

**AIRCRAFT ACQUISITIONS, EXCHANGES,
LEASES AND REFINANCINGS --
MULTISTATE SALES AND USE TAX CONSIDERATIONS**

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I. Background.

A. Types of taxes addressed.

1. Sales and use taxes.

- a. State sales and use taxes are imposed on retail sales or other transfers of ownership to "tangible personal property," unless specifically exempted from tax. Because airplanes are tangible personal property, their transfer generally is subject to such sales and use taxes.
- b. In some instances general sales and use taxes are imposed at special rates or at maximum rates on aircraft transfers. See e.g. Mississippi Code Sec. 27-65-17; Mississippi Tax Rule 46 (normal sales tax rate is 7% -- special sales tax rate of 3% applies to sales of aircraft).

2. Aircraft transfer/excise taxes.

- a. North Dakota. North Dakota excludes aircraft transfers from its general sales and use taxes, and instead imposes a separate excise tax on aircraft transfers. ND Code Section 57-39.2-04(37) (sales/use tax exclusion); ND Code Section 57-40.5-02 (imposing 5% aircraft excise tax).

¹ This outline cites statutes, cases, regulations and administrative pronouncements from jurisdictions throughout the United States. The citations are for illustrative purposes and are not intended to be exhaustive.

- b. Oklahoma. Oklahoma imposes a 3.25% aircraft excise tax on aircraft transfers, in lieu of its sales/use tax. O. S., Tit. 68, Sec. 6001 et. seq.
 - c. Virginia. Virginia excludes aircraft transfers from its general sales and use taxes, and instead imposes a separate excise tax on aircraft transfers. Va. Code Sections 58.1-609.1(5) (Sales/use tax exclusion) and 58.1-1502 (imposing 2% aircraft excise tax).
3. Other taxes.

In addition to taxes on the transfer of aircraft, some states impose taxes on the privilege of owning or leasing aircraft. Examples of these taxes include the following:

- a. Indiana. In addition to sales and use taxes on aircraft transfers, Indiana subjects aircraft to an annual license excise tax in lieu of a personal property tax, which is equivalent to an average property tax rate of \$3.00 on each \$100 of taxable value. IC 6-6-6.5-12 and IC 6-6-6.5-22.
- b. New York. A special sales tax of 5% is imposed by New York on the lease of noncommercial aircraft in lieu of the general sales tax. NY Tax Law Section 1111(i). The special lease tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease. Id.

B. Types of aircraft transferred.

- 1. What is an aircraft?
 - a. Statutory definition. Some states have statutorily defined aircraft to include self-propelled vehicles for navigation or flight in the air or airspace. See e.g. Okla. Stat. Tit. 68, Section 6001(1) (special aircraft excise tax statutory definition); Conn. Gen. Stat. Sections 15-34 and 12-412(99)(aircraft sales/use tax exemption references general statutory definition of aircraft); and Tn. Code Section 67-6-102(1) incorporating definition in Tn. Code Section 42-1-101 (sales/use tax provision incorporates state regulatory definition of aircraft).

- b. Administrative definition. Where lawmakers have failed to adopt a specific definition of aircraft, state revenue departments have turned to generally accepted definitions of this term for purposes of administering their taxing statutes. Massachusetts Tax Information Release 02-2 (January 24, 2002) (Department of Revenue adopts dictionary definition of "aircraft" for purposes of applying sales and use tax exemption).

2. Commercial and non-commercial.

The determination of whether an aircraft is a commercial or non-commercial aircraft is made from the purchaser's perspective, focusing on the purchaser's intended use of the aircraft. The distinction is important because commercial aircraft may be entitled to certain exemptions to which non-commercial aircraft are not entitled.

- a. Certified or licensed carrier -- Some states limit aircraft treated as commercial aircraft to those acquired by common carriers certificated or licensed by the FAA. See Arizona Law Sections 42-5061(B)(7) and 42-5159(B)(7) (limits exemption for aircraft used to transport passengers or freight in interstate commerce to aircraft acquired or used by certificated or licensed carriers; Arizona PLR 01-03 (January 10, 2001) (extends exemption to shares of aircraft); see also 86 Ill. Admin. Code § 130.340 (Illinois regulation requires interstate carrier's FAA registration number as documentation for rolling stock exemption).
- b. Non-certificated carriers -- Other states define commercial aircraft to include those used by carriers that are not licensed by the FAA, as long as the preponderant use of the aircraft is to provide transportation services. NYS Tax Law Section 1115(a)(21); Pasquale & Bowers, TSB-A-96(49)S (August 1, 1996).

