ATTACHMENT 4

Office of Chief Counsel
Internal Revenue Service
memorandum

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date: May 21, 2014

to: Holly L. McCann
Chief, Excise Tax Program

from: Stephanie N. Bland
Branch Chief, Branch 7
(Passthroughs & Special Industries)

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subject: Sightseeing Flight Operations from Private Airstrip

This Chief Counsel Advice responds to your request for assistance dated February 19, 2014. This advice may not be used or cited as precedent.

ISSUES

1. Whether amounts paid for the flight services described below are subject to the tax imposed by § 4261(a) of the Internal Revenue Code (Code).

2. Whether amounts paid for the flight services described below subject to the tax imposed by § 4261(b) of the Code.

CONCLUSIONS

1. Amounts paid for the flight services described below are subject to the tax imposed by § 4261(a) of the Code.

2. Amounts paid for the flight services described below are not subject to the tax imposed by § 4261(b) of the Code.

FACTS

An air transportation business (Operator) provides aerial sightseeing flights. Operator uses twin-engine prop aircraft to provide its aerial sightseeing services. Operator's aircraft have certificated takeoff weights of greater than 6,000 pounds and are operated under part 135 certificates issued by the Federal Aviation Administration (FAA). None of Operator's aircraft are seaplanes.

All of Operator's flights are continuous and do not involve intermediate stops. In addition, all of Operator's flights take off and land at Operator's private airstrip (Airstrip). Airstrip was built by Operator, and Operator did not receive, and is not currently receiving, government funding for Airstrip's construction or operation. Fewer than 100,000 commercial passengers during the second calendar year preceding the year at issue departed on segments from Airstrip. Airstrip is not located within 75 miles of another airport which is not described in § 4261(e)(1)(B)(i) of the Code.

LAW AND ANALYSIS

Section 4261(a) of the Code imposes a tax on the amount paid for the taxable transportation of any person. Section 4261(a)(1) defines "taxable transportation" to generally include transportation by air that begins and ends in the United States.

Section 4261(d) provides that the tax is paid by the person making the payment subject to tax, and § 4291 provides that the tax is collected by the person receiving the payment.

Section 4261(b) (domestic segment tax) imposes a tax on amounts paid for each domestic segment of taxable transportation. Section 4261(b)(2) defines a "domestic segment" as any segment consisting of one takeoff and one landing and which is taxable transportation.

Section 4261(e)(1)(A) exempts from the domestic segment tax amounts paid for segments beginning or ending at rural airports. Section 4261(e)(1)(B) defines the term "rural airport" as any airport if:

> (i) there were fewer than 100,000 commercial passengers departing by air (in the case of any airport not connected by paved roads to another airport, on flight segments of at least 100 miles) during the second preceding calendar year from such airport; and
>
> (ii) such airport: (I) is not located within 75 miles of another airport which is not described in § 4261(e)(1)(B)(i), (II) is receiving essential air service subsidies as of the date of the enactment of § 4261(e)(1), or (III) is not connected by paved roads to another airport.

Section 4261(i) exempts from the taxes imposed by § 4261 amounts paid for any air transportation by a seaplane with respect to any segment consisting of a takeoff from, and a landing on, water[1], but only if the places at which such takeoff and landing occur

[1] In our view, it is irrelevant for § 4261(i) purposes whether the water from which the flight originates and the water on which the flight lands is frozen during certain parts of the year. For example, if during summer months a flight originates from a lake that is in a liquid state and lands on a different lake that is in a liquid state, the application of § 4261(i) does not change merely because during the winter months one or both bodies of water are frozen (even if the seaplane, which uses floats during the summer, uses

have not received and are not receiving financial assistance from the Airport and Airways Trust Fund.

Section 4281 provides that the taxes imposed by § 4261 do not apply to transportation by an aircraft having a maximum certificated takeoff weight of 6,000 pounds or less, except when the aircraft is operated on an established line or when such aircraft is a jet aircraft. For purposes of the preceding sentence, the term "maximum certificated takeoff weight" means the maximum such weight contained in the type certificate or airworthiness certificate. For purposes of § 4281, an aircraft is not considered as operated on an established line at any time during which such aircraft is being operated on a flight the sole purpose of which is sightseeing.

You first ask whether amounts paid for the flight services described above are subject to the tax imposed by § 4261(a). The flight services described above involve air transportation that begins and ends in the United States. Thus, Operator is providing taxable transportation, and the taxes imposed by § 4261 apply to amounts paid for these flights unless the Code otherwise exempts the amounts paid for the flight services from the taxes. The taxability of air transportation services is determined on a flight-by-flight basis.

Exemption for seaplanes

All of the flight services offered by Operator are provided using land-based aircraft, rather than sea or float planes. As a result, § 4261(i) does not exempt from the taxes imposed by § 4261 amounts paid for these flights.

Operator argues, however, that even though Operator's flights originate from, and return to, an airstrip located on land, the exemption provided by § 4261(i) applies because the intent of § 4261(i) is to exempt flight operations that are not based at public airports. We disagree.

