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NBAA

# IRS FINAL REGULATIONS ON FEDERAL EXCISE TAX EXCEPTION FOR AIRCRAFT MANAGEMENT SERVICES

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*This NBAA publication is intended to provide members with an introduction to the rules that relate to the topic of federal excise taxes on air transportation and fuel. Readers are cautioned that this publication is not intended to provide more than an illustrative introduction to the subject matter, and since the materials are necessarily general in nature, they are no substitute for the advice of legal and tax advisors addressing a specific set of facts that readers may face.*

On January 19, 2021, the Internal Revenue Service (IRS) issued final regulations on federal excise tax (FET) obligations for aircraft management companies and aircraft owners. These regulations represent the successful culmination of a years-long advocacy effort led by NBAA and its Tax Committee. The final rules implement a provision in the 2017 Tax Cuts and Jobs Act (TCJA) that made clear the 7.5% FET on commercial air transportation is not due when an aircraft owner pays for management services to support flights on the aircraft. The legislative provision explained that such flights are subject to the non-commercial fuel tax and exempt from the percentage tax ending significant uncertainty that had devastating impacts for aircraft management companies.

For a general explanation of FET and best practices for collection and remittance, review NBAA's Federal Excise Taxes Guide.

## SUCCESSFUL ADVOCACY EFFORT LED TO FINAL RULE

NBAA's victory in securing the TCJA provision resulted from years of advocacy at the IRS, Department of the Treasury and on Capitol Hill. The challenge began in April 2008 when the IRS published an "Air Transportation Excise Tax Audit Techniques Guide" as a resource for IRS auditors. Unfortunately, the guidance in the publication was not reflective of how common aircraft management arrangements are structured and created significant confusion. Although the IRS subsequently withdrew the Guide from publication, IRS agents continued to rely on the improper guidance when conducting FET audits.

The Audit Technique Guide and prior IRS guidance explained that a person must have "possession, command and control" of an aircraft to be considered the provider of taxable transportation for purposes of imposing FET on payments made to such person for such transportation. The Guide explained that possession, command and control of an aircraft is analyzed by determining:

- who chooses and pays for the pilots;
- who provides maintenance on the aircraft;
- who controls the scheduling of the aircraft;
- who pays for the insurance and other expenses of the aircraft.

After publication of the Audit Technique Guide, NBAA and industry partners held numerous meetings with the goal of developing guidance that accurately reflected common aircraft management arrangements. While the IRS agreed to work with industry, the agency unexpectedly issued a Chief Counsel Advice (CCA) memorandum in March 2012. In CCA 2012-10026, the IRS explained that management services companies have possession, command, and control of managed aircraft, unless their services were performed in the capacity of an agent of the owner. Under the facts described in the CCA, the IRS concluded that when an aircraft management company had primary control of the aircraft's pilots, virtually all fees and reimbursements paid by the owner of an aircraft to its aircraft management company were subject to the 7.5% FET.

Audit activity increased significantly with publication of the CCA, and management companies were faced with large retroactive tax assessments. These assessments had the potential to force the closure of many small businesses and were not consistent with applicable law. In response, NBAA continued its advocacy efforts by meeting with the IRS Chief Counsel in 2012 and providing detailed documents on how to correct the efforts in the CCA. These documents included a memorandum provided by NBAA and the National Air Transportation Association (NATA) in February 2013 which identified significant distinctions between a typical management services arrangement and the facts in Revenue Ruling 74-123 (which was frequently cited as authority by the IRS for its position).

In 2013, the IRS agreed that the CCA did not provide clear guidance to management companies on application of FET. Industry successfully made the case, that as deputy tax collectors, the IRS must provide management companies with clear and precise guidance on collecting and remitting the tax. In a meeting with leaders of the Small Business/Self-Employed Division of the IRS, NBAA and industry partners successfully argued for a suspension of audits on issues related to FET and aircraft management companies. While this suspended audit assessments, the underlying policy issues raised in the CCA were not resolved, and prior audit findings against management companies remained.