II. Which states must be analyzed?

More than one state may claim the right to tax aircraft acquisitions, exchanges, leases and refinancings, directly or through a tax on the use of the aircraft. All potential taxing jurisdictions should be considered in evaluating such aircraft transactions. In particular, it is important to analyze the tax treatment in the state where the aircraft is located at the time of the transaction, the state in which the aircraft is hangared, the state(s) where the aircraft is stored temporarily and the state where upgrades are installed or maintenance performed.

A. Location at time of purchase.

First and foremost, it is necessary to analyze the sales and use tax treatment in the jurisdiction in which the aircraft is located at the time of purchase. Such states

always have a right to tax the transaction.

B. Location where hangared.

The jurisdiction in which an aircraft is hangared may impose a use tax on the aircraft's owner. Moreover, there is no requirement that the tax be apportioned, although credits should be provided for sales tax paid to other jurisdictions.

1. Connecticut. Aircraft lease payments for 1994 through October, 1997 were ruled taxable where the aircraft was housed and serviced in Connecticut. Air Tiger, Inc. v. Commissioner of Revenue Services, Connecticut Superior Court, No. CV99-0496956S, 2002 Conn. Lexis 976 (March 27, 2002). (Note that effective October 1, 1997, Connecticut law exempts the sale, storage use or other consumption of aircraft having a maximum certificated takeoff weight of 6,000 pounds or more. Connecticut General Statutes Section 12-412(99).)
2. Oklahoma. In general, an aircraft is considered to be used in Oklahoma and therefore subject to the Oklahoma aircraft excise tax when it is operated or based in an airport in the state for a period of 30 days or more. O.S. 6002 and 6001(4), Tit. 68.
3. Pennsylvania. Aircraft was purchased outside of Pennsylvania and used almost exclusively in interstate travel to transport corporate employees. Nevertheless, the Commonwealth Court found that there was sufficient Pennsylvania nexus to impose use tax on the aircraft because it was hangared and underwent maintenance in Pittsburgh, near the corporate offices of its owner. H.K. Porter Company, Inc. v. Commonwealth of Pennsylvania, 534 A.2d 169 (1987).

C. States where temporarily stored or temporarily present.

Use taxes may be imposed by the states in which an aircraft has a mere temporary presence.

1. Alabama. Aircraft delivered in Alabama are not taxed if they are not permanently domiciled in Alabama and are removed from the state within three days of delivery. Section 40-23-4(a)(37).
2. Missouri. Director of Revenue v. Superior Aircraft Leasing Co., Inc., 734 S.W. 2d 504 (MO. 1987) involved a corporate aircraft that was owned by a Missouri corporation and leased to an Ohio-based charter service. The aircraft was hangared and repaired in Ohio, but was present in Missouri 7-17% of its total flight hours. The Missouri Supreme Court held that the aircraft was subject to Missouri use tax.

3. Washington. Tax was owed on a corporate aircraft purchase outside of Washington and hangared outside of Washington. In addition, all flights were from or to locations outside of Washington and the aircraft never remained in Washington overnight. Nevertheless, the aircraft was subject to Washington use tax because it made stops in Washington to pick-up and drop-off its Washington-based owner's employees. Under the Department of Revenue's interpretation, the aircraft's transportation ended in Washington the first time the aircraft landed in Washington. The period of time in Washington is irrelevant. Washington's "transportation finally ended" principle is not applicable to sales to Washington residents. Administrative Petition for Correction Assessment, No. 98-029, 1998 Wash. Tax Lexis 1030 (February 27, 1998).

