

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

Number: **201233015**

Release Date: 8/17/2012

CC:PSI:B07:MHBeker  
POSTN-128397-12

Third Party Communication: None  
Date of Communication: Not Applicable

UILC: 4261.00-00, 4281.00-00

date: July 25, 2012

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from: Frank Boland  
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(Passthroughs & Special Industries)

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subject: Alaska Bush Flights

This Chief Counsel Advice responds to your request for assistance dated July 2, 2012. This advice may not be used or cited as precedent.

ISSUES

1. Whether amounts paid for the six flight services described in the facts below are subject to the taxes imposed by § 4261 of the Internal Revenue Code (Code).
2. If amounts paid for a flight service described in the facts below are subject to the taxes imposed by § 4261, are amounts paid for the flight segments for that particular service exempt from the tax imposed by § 4261(b) (domestic segment tax) by reason of § 4261(e)(1) (rural airport exemption).

CONCLUSIONS

1. Amounts paid for "Flightseeing tours", "bear viewing platform day tours", "bear viewing boat tours", and "charter service" described in the facts below are not subject to the taxes imposed by § 4261. Amounts paid for "fly-fishing day tours" and "lodge service" are subject to the taxes imposed by § 4261(a).
2. Amounts paid for "fly-fishing day tours" and "lodge service" are exempt from the domestic segment tax under the rural airport exemption.

## FACTS

These facts describe events that occurred after September 30, 2005.

Six unrelated air tour and aircraft charter companies, Operator 1, Operator 2, Operator 3, Operator 4, Operator 5, and Operator 6 (collectively “operators”) offer various air transportation services in Alaska. All of the aircraft in the operators’ fleets are piston-driven float planes with a maximum certified takeoff weight of 6,000 pounds or less. All of the operators’ tour flights originate from an airport (home bases) that receives financial assistance from the Airport and Airways Trust Fund. This airport is not a “rural airport” as that term is defined in § 4261(e)(1)(B) of the Code. All of the sites (other than their home bases) to which the operators fly had fewer than 100,000 commercial passengers departing by air during the second preceding calendar year before any of the flights described herein occurred. In addition, none of the sites (other than their home bases) to which the operators fly are connected by paved roads to another airport.

The operators offer the following services:

- Flightseeing tour. A customer that purchases a flightseeing tour boards an aircraft at Operator 1’s home base, flies to a remote region of Alaska to view mountains, glaciers, and other natural features from the aircraft, and returns to Operator 1’s home base. The flight lasts from half an hour to three hours, depending on the tour selected by the customer. The aircraft does not land at any of the natural features during the flightseeing tour; the aircraft takes off from and lands at the same point.
- Bear viewing platform day tour. A customer that purchases a bear viewing platform day tour boards an aircraft at Operator 2’s home base and flies to a National Park or other scenic location where the aircraft lands on a body of water. After landing, the customer deplanes and walks a short distance to a platform where the customer views wild bears. While on the ground, the customer may have a box lunch, but does not engage in any other activities (such as fishing or kayaking). After a few hours, the customer re-boards the aircraft (which may or may not wait on site) and returns to Operator 2’s home base. The bear viewing platform day tour begins and ends on the same calendar day.
- Bear viewing boat tour. A customer that purchases a bear viewing boat tour chooses a destination from a list of options provided by Operator 3, boards an aircraft at Operator 3’s home base, and flies to a National Park or other scenic location where the aircraft lands on a body of water. After landing, the aircraft docks and the customer deplanes and boards a boat at the same or nearby dock.

The boat then cruises around the body of water while the passengers and a guide look for wild bears. The customer remains on the boat with a guide the entire time the group is bear watching. The boat then returns to the dock from which the boat departed and the customer may have lunch. Lunch is served at a lodge that is walking distance from the dock. After lunch, the customer re-boards the aircraft (which may or may not wait on site) and returns to Operator 3's home base. The bear viewing boat tour begins and ends on the same calendar day.