To elevate the need for clear and precise guidance, NBAA succeeded in having the FET issue added to the IRS/Treasury "Priority Guidance Plan" in 2013. This plan guides the IRS and Treasury in allocating resources to rulemaking efforts. During numerous meetings, industry provided details on sample management agreements, payment flows and aircraft ownership structures to help guide the rulemaking process. Although progress was made, industry agreed to work together on a legislative strategy that could provide certainty for management companies.

In Sept. 2015, the U.S. House and Senate introduced legislation that clearly stated amounts paid by aircraft owners to a management company in connection with flights on the owner's aircraft are not subject to the 7.5% FET. After reviewing the legislation and hearing directly from industry, the Joint Committee on Taxation (JCT) determined the legislation would have a negligible impact on tax revenue. This was a critical

point, as it demonstrated to Congress that the IRS had not collected substantial amounts of FET from management companies due to the significant controversy and lack of clear guidance.

During 2015 and 2016, NBAA, NATA, and management companies held numerous meetings on Capitol Hill to advocate for the legislation. This advance work and education paid dividends when the historic Tax Cuts and Jobs Act (TCJA) was enacted. Our champions in Congress successfully advocated that the management company provision be included in the TCJA which became law in December 2017. This significant legislative victory was the result of years of work by the NBAA Tax Committee and demonstrated what business aviation can achieve with a concerted advocacy effort.

## ADVOCACY CONTINUES DURING RULEMAKING

After passage of the TCJA, the IRS and Treasury Department needed to update Excise Tax Regulations to reflect the new provision in Internal Revenue Code (IRC) § 4261(e)(5). NBAA and NATA took the lead in meeting with the IRS to provide industry input on rules to implement the legislative change. These meetings led to IRS publication of Proposed Regulations in July 2020.[1] While the Proposed Regulations reflected input from NBAA and NATA, there were still significant areas of concern for industry.

Through a collaborative effort with the NBAA Tax Committee and NATA, the Associations provided detailed comments on the Proposed Regulations. Those efforts culminated in Final Regulations that adopt many NBAA-suggested provisions that eliminate potentially confusing provisions from the Proposed Regulations and provide clear standards for taxpayers and the government.[2] The sections below detail key areas of concern in the Proposed Regulations, and the outcome in the Final Regulations.

## ANALYSIS OF THE FINAL REGULATIONS

The FET exception for aircraft management company services in § 4261(e)(5) applies to "amounts paid by an aircraft owner for aircraft management services." The statute provides that the services must relate to "maintenance and support of the aircraft owner's aircraft" or "flights on the aircraft owner's aircraft." It provides a nonexclusive list of qualifying management services. It also provides that a lessee of an aircraft will be deemed to be an aircraft owner for purposes of the exception.

To generalize, the statute imposes two requirements: (1) the "amounts paid" must be paid by the aircraft owner (or lessee); and (2) such payments must be for qualifying services or for flights on such aircraft owner's (or lessee's) aircraft.

NBAA's comments to Treasury focused on (a) concerns over whether certain aircraft structures meet the first requirement that the aircraft owner (or lessee) be the payor, (b) responding to proposed anti-abuse rules and a proposed substitute aircraft rule, and (c) confirming that charter flights provided to the aircraft owner (or lessee) qualify for the exemption.

## OWNER TRUST ARRANGEMENTS

Owner trusts are used for aircraft registration purposes in the United States. Owner trusts for business aircraft are formed through (1) a trust agreement between an owner trustee who is a U.S. citizen and a trust beneficiary who may or may not be a U.S. citizen, and (2) a related aircraft operating agreement that is usually between these same two parties. These documents establish that (i) the owner trustee is the legal titleholder and registered owner of the business aircraft that is being held in trust, and (ii) the beneficiary is granted beneficial ownership of the business aircraft and the right to possess and maintain operational control of the business aircraft including the right to lease the business aircraft to other persons.

The Proposed Regulations did not discuss the treatment of owner trusts when applying the management services exception. NBAA was concerned about a possible lack of clarity regarding whether a beneficial owner of a business aircraft would be respected as an "owner" and whether the right to use the business aircraft provided pursuant to the operating agreement would be respected as a lease for purposes of the exception. Accordingly, NBAA requested clarification that an owner trust would not jeopardize eligibility for the management services exception.

