May 24, 2018

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-43)
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Recommendations for 2018-2019 Priority Guidance Plan (Notice 2018-43)

Dear Sir/Madam:

This letter is submitted by the National Air Transportation Association ("NATA") and National Business Aviation Association ("NBAA") in response to the invitation published in Notice 2018-43 for recommendation of items for inclusion on the 2018-2019 Priority Guidance Plan.

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. NBAA represents more than 11,000-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.

With passage of the Tax Cuts and Jobs Act ("the Act"), new section 13822, "Amounts Paid for Aircraft Management Services" ("AMS provision") is now law. While the Congressional intent of the provision is clear, there are areas where additional guidance or scenarios will be helpful for tax administration.

In addition, IRS Publication 510 (Rev. March 2018) references the AMS provision, but the brief summary of the legislative change is not consistent with the statute or congressional intent. The summary indicates that when an owner's aircraft is available for third-party charter, or for use in fractional ownership programs, payments for management services are not covered by the exemption in the new provision. We believe this to be incorrect, as the use of an owner's aircraft for third party charters, or as part of a fractional ownership program, should have no impact on applicability of the new provision.

With the potential confusion caused by Publication 510, as well as wholly-owned and fractional aircraft management companies presently facing open audits and open tax years relating to federal excise tax assessments on aircraft management services, we respectfully request that guidance be provided in the below areas. Your attention to these issues are of significant importance to the industry and our member companies.

Requirements to Qualify for Exemption

According to the conference report (H. Rep. No. 115–466, 2017) accompanying the Act, the AMS provision has the following effect:

> "…exempts certain payments related to the management of private aircraft from the excise taxes imposed on taxable transportation by air. Exempt payments are those amounts paid by an aircraft owner for management services related to maintenance and support of the owner's aircraft or flights on the owner's aircraft."

The AMS provision and conference report make clear that there are two basic requirements to qualify for the exemption from federal air transportation excise tax ("FET"): (1) the payments must be amounts paid by an aircraft owner, and (2) the payments must be for aviation management services or flights related to the aircraft owner's aircraft.

For example, if an aircraft owning company retains a management company to provide support services for ownership and operation of its aircraft, payments by the company to the management company for support services related to flights on the aircraft would not be subject to FET under the exemption.

We believe it is evident that the AMS provision was enacted to accomplish the following purposes and should be interpreted consistent with these purposes:

1. Under prior law, there were many confusing rulings for more than a half century over the question of who had possession, command, and control ("PCC") of the aircraft. By adopting a bright-line test, it seems evident that Congress intended to put an end to this controversy.
2. The AMS provision indicates an intent to not impose FET on the party that brings the aircraft to the management company.

Accordingly, interpretations of the exemption in regulatory guidance should be drafted to carry out these purposes.

Payments by Aircraft Owner

Under the AMS provision, it is important to determine whether payments are made by the "aircraft owner," as payments for management services must be made by the owner to qualify for the exemption. For purposes of interpreting the provision, we recommend that payments be considered as made by the owner when the payments are made by parties related to the owner. This approach would be most effective for tax administration and would recognize that cash management arrangements among related entities should not determine whether the exemption applies.

1. Affiliated Group Exception

Payments for air transportation between companies in an "affiliated group," as defined in IRC section 4282, are already exempt from FET. This expanded affiliated group exception reflects the view that the members of such an affiliated group should be viewed as a single entity for FET purposes. Accordingly, this standard should be applied to the AMS provision, and payments for management services by a member of an affiliated group (as defined under section 4282) for its flights on an aircraft owned by a member of the group, should be treated as payments by the aircraft owner.

For example, an aircraft is owned by a Corporation A, which is part of an affiliated group of corporations as defined in section 4282. In this scenario, if Corporation A owns the aircraft, but Corporation B (also a member of the affiliated group) makes payments for aircraft management services to support the ownership/operation of the aircraft, the payments should be treated as coming from the aircraft owner and be covered under the exemption in the AMS provision.

