

Office of Chief Counsel
Internal Revenue Service
Memorandum

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Third Party Communication: None
Date of Communication: Not Applicable

UILC: 4043.00-00, 4261.00-00

date: November 14, 2012

to:
Chief, Excise Tax Program

from:

(Passthroughs & Special Industries)

subject: Program manager share ownership in fractional ownership program aircraft

This Chief Counsel Advice responds to your request for assistance dated September 14, 2012. This advice may not be used or cited as precedent.

ISSUES

1. Whether a program manager's ownership of a fractional share of a program aircraft disqualifies the program as a 'fractional ownership aircraft program' as defined in § 4043(c)(2) of the Internal Revenue Code (Code).
2. If the answer to Issue 1 is yes, are amounts paid to the program manager by fractional owners subject to tax under IRC 4261(a)? If the answer to Issue 1 is no, what is the excise tax effect if the program manager charters or sells time on its share of the program aircraft?

CONCLUSIONS

1. A program manager's ownership of a fractional share of a program aircraft does not disqualify the program as a 'fractional ownership aircraft program' as defined in § 4043(c)(2) so long as at least two program aircraft are completely owned by persons other than the program manager.

2. If the program manager charters an aircraft in which it holds an interest to unrelated third parties or sells flight time on its share of a fractional aircraft, the tax imposed by § 4043(a) does not apply to fuel used in such flights, and amounts paid by the third party charterers to the program manager are subject to the tax imposed by § 4261(a).

FACTS

A fractional ownership program manager (Manager) provides fractional ownership program management services to fractional owners of aircraft that are part of the fractional ownership aircraft program (Program) operated by Manager. All of the aircraft in the Program (Program Aircraft) are listed as fractional program aircraft in the management specifications issued to Manager by the Federal Aviation Administration (FAA) and are registered in the United States. There is a dry-lease aircraft exchange arrangement among all of the fractional owners and multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

Fractional interests in the Program Aircraft are sold in 1/16th shares. At least two Program Aircraft are fully sold and have 16 fractional owners that are not Manager or entities controlled by Manager. Several of the Program Aircraft do not have all 16 shares sold to fractional owners. The remaining shares in these aircraft are owned by Manager. Manager considers the shares that it owns as held as inventory for sale.

Manager charters aircraft in which it holds interests to unrelated third parties when the aircraft are otherwise idle. In addition, Manager sells time, via a prepaid card program, on its share of the aircraft in which it holds interests. Both of these activities occur while Manager's share in a particular aircraft is held as inventory for sale.

LAW AND ANALYSIS

Section 4043(a) imposes a tax on any liquid used in a fractional program aircraft as fuel (1) for the transportation of a qualified fractional owner with respect to the fractional ownership aircraft program of which such aircraft is a part, or (2) with respect to the use of such aircraft on account of such a qualified fractional owner, including use in deadhead service.

Section 4043(c)(1) defines 'fractional program aircraft' with respect to any fractional ownership aircraft program, as any aircraft that (A) is listed as a fractional program aircraft in the management specifications issued to the manager of such program by the FAA under subpart K of 14 CFR part 91, and (B) is registered in the United States.

Section 4043(c)(2) defines 'fractional ownership aircraft program' as a program under which:

(A) A single fractional ownership program manager provides fractional ownership program management services on behalf of the fractional owners;

(B) There are one or more fractional owners per fractional program aircraft, with at least one fractional program aircraft having more than one owner;

(C) With respect to at least two fractional program aircraft, none of the ownership interests in such aircraft are (i) less than the minimum fractional ownership interest, or (ii) held by the program manager;

(D) There exists a dry-lease aircraft exchange arrangement among all of the fractional owners; and

(E) There are multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

Section 4043(c)(3)(A) defines 'qualified fractional owner' as any fractional owner that has a minimum fractional ownership interest in at least one fractional program aircraft. Section 4043(c)(3)(B) defines 'minimum fractional ownership interest' as including a fractional ownership interest equal to or greater than 1/16 of at least one subsonic, fixed wing, or powered lift aircraft.

Section 4043(c)(3)(C) defines 'fractional ownership interest' as (i) the ownership of an interest in a fractional program aircraft, (ii) the holding of a multi-year leasehold interest in a fractional program aircraft, or (iii) the holding of a multi-year leasehold interest which is convertible into an ownership interest in a fractional program aircraft. Section 4043(c)(3)(D) defines 'fractional owner' as any person owning any interest (including the entire interest) in a fractional program aircraft.

Section 4043(c)(4) defines 'dry-lease aircraft exchange' as an agreement, documented by the written program agreements, under which the fractional program aircraft are available, on an as needed basis without crew, to each fractional owner.

Section 4261(a) imposes a tax on the amount paid for the taxable transportation of any person. "Taxable transportation" includes 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.

You asked what affect, if any, does Manger's aircraft share ownership have on Program's qualification as a 'fractional ownership aircraft program', as defined in § 4043(c)(2), and by extension, whether the tax imposed by § 4043(a) applies to fuel used in the aircraft in the Program.

Section 4043(c)(2)(C)(ii) sets a floor on the number of program aircraft in which a program manager can own an interest and still qualify the program as a § 4043(c)(2) 'fractional ownership aircraft program'. Program will qualify as fractional ownership aircraft program, assuming the other requirements of § 4043(c)(2) are satisfied, so long as at least two of the aircraft in the program are completely owned by fractional owners other than Manager. Two aircraft in Program are owned completely by fractional owners other than Manager or entities controlled by Manager. In addition, all of the other requirements of § 4043(c)(2) are satisfied by Program. Accordingly, Manager's ownership interests in Program aircraft do not affect Program's qualification as a fractional ownership aircraft program. It is irrelevant to this analysis that Manager considers – or treats in its books and records – its shares as inventory for sale.

Because Manager's ownership interests in Program aircraft do not affect Program's qualification as a fractional ownership aircraft program, the tax imposed by § 4043(a) applies to fuel used in Program aircraft (including those aircraft in which Manager owns its interests) for the transportation of qualified fractional owners, or on account of qualified fractional owners, including use in deadhead service.

However, when Manager charters an aircraft in which it holds an interest to unrelated third parties or sells flight time on its share of the aircraft via a prepaid card program, the aircraft is not used for the transportation of qualified fractional owners or on account of qualified fractional owners. Accordingly, the tax imposed by § 4043(a) does not apply to fuel used in such flights, and amounts paid by the third party charterers to Manager are subject to the tax imposed by § 4261(a).

Please call Michael Beker at (202) 622-3130 if you have any further questions.