- Fly-fishing day tour. A customer that purchases a fly-fishing day tour chooses a fishing location from a list of options provided by Operator 4, boards an aircraft at Operator 4's home base, and flies to a remote area of Alaska where the aircraft lands on a body of water at the selected location. All of the fly-fishing locations are accessible only by aircraft or boat. After landing, the customer deplanes and is accompanied by a guide for a day of fly-fishing. At the end of the day, the customer re-boards the aircraft (which may or may not wait on site) and returns to Operator 4's home base. Also included in this category of flight services are tours that involve activities such as kayaking, where the customer spends the day kayaking rather than fly-fishing. Most days during the summer season, Operator 4 offers daily or near-daily departures for these tours and the aircraft used is determined by Operator 4 based on the total number of passengers that signed up for the tour.
- Lodge service. Operator 5 partners with several lodges located in the Alaska wilderness that are accessible only by aircraft or boat. A customer that purchases lodge service is flown from Operator 5's home base to one of the lodges. After several days Operator 5 returns to the lodge and flies the customer back to Operator 5's home base. Most days during the summer season, Operator 5 offers daily or near-daily departures to the lodges and the aircraft used is determined by Operator 5 based on the total number of passengers flying to or from the lodges.
- Charter service. Operator 6 offers private charter service to fly customers to locations it otherwise does not service. A customer that purchases charter service arranges with Operator 6 the departure time, departure location, destination, and either specifies the type of aircraft for the flight or works with Operator 6 to choose the appropriate aircraft to fit the customer's needs.

## LAW AND ANALYSIS

Section 4261(a) of the Code imposes a tax on the amount paid for the taxable transportation of any person. "Taxable transportation" is defined in § 4262(a)(1) 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. A “domestic segment” is defined in § 4261(b)(2) 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, but only if the places at which such takeoff and landing occur 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.<sup>1</sup> 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.

Section 49.4263-5(c) of the Facilities and Services Excise Taxes Regulations (regulations) defines the term “operated on an established line” to mean operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction,

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<sup>1</sup> The requirement that amounts paid must be for transportation provided on non-jet powered aircraft was added to § 4281 by section 1107 of the FAA Modernization and Reform Act of 2012 (Pub. L. 112-95). The requirement applies to taxable transportation provided after March 31, 2012. This change to the law does not affect this case because none of the transportation at issue here was provided on jet powered aircraft.

route, time, number of passengers carried, etc.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59 (August 10, 2005), added the last sentence to § 4281 (providing that sightseeing flights are not operated on established lines). The Code does not define the term “sightseeing” for purposes of § 4281, and the IRS has not issued guidance defining the term. However, the Senate Finance Committee (Committee) Report (Report) to SAFETEA-LU, S. Rep. 109-82, 16, explains that “sightseeing” flights--

include flights of short duration that overlook a glacier, volcano, the Grand Canyon, or other similar attraction and for which the air tour begins and ends at the same point. By short duration, the Committee intends that the tour occur within a calendar day, irrespective of intermittent stops to view the attraction. In addition, all passengers from the initial point of departure must return with the aircraft at the conclusion of the tour.

The Report also explains the policy behind the provision – that such flights are primarily for entertainment rather than for transportation from one place to another and so should be treated as noncommercial aviation.

You asked whether the taxes imposed by § 4261 apply to amounts paid for the flight services described in the facts above. The six flight services described above involve air transportation that begins and ends in the United States. Thus, the operators are providing taxable transportation, and the taxes imposed by § 4261 apply to the 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 the operators are provided on float planes and all of the flights originate from, or return to, the operators’ home bases, which receives financial assistance from the Airport and Airways Trust Fund. Because all of the operators’ flights either take off from, or land at, a seabase that receives financial assistance from the Airport and Airways Trust Fund, § 4261(i) does not exempt from tax amounts paid for these flights.

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

The operators use piston-driven aircraft with maximum certified takeoff weight of 6,000 pounds or less. Therefore, the aircraft used for all of the flight services satisfy Item (1).

Item (2) is satisfied if the aircraft is either (a) not operated on an established line or (b) solely for the purpose of sightseeing. If the flight meets neither of these tests, then the flight does not qualify for the § 4281 exemption.