D. Possible liability from occasional landings in state.

1. Illinois. In PLR 92-0463 (September 1, 1992), 1992 Ill. PLR Lexis 1401, the Illinois Department of Revenue ruled that use tax was not due on aircraft leased by Bermuda corporation to its European affiliate that twice a month ferried that affiliate's executives to meetings in Illinois. The Department found "under the U.S. Supreme Court's decision of Complete Auto Transit, as well as the case law developed under the Foreign Commerce Clause of the U.S. Constitution, that Illinois would be barred by federal supremacy from asserting tax on the facts you have outlined". Interestingly, the Department made that statement after noting that no temporary use exemption applied and also after noting that under the case of Philco Corporation v. Department of Revenue, 40 Ill. 2d 312 (1968), presence of an asset in Illinois in the possession of a lessee is sufficient to hold the owner liable for Illinois use tax.
2. Michigan. The Michigan Court of Appeals held that the state's use tax was not owed by the owner/lessor of two aircraft occasionally landed in Michigan by the lessee, Southwest Airlines. Each aircraft landed in the state more than 40 times during the year at issue. However, Southwest Airlines controlled each aircraft's flight schedule. The court held that the lessor exercised no control over the aircraft and could not have used the aircraft in Michigan. Furthermore, the lessor's use of a Michigan address on its FAA registration did not constitute a use of the aircraft in Michigan. WPGPI Inc. v. Treasury, 220 Mich. App. 414 (Ct. Appeals April 4, 2000).
3. Missouri. Director of Revenue v. Superior Aircraft Leasing Co., Inc., 734 S.W. 2d 504 (MO. 1987) involved a corporate aircraft that was owned by a Missouri corporation and leased to an Ohio-based charter service. The aircraft was hangared and repaired in Ohio, but was present in Missouri 7-17% of its total flight hours. The Missouri Supreme Court held that the aircraft was subject to Missouri use tax.

4. New York. Ross Lipman, New York Division of Tax Appeals, ALJ Unit, DTA 816710 (February 17, 2000). A New York State resident purchased an aircraft in Mississippi, and took delivery and hangared the aircraft in New Jersey. The aircraft was never permanently stored or hangared in New York, but did occasionally take off or land in New York. The Administrative Law Judge held that a taxable use occurred on the first occasion when the aircraft had a wholly-intrastate flight, both taking off from and landing in New York State. The ALJ distinguished Xerox Corporation v. State Tax Commission, 422 N.Y.S. 2d 493 (1979). In that earlier case, the court refused to impose a local tax on the use of the aircraft, as the aircraft was hangared in a different county. The ALJ stated that this case was based on an administrative rule that local taxes are imposed based upon where the aircraft is hangared. However, the ALJ concluded that this local tax rule did not apply to the state.

E. States where upgrades are installed or repairs/maintenance performed.

States may tax aircraft present for upgrading or servicing. However, the states typically do not do so because of the negative effect such taxation would have on in-state businesses performing such services.

1. Arizona. The Arizona Department of Revenue has ruled that no use occurs and the transaction privilege and use taxes are not due on the in-state transfer of an aircraft to a nonresident "when the aircraft is retained in this state, at the direction of the seller, for the sole purpose of completing the manufacturing process." Private Letter Ruling LR 01-003 (January 10, 2001).
2. Arkansas. State provides a use tax exemption for aircraft that are brought into the state solely for refurbishing, conversion or modification, are not used or intended to be used in the state, and are removed from the state within 60 days of the completion of the refurbishing, conversion, modification, etc. Law Sections 26-53-106(e), 26-53-115, 26-53-130; Reg. UT-9.
3. Wisconsin. Canadian manufacturer's sale of "green" aircraft to purchaser was subject to Wisconsin use tax when the aircraft was transferred by the manufacturer to the "completer" who completed the aircraft's exterior and interior (including installing instruments, seating and other equipment) in Wisconsin on behalf of the purchaser, and when the purchaser had property in Wisconsin in addition to the aircraft. Completer's sale of completion services and tangible personal property installed in the plane was not subject to Wisconsin sales and use taxes because possession of completed aircraft was transferred by completer to the purchaser outside of Wisconsin. Wisconsin Private Letter Ruling W9314001 (January 1, 2002).

