraft operators in general, and air tour operators in particular.

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Since late 1997, sellers of air transportation who fail to collect air transportation excise taxes are directly liable to the IRS for such taxes. Consequently, an aircraft operator who incorrectly determines that he does not operate on an established line, and who therefore does not collect excise taxes from passengers, could be required to pay the uncollected taxes, as well as interest and penalties, out of its own pocket. Such a tax liability could certainly be financially devastating.

### Background.

Many commercial operators and licensed air carriers who operate small aircraft are authorized by the FAA to conduct only “on demand” operations, but may not lawfully conduct “scheduled” operations, as such terms are defined in FAR 119.3. However, the fact that an aircraft operator is not authorized to conduct scheduled operations is not determinative, or even particularly helpful, in determining whether the operator operates on an established line. The IRS interprets transportation on an established line to mean transportation that meets all three parts of a three-prong test. The test states that transportation on an established line is transportation (i) between definite points (ii) occurring with some degree of regularity (iii) if the primary contract between the operator and the passenger is for transportation and not for the hire or use of the aircraft. The IRS and the courts have elaborated on the foregoing three-prong test on several occasions.



### The Between Definite Points Prong.

The “between definite points” prong does not require that transportation be between two different points to be taxable. The IRS has held that continuous transportation beginning and ending at the same point is taxable unless otherwise exempt. Thus, an air tour operator that always returns its passengers to the same point at which the tour began could be found to be operating on an established line.

### The Some Degree of Regularity Prong.

The term “operated on an established line” does not mean that strict regularity of schedule must be maintained, that a particular route be followed, or that intermediate stops be restricted. It is enough that merely some degree of regularity be maintained. The IRS may determine that an operator meets the “some degree of regularity” prong if the operator generally controls the frequency that it operates over a particular route, as opposed to operating over a particular route only when hired specifically to do so. An operator will likely be found to control the frequency of operations over a particular route if he advertises services over the route at scheduled or fixed times, or accepts advance bookings to provide service on the route.

### The Primary Contract Prong.

Merely operating between two geographic points on a routine basis does not necessarily result in a finding that an aircraft is operated on an established line. Where the details of a flight, such as departure point and time, destination, and scheduling frequency are in the control of the customer, the flight likely will not be found to be operated on an established line, unless the operator of the flight also operates other flights between the same points in a manner that would result in an established line finding. In one case, the IRS held that a charter operator who contracted with the United States Postal Service to provide six round trips per week between two particular cities on a fixed schedule was not operating on an established line because the Postal Service, and not the operator, designated the cities and determined the schedule of the flights, and the charter operator did not operate other flights between the two cities on a regular basis. If it can be established that an operator operates flights “on an established line” between any two points, all flights conducted by the operator between those two points are subject to taxation.

The Small Aircraft Exemption issue frequently arises in the context of the scenic air tour industry. The fact that air tour operators generally have direct liability to the IRS for payment of uncollected air transportation excise taxes, combined with the fact that air tour operators operate in highly competitive and price-sensitive markets, makes accurately interpreting the three-prong test and determining when collection of air transportation excise taxes is required essential to an air tour operator’s competitive edge and profitability. In many cases, thoughtful and creative planning techniques can be employed in an effort to minimize the probability that the IRS may find that an air tour operator’s flights are operated on an established line. GKG Law, P.C., has assisted a variety of air tour operators in accurately determining whether their operations are on an established line, in planning their flight and marketing operations to avoid an established line finding, and in determining their excise tax collection responsibilities. The firm’s aviation-tax attorneys have also successfully represented air tour operators in tax audits.