#### *Flightseeing tours*

Flightseeing tours involve over-flights of scenic areas that depart from, and return to, Operator 1's home base. Flightseeing tours are short duration flights that overlook a glacier or other similar attraction, and which begin and end at the same point on the same day. In addition, all passengers from the initial point of departure return with the aircraft at the conclusion of the tour. Therefore, these flights are solely for the purpose of sightseeing and Item (2)(b) is satisfied.

#### *Bear viewing platform day tour*

Bear viewing platform day tours involve flights to wild bear habitats, a stop of several hours at the habitat to view bears, and a return flight to Operator 2's home base. These tours are short in duration, occurring within a calendar day, and involve flights with an intermittent stop to view wild bears in their natural habitat. While on the ground, the passengers leave the aircraft and walk a short distance but only for the purpose of viewing the bears; the passengers do not participate in any other activities. In addition, all passengers from the initial point of departure return with the aircraft at the conclusion of the tour. Therefore, these flights are solely for the purpose of sightseeing and Item 2(b) is satisfied.

#### *Bear viewing boat tour*

Bear viewing boat tours involve flights to wild bear habitats, a stop of several hours during which the customer cruises around a body of water to view wild bears from a boat, and a return flight to Operator 3's home base. These tours are short in duration, occurring within a calendar day, and involve flights with an intermittent stop to view wild bears in their natural habitat. While on the ground, the passengers leave the aircraft and board a boat, but only for the purpose of viewing the bears; the passengers do not participate in any other activities while on the boat (such as fishing or waterskiing). The sole purpose of the boat is to provide a mobile viewing platform to watch wild bears; customers begin and end the trip from a single point and do not dock at any other location during the tour; the boat is not used to transport customers in the same sense that a ferryboat transports passengers from one point to a different point across a body of water; and all passengers from the initial point of departure return with the aircraft at the conclusion of the tour. Therefore, these flights are solely for the purpose of sightseeing and Item 2(b) is satisfied.

### *Fly-fishing day tour*

Sightseeing. Fly-fishing day tours involve flights to remote sections of river, a stop of several hours to fly-fish, and a return flight to Operator 4's home base. The purpose of these flights is not to overlook a glacier, volcano, or other similar attraction, but rather to transport the passenger from one location to another location to engage in an activity that is not sightseeing. These flights are essentially no different than purchasing a ticket on a commercial airline to fly from one's home city to another city to engage in an activity there. Therefore, fly-fishing day tours are not sightseeing flights as that term is used in § 4281.

Established line. An aircraft is operated on an established line if (1) the aircraft is operated with some degree of regularity between definite points (even though strict regularity of schedule is not maintained) and (2) the operator of the aircraft maintains and exercises control over the direction, route, time, and number of passengers carried.

The crux of "regularity" is that the public can rely on the transportation; a fixed schedule is not required. Papillon Airways, Inc. v. U.S., No. 09-297T, 2012 WL 2126815, at \*6 (Fed.Cl. June 5, 2012). However, some form of scheduled air service, whether advertised or merely existing in fact, is necessary. Service on demand is not by itself sufficient, even where such service is characterized by a substantial number of flights.

The fly-fishing day tours are operated with some degree of regularity because the tours are offered daily, even though some flights may be cancelled because of bad weather or lack of customers. Because the customer chooses a destination from a list of options offered by Operator 4, these flights are operated between definite points even though the exact landing spot on a river or lake may vary with the weather and fishing conditions of each day. For example in Temsco Helicopters, Inc. v. U.S., 409 Fed. Appx. 64, 67 (9<sup>th</sup> Cir. 2010), the "definite points" requirement was satisfied even though the exact landing points on a glacier varied with the conditions of the day. Also, Operator 4 maintains the requisite control over the flights because Operator 4 decides what tours to offer, which aircraft to fly, when to schedule flights, the route to take, and where to land. It also decides the maximum number of passengers allowed and whether to cancel a flight for insufficient sales. When purchasing a fly-fishing day tour, a customer cannot simply call Operator 4 and inform them of their departure time.

Thus, the fly-fishing day tours are operated on an established line and are subject to the tax imposed by § 4261(a).