2. Subsidiaries

In the aviation industry, it is common for special purpose entities to be created for purposes of owning aircraft. These structures are used to comply with FAA regulations, limit liability exposure and satisfy other business requirements.

Under these structures, payments for aircraft management services might not be made by the aircraft owning entity, but could be made by the individual owner of the entity, or by another entity commonly controlled by the same individual or company. Under a scenario where the aircraft is owned in one entity, and payments for aircraft management services come from another entity controlled by the same person, the payments should be covered by the exemption in the AMS provision.

As another example, individuals or corporations often elect to own aircraft in single member LLCs (SMLLCs) that can be disregarded for income tax purposes, but are regarded for federal excise tax purposes. Under the AMS provision, if an aircraft owner elects to own its aircraft in a SMLLC, payments from sole Member to an aircraft management company to support ownership/operation of the aircraft should be treated as payments by the aircraft owner.

3. Related Parties

It would also seem inconsistent with the purposes of minimizing tax controversies to impose FET when payments for the flight are made by a family member of the aircraft owner. Consistent with this view and with the above situations, we suggest that when payments for management services or for flights are made by a person related to the owner of the aircraft, under IRC sections 267(b) or 707(b), then the payment should be treated as a payment made by the owner for purposes of the AMS provision.

Aircraft Operated under FAR Part 135 for Owner

When an aircraft owner elects to fly on its own aircraft under Part 135 of the Federal Aviation Regulations ("FARs"), payments for the associated management services should be covered by the exemption in the AMS provision. While general aviation aircraft are most commonly operated under the Part 91 flight rules, certain aircraft owner's elect to operate their aircraft under Part 135, which provides additional FAA regulatory requirements related to operational safety and enhanced liability protection.

The AMS provision does not make any references to the FARs, as those regulatory distinctions do not govern tax law. This means that if an aircraft owner elects to conduct flights on its own aircraft under Part 135, payments made by the owner for those flights should qualify for the exemption under the AMS provision in the same manner as a flight conducted under Part 91.

For example, an aircraft owner could enter into a management agreement with a charter management company certificated under Part 135. This agreement would allow the charter management company to operate flights on behalf of the aircraft owner under Part 135. In this scenario, when the charter management company conducts flights for the aircraft owner on the owner's aircraft under Part 135,

the payments made by the owner to the management company for those services are covered by the exemption under the AMS provision.

Aircraft Available for Charter to Third Parties Under FAR Part 135

An aircraft owner may also enter into a management agreement with a charter management company that holds an operating certificate under FAR Part 135, permitting the company to use the owner's aircraft for third-party charter flights. The FET on amounts paid for commercial air transportation and applicable segment fees would be assessed on the third-party charter flight invoice, unless a flight is otherwise exempt (i.e. air ambulance, small aircraft, etc.).

Although an owner's aircraft may be available for third party charter, and FET would be due on those flights, amounts paid by the owner for management services in support of the owner's aircraft are not payments for transportation and thus covered by the exemption in the AMS provision.

Payment Arrangements for Aircraft Management Services

Aircraft management companies have varying business practices for billing aircraft owners for services provided on their behalf. Regardless of the specific business arrangement of the company, any charges paid by the aircraft owner for management services for flights on its aircraft should be covered by the exemption in the AMS provision.

For example, an aircraft management company could charge an aircraft owner an hourly amount for management services to support operation of the owner's aircraft. The management agreement would typically list what the hourly charge covered, but instead of a billing statement listing specific costs, the owner would be charged an hourly rate.

Assuming the hourly charge was for support services related to the owner's aircraft, the charges would be covered by the exemption in the AMS provision.

