April 19, 2013

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2013-22)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

VIA EMAIL: Notice.Comments@irscounsel.treas.gov

Re: Recommendations for 2013-2014 Guidance Priority List (Notice 2013-22)
Transportation of Persons by Air: Taxability of Aircraft Management Fees Under I.RC. § 4261

Dear Sir and/or Madam:

This letter is submitted by the National Business Aviation Association ("NBAA") and the National Air Transportation Association ("NATA") in response to the invitation published in Notice 2013-22 for recommendation of items for inclusion on the 2013-2014 Guidance Priority List. NBAA represents more than 9,000 member companies and is the leading organization for companies that own or operate general aviation aircraft to make their businesses more efficient, productive and successful. NATA is the leading organization representing over 2,000 owners and operators of aviation service businesses such as fixed base operators, charter providers, maintenance and repair organizations, and aircraft management companies.

For the reasons discussed below, we respectfully request that the Internal Revenue Service ("Service") issue clear and precise guidance to determine if an aircraft management company providing certain services to an aircraft owner is providing taxable air transportation under I.R.C. § 4261.

While this letter outlines our request at a high level we have previously provided officials in the Service's Office of Associate Chief Counsel (Passthroughs and Special Industries) with additional details as to possible guidance. We look forward to discussing our previous submissions in more detail as part of the priority guidance process.

Existing Guidance on Taxability of Aircraft Management Fees

For over 60 years there has been a recognized lack of clear and precise guidance as to the applicability of the Federal Excise Tax ("FET") on air transportation to aircraft management companies and their customers. For example, in Rev. Rul. 58-215, 1958-1, C.B. 439, the IRS determined that "since the corporation owns the aircraft, has exclusive control over the aircraft's personnel, pays the operating expenses of the aircraft, and maintains liability and risk insurance and the airline operates the aircraft as an agent for the corporation," the airline company was not providing taxable transportation and thus the corporation's payments to the airline company were not subject to FET.

However, the Service also issued an outlier ruling, Rev. Rul. 74-123, 1974-1 C.B. 31, where a government agency was required to pay FET for fees the agency paid to a charter company for transporting government personnel both on aircraft owned by the charter company and on government-owned-aircraft. At the request of the Service we previously provided a detailed explanation contrasting the facts and conclusions in Rev. Rul. 74-123 with a typical aircraft management arrangement.

The publication of the Excise Tax- Air Transportation Audit Technique Guide ("ATG") in 2008 created further confusion as it described aircraft management arrangements in ways that are inconsistent with

how the industry functions. Publication of the ATG generated increased audit activity but did not provide the aircraft management industry with clear and precise guidance as to FET applicability.

Finally, the Chief Counsel Advice ("CCA") memorandum (Number: 201210026, released March 9, 2012) ignored this conflicting guidance and took the approach that virtually all amounts paid by an aircraft owner to a management company are subject to FET. Since the publication of the CCA, NBAA and NATA have observed that virtually any business aviation company engaged in providing aircraft management services is subject to audit. The expense incurred by the Service to undertake these audits, and by the taxpayer to defend the audits, is significant and clearly not the best use of resources by either party.

Requirement for Clear and Precise Guidance

Management companies are typically small and mid-sized companies that may manage one or two aircraft each and do not have significant financial resources. FET is a collected tax causing the management companies to be secondarily liable for the tax. With the enforcement position currently being taken by the Service, management companies are often found liable for FET not only on payments by current customers but also on payments by previous customers. With the lack of clear and precise guidance on this issue, aircraft management companies have not typically collected FET from owners conducting non-commercial flights for themselves on their own aircraft. These owners may no longer own aircraft or may not even exist, making it impossible for management companies to collect retroactive taxes. Management companies simply cannot continue as going concerns with the retroactive tax liabilities being imposed by the Service during audits.

In *Central Illinois Public Service Co. v. United States,* 435 U.S. 21 (1978)—which involved the scope of an employer's secondary liability for allegedly failing to withhold and deposit employment taxes on an employee's "wages"—the Supreme Court explained that when a taxpayer (the employer in that case) acts as the Government's tax collector, its collection and deposit obligations must be clear at the time the taxpayer is required to collect the tax. Thus, a person in a secondary liability position is protected by the Central Illinois principle from liability for failing to collect the tax from the person primarily liable for the tax when it lacks a contemporaneous "precise and not speculative" notice of its duty to collect the tax.

In the context of FET, aircraft management companies have not been provided with guidance that is clear as to their requirements for serving as the government's deputy tax collector. Aircraft management companies are left to try and make sense of conflicting IRS rulings and have no explanation as to how the Service actually determines FET applicability.

Apply Common Law Principles of Leasing to Determine if Aircraft Owner has Transferred Possession, Command and Control of Aircraft to Management Company

In general, to provide taxable air transportation, a person must provide both the aircraft and the pilot services for the flight. In order to provide the aircraft, the person must have possession, command and control of the aircraft. It is possible to have possession, command and control of the aircraft by owning the aircraft or by leasing it from another person.

Based on several meetings with the Service on this issue, we understand that they agree that a clear standard is needed to determine when taxable air transportation is provided. Since obtaining possession, command and control of the aircraft is necessary to provide taxable air transportation, focusing on this element in developing a test seems to be logical.

Under common law principles, an aircraft owner has the exclusive right to possession, command, and control of its aircraft. Furthermore, under common law principles, a lease of an aircraft can be by means of an actual lease or a constructive lease. Common law principles apply to determine, on a flight by flight basis, whether the owner has transferred possession, command, and control of its aircraft to another

person under a constructive lease, or whether such other person is merely performing services with respect to the aircraft, *e.g.,* pursuant to an aircraft management agreement. *Petit Jean Air Service, Inc. v. United States,* 33 A.F.T.R.2d 74-1526 (E.D. Ark. 1974, *appeal not recommended,* AOD 1975-33 (Mar. 27, 1974) (constructive lease found based on intent of the parties).

Using these common law principles and existing case law to determine whether an aircraft has in fact been actually or constructively leased to an aircraft management company will provide a clear test to determine whether the management company has obtained possession, command and control of the aircraft. Most aircraft management arrangements are simply service arrangements and the aircraft is not actually or constructively leased to the management company.

We have previously submitted an explanation regarding this constructive leasing standard to the Service's Office of Associate Chief Counsel (Passthroughs and Special Industries) and look forward to discussing the concept further.

Requested Guidance

Accordingly, we respectfully request that the Service provide guidance that creates a clear standard, consistent with applicable law, to determine when taxable air transportation is being provided. In our opinion, the constructive leasing standard discussed above may serve as a good starting point for such guidance.

We would appreciate the opportunity to discuss this issue with appropriate officials from the Service and Department of the Treasury.

Thank you in advance for your consideration of this request.

Sincerely,

Ed Bolen
President and CEO
National Business Aviation Association

Thomas L. Hendricks
President and CEO
National Air Transportation Association

cc: Lisa Zarlenga, Tax Legislative Counsel, U.S. Department of the Treasury
Curt Wilson, Associate Chief Counsel, Passthroughs and Special Industries, IRS