### *Lodge service*

Sightseeing. Lodge service is similar to the fly-fishing tours as the purpose of these flights is to transport the passenger from one location to another location to visit a lodge and engage in activities organized by the lodge. Like the fly-fishing day tours, these flights are essentially no different than purchasing a ticket on a commercial airline to fly

from one's home city to another city to engage in an activity there. Therefore, lodge service is not sightseeing flights as that term is used in § 4281.

Established line. Lodge service is similar to fly-fishing tours as the flights are operated with some degree of regularity between Operator 5's home base and the Operator 5's partner lodges. Operator 5 maintains the requisite control over the flights because Operator 5 maintains control over time of departure, route, number of passengers to take, and whether to cancel a flight for insufficient sales.

Thus, the lodge service is operated on an established line and are subject to the tax imposed by § 4261(a).

#### *Charter service*

Sightseeing. Charter service is similar to the fly-fishing tours and lodge service as the purpose of these flights is to transport the passenger from one location to another location to engage in activities at the destination. Like the fly-fishing day tours and lodge service, these flights are essentially no different than purchasing a ticket on a commercial airline to fly from one's home city to another city to engage in an activity there. Therefore, charter service is not sightseeing flights as that term is used in § 4281.

Established line. Unlike fly-fishing tours and lodge service, charter services are not operated with some degree of regularity between Operator 6's home base and the charter flight destinations. Operator 6 does not maintain control over time of departure, route, number of passengers to take, and whether to cancel a flight for insufficient sales like it does for its other services.

Thus, the charter service is not operated on an established line and is not subject to the tax imposed by § 4261(a).<sup>2</sup>

#### Exemption for Rural Airports

You also asked whether those flight services that are not exempted from § 4261 taxes by operation of § 4281 (fly-fishing day tours and lodge service) are nevertheless exempted from the domestic segment tax by § 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 state that the operators' home bases are not rural airports. However, amounts paid for flight segments that begin or

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<sup>2</sup> If a customer charters an aircraft having a maximum certificated takeoff weight of 6,000 pounds or more, § 4281 would not exempt amounts paid for the flight from the taxes imposed by § 4261. In that case, the amount paid for the charter is subject to the tax imposed by § 4261(a). However, applying the analysis discussed below, amounts paid for the charter flights would be exempt from the domestic segment tax.

end at the operators' home bases 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). None of the destinations to which the operators fly is on the USDOT list. Therefore, we must first determine whether the landing site 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 define the word "airport" for purposes of the rural airport exemption. Although Rev. Rul. 78-75, 1978-1 C.B. 340, holds that regulations issued by the Federal Aviation Administration (FAA) are not determinative for air transportation excise tax purposes, 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.

In this case, the FAA's definition of "airport" in the Federal Aviation Regulations (FAR), which is consistent with dictionary definitions of the term, is informative. FAR 14 CFR 1.1 defines "airport" as "an area of land or water that is used or intended to be used for the landing and takeoff of aircraft, and includes its buildings and facilities, if any."

The remote bodies of water on which the operators land and takeoff are 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. The broader reading of the word "airport" is further supported by the definition of "airport" in FAR 14 CFR 1.1. Accordingly, these areas of water are "airports" for purposes of the rural airport exemption.

We must next determine whether these airports are "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 airports. Fewer than 100,000 commercial passengers depart from the bodies of water to which the operators fly. 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;
- (II) is receiving essential air service subsidies as of August 5, 1997; or
- (III) is not connected by paved roads to another airport.

Clause (ii) of §4261(e)(1)(B) is also satisfied because all of the airports to which the operators fly are accessible only by air or boat; none of the airports are connected to other airports by paved roads.

Because § 4261(e)(1)(B)(i) and (ii) are satisfied, the sites to which the operators fly are “rural” airports. Accordingly, we conclude that amounts paid for the fly-fishing day tours and lodge service are exempt from the domestic segment tax.<sup>3</sup>

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

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<sup>3</sup> Because the rural airport exemption to the domestic segment tax does not depend on the weight of the aircraft, we would reach the same conclusion if the aircraft used for these flights have a maximum certificated takeoff weight of 6,000 pounds or more.