In its comments on the proposed regulations, NBAA explained that the beneficiary in an owner trust for business aircraft retains many of the indicia of ownership of such aircraft. NBAA also explained that the aircraft operating agreement provides that the beneficiary has the exclusive right to possess and maintain operational control of the aircraft and the related obligations to maintain and operate the aircraft in accordance with manufacturer guidelines and FAA regulations.

[1] 85 Fed. Reg. 46,032 (July 31, 2020).
[2] 86 Fed. Reg. 4990 (Jan. 19, 2021).

In response to NBAA's comments, the Final Regulations provide a definition of an owner trust and further provide that the beneficiary of an owner trust, in which the beneficiary is considered a lessee under the aircraft operating agreement, is deemed to be an "aircraft owner" eligible for the exemption on amounts it pays to a management company.[3]

## RELATED PARTIES, AGENTS AND CONSTRUCTIVE LEASES

Read literally, § 4261(e)(5) applies the management services exception to payments made by only the aircraft owner (or lessee). NBAA raised the concern with Treasury that this could be a problem in many situations, such as payments by the owner of a disregarded entity, a family member, or another company in a consolidated group of companies. Accordingly, NBAA requested that the exemption should apply at a minimum to these three categories, but preferably to payments by any party related to the aircraft owner.

Unfortunately, the IRS views the requirement that the aircraft owner (or lessee) be the payor as a requirement strictly imposed by the statute. The only flexibility the IRS provided was to permit payments by "agents" of the aircraft owner (or lessee) to count as payments by the owner (or lessee).[4] Furthermore, when asked to apply the exception to lessees under constructive leases in which the basic attributes of a lease are present (transfer of possession, use, and control to a purported lessee), the IRS declined. The IRS stated that the analysis necessary to identify a constructive lease would be similar to the analysis necessary to identify a provider of air transportation services under the "Possession, Command, and Control" test. The IRS explained that the management services exception was designed to avoid the need for that analysis.[5]

This restrictive view may result in arbitrary and unexpected limitations on the exception. For example, if payments are made to a management company by an individual who owns a limited liability company (LLC) that owns an aircraft, then it will be important to determine whether the LLC leases the aircraft to the individual. If the individual failed to lease the aircraft from the LLC, then the IRS may argue that the exception does not apply. Similarly, if one company in a consolidated group of companies handles the treasury functions including paying bills, while another company operates the aircraft, then the IRS may argue that the exception is not available. In such cases, it is important to remember that if the exception does not apply, the taxpayer can still argue that the management company does not have Possession, Command, and Control of the aircraft under existing rulings.

## PROPOSED "ANTI-ABUSE" RULE FOR DISQUALIFIED LEASES

Under § 4261(e)(5)(C), a disqualified lease is a lease of an aircraft from a person providing aircraft management services with respect to the aircraft (or person related to the aircraft management services provider), if the lease is for a term of 31 days or less.

The Proposed Regulations included an anti-abuse provision that significantly expanded the definition of disqualified lease to include any lease with a term that is greater than 31 days but that did not provide the lessee with exclusive and uninterrupted access to and use of the leased aircraft.[6] NBAA and NATA submitted comments regarding the Proposed Regulations that identified multiple issues with the proposed anti-abuse provision, including that the definition would tax legitimate non-exclusive dry (without crew) leasing structures. NBAA and NATA were successful in convincing the IRS that the anti-abuse rule could capture commonly used legitimate leasing arrangements, so the final regulations omitted the proposed anti-abuse rule and simply cross-referenced the statutory definition of a disqualified lease, as described above.

## DEFINITION OF DISQUALIFIED LEASE

The final regulations contemplate the possibility that multiple aircraft management services providers may exist with respect to one aircraft. An aircraft management services provider includes any person that provides aircraft management services to an aircraft owner.[7] Such aircraft management services include (i) assisting an aircraft owner with administrative and support services, such as scheduling, flight planning, and weather forecasting, (ii) obtaining insurance, (iii) maintenance, storage and fueling of aircraft, (iv) hiring, training, and provision of pilots and crew, (v) establishing and complying with safety standards, and (vi) any other service (including, but not limited to, purchasing fuel, purchasing aircraft parts, and arranging for the fueling of an aircraft owner's aircraft) provided directly or indirectly to an aircraft owner in order to provide air transportation to the aircraft owner on the aircraft owner's aircraft at a level and quality of service required under the agreement between the aircraft owner and the aircraft management services provider.[8] Therefore, under the Final Regulations, the concept of who is an