First, the plain language of § 4261(i) exempts only those flight segments "consisting of a takeoff from, and landing on, *water*" (emphasis added). Unless the segment begins and ends on water, the plain language of the Code does not exempt the segment from tax.

Second, the legislative history to § 4261(i) does not support Operator's argument. Senator Murkowski, when introducing to the Committee on Finance the bill that would create the § 4261(i) exemption, said:

> Air passenger transportation is subject to a 7.5 percent excise tax in addition to the $3.20 per-segment fee. This generates revenue that goes toward the maintenance and improvements of airports receiving Airport Improvement

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snow skis to takeoff or land on those same lakes during the winter months). Thus, if a flight using a seaplane is exempt from § 4261 taxes by application of §4261(i), it is exempt regardless of whether the water is liquid or frozen.

> Program (AIP) funding. However, in several cases in Alaska, and in at least one case in the State of Washington, the taxes are *imposed on seaplane operators who land on and take off from open waters*, not from facilities using AIP funds, and which rarely if ever make use of FAA communication and navigation systems. (emphasis added)

CONG. REC. S579 (daily ed. Jan. 26, 2005) (statement of Sen. Murkowski); 2005 TNT 32-84. It is clear from this language that Congress intended that § 4261(i) exempt from the § 4261 taxes only seaplanes operating from water.

Exemption for small aircraft on a nonestablished line

The § 4281 exemption applies to air transportation if the aircraft--

(1) Has a maximum certificated takeoff weight of 6,000 pounds or less;

(2) Is not a jet aircraft; and

(3) (a) Is not operated on an established line; or
(b) Is on a flight the sole purpose of which is sightseeing.

Operator uses uses twin-engine prop aircraft with maximum certificated takeoff weight of more than 6,000 pounds. Therefore, the aircraft used by Operator fail to satisfy item (1) above. As a result, the exemption provided by § 4281 does not apply to the flight services provided by Operator.

Exemption for Rural Airports

You next ask whether those flight services that are not exempted from the § 4261(a) tax by operation of § 4281 are nevertheless exempted from the § 4261(b) domestic segment tax by virtue of § 4261(e)(1) (the rural airport exemption).

An amount paid for a flight segment is exempt from the domestic segment tax if the segment begins or ends at a rural airport. The facts do not state whether Airstrip is a rural airport. However, amounts paid for flight segments that begin or end at Airstrip are exempt from the domestic segment tax if the destination or origin of the flight is a rural airport.

Rev. Proc. 2005-45, 2005-2 C.B. 141, allows taxpayers to rely on a list of rural airports published by the U.S. Department of Transportation, Office of the Secretary of Transportation (USDOT list), to determine whether an airport is a "rural airport". However, any airport not on the USDOT list qualifies as a rural airport if it meets the requirements of § 4261(e)(1)(B). Airstrip is not on the USDOT list. Therefore, we must first determine whether Airstrip is an "airport," and if we determine that it is, we must then determine whether the airport is "rural" by applying § 4261(e)(1)(B).

Neither the Code, IRS published guidance, nor the legislative history defines the word "airport" for purposes of the rural airport exemption. The Service sometimes considers external sources (including dictionaries) as an aid in construction when those sources do not conflict with the Code or IRS published guidance or such guidance is silent. Dictionaries generally define "airport" as a tract of land or water with facilities for the landing, takeoff, shelter, supply, and repair of aircraft, especially one used for receiving or discharging passengers and cargo at regularly scheduled times.[2]

Airstrip is among the types of areas that Congress intended to include when it created the rural airport exemption. A narrow reading of the word "airport" to only mean a transportation facility with a terminal building and control tower would undermine the purpose of the exemption by excluding from it some rural air facilities. Accordingly, Airstrip is an "airport" for purposes of the rural airport exemption.

We must next determine whether this airport is "rural" as defined in § 4261(e)(1)(B). Applying § 4261(e)(1)(B)(i), we first look at the number of commercial passengers that depart by air from the airport. Fewer than 100,000 commercial passengers depart from Airstrip. Therefore, clause (i) of § 4261(d)(1)(B) is satisfied.

Clause (ii) of §4261(e)(1)(B) looks at the connectivity of the airport at issue with other airports. To satisfy this test, the airport must satisfy one of three conditions.

> The airport:
>
> (I) is not located within 75 miles of another airport that has a minimum of 100,000 commercial passengers departing by air during the second preceding calendar year from such airport;
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> (II) is receiving essential air service subsidies as of August 5, 1997; or
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> (III) is not connected by paved roads to another airport.

Clause (ii) of §4261(e)(1)(B) is also satisfied because Airstrip is not located within 75 miles of another airport that has a minimum of 100,000 commercial passengers departing by air during the second preceding calendar year from such airport.

Because § 4261(e)(1)(B)(i) and (ii) are satisfied, Airstrip is a "rural" airport. Accordingly, we conclude that amounts paid for Operator's services are exempt from the domestic segment tax.

Please call Michael Beker (202) 317-6855 if you have any further questions.

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[2] Dictionary.com definition of "airport", accessed on May 16, 2014.