4. Michigan (aircraft parts). Under Michigan case law, items brought into Michigan within 90 days of their purchase are presumed to be subject to the use tax. Here, aircraft parts were used when the taxpayer received the parts in Michigan. The court held that no interstate activity was involved, as the tax was imposed on parts delivered and installed or stored in Michigan. The Court rejected the taxpayer's argument that tax was unconstitutional because it was imposed on parts installed on aircraft used in interstate commerce. Zantop International Airlines, Inc. v. Michigan Department of Treasury. Michigan Court of Appeals, 2001 Mich. App. Lexis 830 (unpublished opinion), April 24, 2001, leave to appeal denied, 465 Mich. 912 (November 30, 2001), cert. denied, 122 S. Ct. 1912 (May 13, 2002).
5. Oklahoma (aircraft parts). Effective July 1, 2002, Oklahoma's sales and use tax exemption for aircraft engine and frame repairs, modifications, replacement parts and services applies to repairs or modifications made at an aircraft repair facility (which includes an aircraft manufacturer's authorized service facility) on aircraft weighing more than 9,000 pounds gross take-off weight and less than 300,000 pounds gross take-off weight and provided that the aircraft are brought into Oklahoma exclusively for such repairs or modifications. Oklahoma Statute 1357(26) as amended by ch. 163 (S.B. 1282) Laws 2002.

III. Acquisition of new or used aircraft.

A. States not imposing sales and use taxes.

Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose state-wide sales and use taxes. However, other taxes may apply. For example, sales and use taxes in Alaska are imposed, collected and administered locally.

B. States not taxing aircraft sales.

For policy reasons, some states otherwise imposing sales and use taxes provide exemptions for aircraft transfers.

1. Connecticut. Connecticut General Statute Section 12-412(99), exempts "sales of and the storage, use or consumption of aircraft having a maximum certificated takeoff weight of six thousand pounds or more."
2. Massachusetts. Effective March 1, 2002, the Commonwealth of Massachusetts adopted a broad exemption from sales and use taxes for the sale or storage of aircraft and aircraft repair or replacement parts. Mass. Chapter 64H Sections 6(vv) and 6(uu) (sales tax) and 64I Sections 7(e) and (d) (use tax). "Aircraft" is not defined by the statutory exemption.

However, the Massachusetts Department of Revenue has issued an information release stating the term will be defined using its natural meaning according to ordinary and approved usage of language and adopting American Heritage Dictionary definition that includes "a machine or device such as an airplane, helicopter, glider . . . that is capable of atmospheric flight." Mass. Tax Information. Release 02-2 (January 24, 2002). Note: In the same information release, the Department of Revenue advised that no documentation is necessary to receive the benefit of this exemption.

3. Michigan. Michigan Statute Sections 205.54x(1) and 205.94(x) exempts from sales and use taxes the sale of an aircraft that "has a maximum certificated takeoff weight of at least 6,000 pounds for use solely in the transport of air cargo, passengers, or a combination of air cargo and passengers."

C. States with maximum taxes or reduced tax rates.

Some states provide tax relief by adopting a maximum tax or reduced tax rate on aircraft transfers. For example,

1. North Carolina. Sales and use taxes on aircraft sales are limited to a 3% state tax with a maximum tax of \$1,500 imposed on the sale of any single aircraft, including all attached accessories. N.C. G.S. 105-164.4(a)(1b), N.C. Adm. Code 17:07B:4602. Aircraft sales are exempt from local sales and use taxes. N.C.G.S. 105-467(a)(1).
2. South Carolina. General state sales and use taxes imposed at a 5% rate are capped at a maximum tax of \$300 for each aircraft sale made after June 30, 1984 or lease executed after August 31, 1985. SC Stat. Sections 12-36-910, 12-36-1310 and 12-36-2110(A)(1) (maximum tax includes unassembled aircraft, but not items to be added to unassembled aircraft). Aircraft sales are exempt from local sales/use taxes. SC Stat. Section 4-10-20.
3. Tennessee (former). Prior to July 1, 2001 sales of aircraft were subject to a reduced tax rate of 3% on that portion of the purchase price over \$100,000, however, this reduced tax rate has been repealed. Tn. Code Section 67-6-225 (repealed by Ch. 976, Laws 1998, effective July 1, 2001). Aircraft are currently subject to the general Tennessee sales and use taxes rate of 7%. Tn. Code Sections 67-6-202.