[3] Treas. Reg. § 49.4261-10(b)(3), (7); Preamble to Final Regulations, § II.b.ii, 86 Fed. Reg. 4992.
[4] Treas. Reg. § 49.4261-10(a)(1).
[5] Preamble to Final Regulations, § II.b.i, 86 Fed. Reg. 4991-2.
[6] Prop. Treas. Reg. § 49.4261-10(b)(4).
[7] Treas. Reg. § 49.4261-10(b)(2).
[8] Treas. Reg. § 49.4261-10(b)(1).

aircraft management services provider is broader than what the business aviation industry typically considers to be an aircraft management company.

This broad definition of an aircraft management services provider may be both beneficial and burdensome to aircraft owners. It is beneficial since it allows for the exemption to apply to payments made by an aircraft owner for different types of services provided to the aircraft owner by multiple vendors. However, the definition may also cause an aircraft owner to be an aircraft management services provider since many aircraft owners continue to provide at least some services to the lessee(s) of the aircraft they own, such as insurance, hangarage, or maintenance. It is therefore important for aircraft owners who lease the aircraft they own to be aware that they may also be management services providers. Under the disqualified lease provisions in § 4261(e)(5)(C), if the owner leases the aircraft for 31 days or less and provides any management services to the lessee, then the lease may be a disqualified lease and the lessee may not be a deemed owner. This result would mean that the lessee would not be eligible for the management services exception when the lessee hires a management services company. In that case, the lessee may nevertheless argue that FET does not apply under the existing Possession, Command, and Control test. Nevertheless, it may be advisable to avoid entering into leases of 31 days or less, if the lessor provides any services to the lessee.

## PROPOSED "ANTI-ABUSE" RULE FOR FRACTIONAL PROGRAMS

Given the broad potential for applicability of the management services exception to leasing structures, the IRS was concerned that taxpayers may create structures similar to fractional ownership programs, but designed to fall outside the applicability of the higher fuel tax imposed under I.R.C. § 4043, and attempt to rely on the management company exemption for these structures. To address that concern, the IRS proposed an anti-abuse rule[9], which stated that the management company exemption would not be applicable to such structures. There were several issues with this Proposed Regulation, including that it was unclear how it would apply, and it was likely to cut off the availability of the management company exemption to many types of legitimate structures that were not created for the purpose of avoiding tax.

NBAA's comments explained the lack of clarity and provided examples of how this anti-abuse rule could be misapplied. The comments also proposed modifications to the rule, and several examples to include in the final regulation, to provide guidance on how to properly apply the regulation. In response, the IRS removed this anti-abuse rule from the Final Regulations. The removal of this anti-abuse rule will benefit business aircraft owners and operators whose structures would otherwise meet the requirements for the management services exception, as they will not risk unexpectedly running afoul of an anti-abuse rule simply because they involve multiple aircraft or have other attributes that an IRS auditor may view to be similar to a fractional program.

## "SUBSTITUTE AIRCRAFT"

When the TCJA was enacted in 2017 and at subsequent meetings between industry and regulators, few thought that substitute, alternate or supplemental lift was within the scope of any rulemaking. However, the proposed regulations elected to consider this unrelated issue.

The Proposed Regulations provided a set of complicated calculations to determine the FET taxable payments by an aircraft owner, to a services provider, for transportation on "substitute aircraft." Under this Proposed Regulation, FET would apply to all payments made to the management services company with respect to the owner's aircraft and any substitute aircraft multiplied by the ratio of substitute aircraft flight hours over total flight hours for the owner and substitute aircraft for the year.[10]

NBAA's comments pointed out that when the management company provides a substitute aircraft, the transaction is typically a charter on which the correct amount of FET is paid. Accordingly, there is no need for a special calculation of FET for substitute aircraft. The IRS agreed and removed this complex calculation for substitute aircraft from the Final Regulation.[11]

## AIRCRAFT MANAGEMENT SERVICES AND BILLING PRACTICES

NBAA was initially concerned that the IRS would only apply the management services exception with respect to the specific aircraft management services listed in § 4261(e)(5)(B). In addition, NBAA was concerned that the exception might only apply to payments specifically allocated to these services, and that payments for management services by the hour or month or under some other method might not qualify.