Aircraft Management Expenses Not Listed in the Statute

Under the AMS provision, aircraft management services are defined to include:

- assisting an aircraft owner with administrative and support services, such as scheduling, flight planning, and weather forecasting
- obtaining insurance
- maintenance, storage and fueling of aircraft
- hiring, training, and provision of pilots and crew
- establishing and complying with safety standards, and
- such other services as are necessary to support flights operated by an aircraft owner.

In addition to the services described above, aircraft management companies often purchase aircraft parts, fuel or other items on behalf of the aircraft owner. Although the above list includes a general "such other services," provision, it is possible that purchase of these items by the management company which are ultimately paid for by the owner could cause confusion.

Clearly, the purposes of the AMS provision would be frustrated if the taxpayers were put in the position of having to argue the PCC issue with respect to such unlisted items. Since FET determinations are made on a flight-by-flight basis, once a flight is covered by the AMS provision, individual costs such as the purchase of aircraft parts should not be taxable under section 4261 as they do not constitute transportation services.

Open Audits and Open Tax Years

Taxpayers are presently facing a pressing issue dealing with current open audits and open tax years related to FET assessments on aircraft management services – the same issue that Congress recently clarified through the AMS provision.

While the conference report accompanying the Act stated that the IRS has conceded all open cases, and has issued letters to many taxpayers conceding FET assessments, there are at least two audits that remain open (that NBAA and NATA have been notified about). These open audits create a significant competitive disadvantage for these companies, therefore the IRS should close the audits with regard to wholly-owned and fractional aircraft management companies so as not to create an uneven playing field in the industry. Additionally, the IRS should issue guidance stating it will not pursue FET assessments for open tax years preceding the AMS provision's date of enactment. This will relieve the uncertainty that hundreds of aircraft management companies are experiencing.

As stated in the conference report accompanying the Act, the IRS informed Congress that it conceded the application of FET on the aircraft management services issue:

> In 2017, the IRS decided not to pursue examination of the issue of whether amounts paid to aircraft companies by the owners or lessors of the aircraft are taxable until further guidance is made available. According to the IRS, for any exam in suspense the aircraft management fee issue was conceded and the taxpayers were notified accordingly. The IRS has not issued further guidance on this issue.

The conference report, citing past litigation of this issue, also recognized that the IRS had failed to provide "precise and not speculative notice" to management companies of their obligation to collect FET from aircraft owners on management fees.

It is important to note that the statutory text of the AMS provision, and the above referenced conference report language, do not distinguish between the form of aircraft ownership. This is because management companies perform the same services regardless of whether the aircraft is fractionally or wholly-owned.

Congressman Jim Renacci, a member of the House Ways and Means Committee during consideration of the Act, and a co-sponsor of the original legislative proposal that became the AMS provision, made a statement in the congressional record clarifying this point. He also referenced the IRS's inconsistent enforcement in this area, resulting in winners and losers among similarly situated companies. Thus, "with the enactment of H.R. 1, the IRS should cease its efforts to collect the FET on air transportation from [aircraft management] companies." See 115 Cong. Rec., E17157 (daily ed. Dec. 22, 2017).

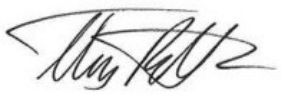
To apply consistency among similarly situated taxpayers, we respectfully request that the IRS issue guidance to close all remaining open audits on this matter with regard to wholly-owned and fractional aircraft management companies. The IRS should also issue guidance that it will not pursue FET assessments for open tax years before the AMS provision's date of enactment.

Requested Guidance

Accordingly, for purposes of tax administration and to follow the legislative intent of Congress, we respectfully request that guidance be provided to further define the various types of business arrangements that are subject to the exemption in the AMS provision as described above. In addition, guidance is requested clarifying that the AMS provision applies to open tax years and audits preceding the enactment of the Act.

Thank you in advance for your consideration of this request. If you have questions, please contact Scott O'Brien at (202) 783-9451 or sobrien@nbaa.org or Tim Obitts at (202) 774-1535 or TObitts@nata.aero.

Sincerely,



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