

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

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to: Lisa M. Piehl
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from: Charles J. Langley, Jr.
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subject: Non-Taxpayer Specific Advice - Kerosene Used in Aviation

This Program Manager Technical Advice (PMTA) responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether kerosene used in a flight subject to tax under § 4261 or § 4271¹ (“air transportation taxes”) is taxed at the commercial or noncommercial aviation tax rate under § 4081(a)(2)(C).

LAW

Section 4081(a) imposes a tax on certain removals, entries, and sales of taxable fuel, including kerosene used for aviation (“aviation fuel tax”).

Section 4081(a)(2)(C) prescribes the rates of tax for kerosene used for commercial and noncommercial aviation. More specifically, this section provides that the tax rate for kerosene used for commercial aviation is 4.4 cents per gallon (including the LUST tax imposed by § 4081(a)(2)(B)), and the rate for kerosene used for noncommercial aviation is 21.9 cents per gallon (including the LUST tax).

¹ In this memorandum, the phrases “subject to tax under § 4261 or § 4271” and “subject to the air transportation taxes” means a flight for which there has been an amount paid for taxable transportation within the meaning of § 4261 or § 4271 and to which no exemptions apply.

Section 4083(b) defines “commercial aviation,” for purposes of §§ 4081 - 4084, as any use of an aircraft in a business of transporting persons or property for compensation or hire by air, unless properly allocable to any transportation exempt from the taxes imposed by §§ 4261 and 4271 by reason of § 4281 (relating to the exemption for small aircraft on nonestablished lines) or 4282 (relating to the exemption for transportation of members of an affiliated group) or by reason of § 4261(h) (relating to the exemption skydiving uses of aircraft) or 4261(i) (relating to the exemption for seaplanes).

Section 4261(a) imposes a tax on amounts paid for the taxable transportation of any person.

Section 4271(a) imposes a tax on amounts paid for the taxable transportation of property.

Revenue Ruling 72-156, 1972-1 C.B. 331, addresses the question of whether fuel used in aircraft providing aerial firefighting protection is subject to the § 4041(c) tax on fuel used for noncommercial aviation. In its analysis, the ruling first considers whether the firefighting flights are subject to air transportation taxes under § 4261 or § 4271 and concludes that the flights are not “use in a business of transporting persons or property by air for compensation or hire.” Based on this determination, the ruling concludes that the fuel used in the firefighting flights is subject to the tax under § 4041(c) for fuel used in noncommercial aviation. The revenue ruling also concludes that, in accordance with Congressional intent, either the § 4041(c) tax or the air transportation taxes, but not both, apply to any given flight.

Revenue Ruling 72-360, 1972-1 C.B. 542, holds that tax liability for air transportation tax and the aviation fuel tax must be determined on a flight-by-flight basis. An aircraft operator that is normally engaged in noncommercial aviation, but occasionally provides commercial aviation flights cannot choose to designate all of its flights as noncommercial aviation in order to avoid the additional recordkeeping necessary to distinguish the flights and correctly report the tax liability.

BACKGROUND and LEGISLATIVE HISTORY

The relevant legislative history offers insight into what Congress intended regarding the interplay between the air transportation taxes and the aviation fuel tax. In 1970, Congress enacted the Airport and Airway Revenue Act of 1970 (Pub. L. No. 91-258), which established the Airport and Airway Trust Fund as a user fee system and modified the existing air transportation taxes and aviation fuel tax to fund the newly created trust fund.

The Senate Finance Committee Report to the Airport and Airway Revenue Act of 1970 discusses the relationship between the air transportation taxes and the aviation fuel tax. Specifically, the report states:

In general, the dividing line between noncommercial aviation (subject to the fuel taxes) and commercial aviation (subject to the taxes on passenger and air freight transportation) is use in a business of transporting persons or property for compensation or hire. If for a flight an aircraft is subject to the passenger or cargo tax, then it is, for that flight, used 'in a business of transporting persons or property for compensation or hire by air' and is therefore for that flight not subject to the fuels taxes. S. REP. NO. 91-706, at 12 (1970).

The report further states that with respect to aircraft used sometimes for hire and at other times for nonbusiness purposes, "the passenger and cargo taxes will apply at some times and the fuels taxes at other times." *Id.* at 17 (1970). The report continues on to plainly state that Congressional intent was "to have the use of aircraft be subject either to the taxes on the transportation of persons and freight or else to the fuel taxes, but not to both as to any one trip." *Id.* at 19 (1970).

Since 1970, Congress has enacted a number of changes to both the aviation fuel tax and air transportation taxes, including imposing a reduced rate tax on fuel used for commercial aviation and adding a segment tax to the § 4261 tax. However, none of the changes indicate a deviation from the original Congressional intent. In fact, the Joint Committee on Taxation has affirmed that "[d]omestic commercial aviation (the use of an aircraft in a business of transporting persons or property for compensation) is subject to the ticket tax and air cargo tax, as well as a 4.4 cent per gallon fuel tax. Noncommercial aviation is subject only to the fuel taxes, but at higher rates." JCX-58-07 at 1 (June 30, 2007).

ANALYSIS AND CONCLUSION

Sections 4261(a) and 4271(a) impose tax on amounts paid for the taxable transportation of persons and property.

Section 4081(a)(2)(C)(i) provides a reduced tax rate for kerosene removed under certain circumstances for commercial aviation. Kerosene removed directly into the fuel supply tank of an aircraft from a terminal or refinery for use in aviation is taxable at either a noncommercial rate or a reduced commercial rate. To qualify for the reduced commercial rate of aviation fuel tax the flight must qualify as "commercial aviation" under § 4083(b).

Section 4083(b) defines "commercial aviation" to mean any use of an aircraft in a business of transporting persons or property for compensation or hire by air, unless properly allocable to any transportation exempt from the taxes imposed by §§ 4261 and 4271 by reason of certain statutory exemptions. In other words, § 4083(b) first requires a determination on whether an amount paid for a particular flight is subject to or exempt from air transportation taxes before determining which aviation fuel tax rate applies. Thus, determining the applicability of the air transportation taxes before calculating the

aviation fuel tax rates is consistent with the language of § 4083(b), Congressional intent and published guidance. See JCX-58-07, Rev. Rul. 72-156, and Rev. Rul. 72-360.

Accordingly, we conclude that if a flight is subject to air transportation taxes, the kerosene used in that flight is taxed at the lower commercial aviation rate under § 4081(a)(2)(C)(i). If a flight is not subject to air transportation taxes, the kerosene used in that flight is taxed at the higher noncommercial aviation rate under § 4081(a)(2)(C)(ii). The determination of whether a flight is subject to air transportation taxes and, therefore, subject to the lower commercial rate of aviation fuel tax is made on a flight-by-flight basis. The normal use of an aircraft in commercial or noncommercial aviation is irrelevant in this determination. Rev. Rul. 72-360.

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Please call Danielle J. Mayfield (202) 317-6855 if you have any further questions.