[9] Prop. Treas. Reg. § 49.4261-10(b)(3)(ii).
[10] Prop. Treas. Reg. § 49.4261-10(b)(3)(ii).
[11] Treas. Reg. § 49.4261-10(c)(2).

NBAA expressed these concerns to Treasury before the issuance of the Proposed Regulations, and the Proposed and Final Regulations addressed both concerns.

The regulations make it clear that any service (including parts) provided by the management company with respect to the aircraft can qualify for the exception.[12] The services are not limited to the specific services listed in the statute. In fact, at NBAA's request, the Final Regulation dropped the requirement from the Proposed Regulation that the services must be necessary to keep the aircraft airworthy.

Likewise, the regulations make it clear that the application of the management services exception is not affected by the billing arrangements with the management company.[13] Therefore, the management company can charge on an item by item basis, or a flat monthly or hourly basis, or any other basis.

## OWNER CHARTER FLIGHTS

An issue that has created much controversy over many decades between aircraft owners and the IRS was the use of the subjective Possession, Command and Control factors to determine FET taxability to owner flights under the supervision or operation of a management company. Section 4261(e)(5) was welcomed as clarity to end the controversy once and for all. Prior to the Proposed Regulation, industry requested clarification and confirmation that an owner flying under the FAA commercial certificate of a common air carrier will not be disqualified from exclusion under the new law, regardless of the payment arrangement between the owner and the FAA Regulation (FAR) Part 135 operator.

The IRS and Treasury understood the need for clarity and adopted a definitive pronouncement in both the Proposed and Final Regulations that operating under FAR Part 91 or Part 135 is not a determinative factor in applying the FET exemption under 4261(e)(5). In response to one of the comments submitted by NBAA, the Final Regulations clarify that the exception applies to amounts paid by the aircraft owner (or lessee) for flights operated under FAR Part 135.[14] In other words, FET does not apply to payments by the owner (or lessee) to charter a flight on the owner's (or lessee's) aircraft under Part 135.

While this clarification is beneficial to taxpayers, the requirement that it only applies to payments by the aircraft owner (or lessee) means that its benefit may be relatively limited. For example, suppose a company leases its aircraft to a charter company, and the charter company provides a flight under Part 135 to an individual employee of the company. If the individual pays the charter fee to the charter company, then the amount paid for the flight is not paid by the owner (or lessee) and the exception would not apply. In contrast, if the company paid the charter fee to the charter company, and the company provided the charter flight to the individual as a fringe benefit, then the exception should apply.

Similarly, suppose a company owns a subsidiary which owns an aircraft and leases the aircraft to a charter company. If the company pays the charter company for a flight under Part 135, then the fact the owner (or lessee) did not pay for the flight would prevent the management services exception from applying. However, if the subsidiary leases the aircraft to the company, and the company subleases it to the charter company, then the company's payment to the charter company for a flight would qualify for the exception. While the exception may eliminate some of the need to apply the complex Possession, Command, and Control test, it introduces a new set of arbitrary and complex distinctions.

## AVIATION FUEL TAXES ON OWNER CHARTER FLIGHTS

The management services exception does not affect the fuel tax rate. The Proposed Regulations provided that the higher noncommercial fuel tax rates would apply to flights qualifying for the exception from FET.[15] NBAA commented that since the statutory language in the exception does not change the fuel tax rate, the fuel tax rate should continue to be governed by the distinction between commercial and noncommercial flights under existing law. Upon further review, the IRS agreed with NBAA's comment, and, as explained more fully below, the IRS revised the regulation accordingly.[16]

Fuel taxes imposed on kerosene used in commercial flights are lower (4.4 cents per gallon) than fuel tax imposed on kerosene used in noncommercial flights (21.9 or 24.4 cents per gallon). The definition of commercial aviation under § 4083(b) is "transporting persons or property for compensation or hire by air." To determine whether transportation is being provided, in contrast with merely leasing an aircraft or merely providing the personal services of a pilot, the IRS and the courts have applied the Possession, Command, and Control test, which "focuses on whether the taxed entity rather than the entity being transported, has

[12] Treas. Reg. § 49.4261-10(b)(1); Prop. Treas. Reg. § 1.4261-10(b)(1).
[13] Treas. Reg. § 49.4261-10(f); Prop. Treas. Reg. § 1.4261-10(f)
[14] Treas. Reg. § 49.4261-10(e); Preamble to final Regulations, § II.f, 86 Fed. Reg. 4998.
[15] Prop. Treas. Reg. § 49.4261-10(g).
[16] Treas. Reg. § 49.4261-10(g); Preamble to Final Regulations § II.g, 86 Fed. Reg. 4998.

'possession, command, and control' of the means of transportation and charges for its services."[17] This definition of commercial aviation applies to determine the applicability of both FET and fuel tax.[18]

There are several exceptions to FET provided by statute. In each case, there is a corresponding fuel tax statute which states whether the fuel tax applies at commercial or noncommercial rates. Section 4083(b) states that noncommercial fuel tax rates apply to flights for skydiving (§ 4261(h)), seaplanes (§ 4261(i)), small aircraft on established lines (§ 4281), and affiliated group members (§ 4282). Section 4041(l) provides for an exemption from fuel tax for air ambulances (§ 4261(g)), oil, gas and mineral exploration and mining by helicopter (§ 4261(f)(1)), and logging operations (§ 4261(f)(2)). However, there is no statute prescribing the fuel tax rate for flights that qualify for the management services exception in § 4261(e)(5).

As noted above, at NBAA's request, the IRS withdrew from the regulations the provision in the Proposed Regulations which provided that all flights qualifying for the management services exception would have been subject to fuel tax at noncommercial rates.[19] As the Preamble to the Final Regulations explains, "persons affected by the aircraft management services exemption should continue to follow current statutory, regulatory, and administrative guidance related to the rates of tax for aviation fuel." In general, flights provided by a charter company under FAR Part 135 rules are regarded as commercial flights for fuel tax purposes.[20] It should follow that fuel burned in charter flights provided to the aircraft owner (or lessee) in a manner similar to other ordinary charter flights would qualify for commercial fuel tax rates.

## CONCLUSION

The enactment of the management services exception was the result of many years of advocacy by NBAA, and it provided much needed relief for business aviation on the FET issue regarding aircraft management services. The Final Regulations on the management services exception are generally positive, and they represent a successful effort by NBAA to provide comments and meet with the drafters of the regulations at the IRS. It is unfortunate that the IRS did not accept the request to apply the exception to payors who are related to the aircraft owner (or lessee). This conclusion by the IRS results in needless complexity. However, it is helpful that the Final Regulations provided reassurance to owner trusts, removed the proposed anti-abuse rules, removed the proposed complex calculations for substitute aircraft, clarified that owner charters qualify for the exception and may qualify for the commercial fuel tax rates if conducted in a commercial manner under existing law. ✣

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[17] Bombardier Aerospace Corp. v. United States, 831 F.3d 268, 276 (5th Cir. 2016), cert. denied, (Jun. 26, 2017); see also Rev. Rul. 60-311, 1960-2 C.B. 341.
[18] Bombardier, 813 F.3d at 276 ("the possession, command, and control test is the proper framework under which to analyze an entity's Section 4261 tax liability").
[19] Prop. Treas. Reg. § 49.4261-10(g); Preamble to Final Regulations § II.g, 86 Fed. Reg. 4998.
[20] See Executive Jet Aviation v. United States, 125 F.3d 1463, 1469 (1997) (fractional program was commercial, because it had only "negligible differences [from] the operation of a commercial air charter business.")

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Founded in 1947 and based in Washington, DC, the National Business Aviation Association (NBAA) is the leading organization for companies that rely on general aviation aircraft to help make their businesses more efficient, productive and successful. Contact NBAA at 800-FYI-NBAA or info@nbaa.org. Not a member? Join today by visiting **nbaa.org/join**.