D. Possible exceptions and other non-taxable treatments.

1. Purchase for resale exemption.

a. Exemption of purchase for resale.

Generally, a sales tax is levied on the retail sale of an aircraft to the consumer, and as a result sales of aircraft for purposes of resale by the purchaser are exempt from tax. See e.g. Minnesota Statute Section 297A.61(4)(a) ("retail sale means any sale, lease, or rental for any purpose other than resale, sublease, or subrent.").

b. Documentation.

A purchaser typically must present its seller with a resale certificate documenting that the purchase is a tax-exempt purchase for resale. The resale certificate, must contain the purchaser's state tax registration number as evidence that the purchaser is a registered vendor of aircraft. Failure to register as a vendor with the state revenue department or present other evidence that the purchaser is an aircraft dealer can result in disallowance of the exemption for the purchase.

In Falcon Helicopter, Inc. v. Department of Revenue, Ill. Circuit Court 01 CH 3578 (March 26, 2002), an Illinois Cook County Circuit Court stated that when an aircraft is purchased "without the benefit of a registration or resale number from the Department, the taxpayer better come 'armed for bear' to the hearing." The court ruled that unsubstantiated testimony of the purchaser that the aircraft was purchased for resale was not sufficient evidence to secure the resale exemption.

c. Use of aircraft prior to sale.

As a general rule, if aircraft are withdrawn from sales inventory, the resale exemption no longer applies and a use tax is due based on the purchase price of the aircraft. See e.g. Neb. Reg. 1-067.067.06. Some states have adopted exceptions to this general rule for use of aircraft for a limited period of time prior to sale.

i. Arkansas. Aircraft inventory may be rented by aircraft dealers for a period of one year or less from their date of purchase without the dealer losing its purchase for resale exemption on the aircraft. Ark. Stat. Section 26-52-409; Ark Reg. GR-14; Neb. If the one-year holding period expires without a sale of the aircraft, tax accrues and is due on the dealer's use of the aircraft based on purchase price.

Weiss v. Central Flying Service, Inc., 326 Ark. 685, 934 SW 2d. 211 (Ark. Sup. Ct. 1996).

- ii. Idaho. A use tax is imposed on any taxable use of an aircraft placed in sales inventory. However, this tax is limited to lease payments, or if there are no lease payments the tax is based on an imputed "reasonable rental value for the time the aircraft is used." Idaho Reg. 35.01.02.037.10.
- iii. Iowa. Effective July 1, 1999, aircraft sold to aircraft dealers who rent or lease the aircraft is exempt from Iowa use tax if the: i) aircraft continues to be recorded as inventory by the dealer; and ii) the dealer reserves the right to take back possession of the leased aircraft if it finds a purchaser. IA Code Section 422.45(38C) and Rule 701-32.13(422,423), IAC.
- iv. Louisiana. New aircraft withdrawn from inventory for use as demonstrators are not subject to use tax [Note: this exemption is currently suspended. La. R.S. Section 47:305(D)(1)(i).]
- v. Minnesota. Sale to licensed aircraft dealer is exempt provided the aircraft has been issued a commercial use permit and is resold while the permit is still in effect. The permit is good for one year. The permit allows an aircraft dealer to use the aircraft without generating a use tax on the purchase price during this one year period. Purposes for which the aircraft can be used include charter, instruction, crop spraying or similar activities. The permit expires one year from the date the aircraft is purchased, at which time tax becomes due on the aircraft if it has not been resold. Minn. Stat. 297A.82(4)(c); Minn. Tax Rule 8130.6500.
- vi. Mississippi. Aircraft used by dealers as demonstrators remain exempt from tax under the sale for resale exemption where aircraft remains in dealer's inventory. Ms. Reg. Rule 46.
- vii. Nebraska. If an aircraft is purchased exempt from tax as a purchase for resale (e.g. by a retailer), but subsequently is used by a purchaser/retailer, the retailer would normally be required to pay a use tax on the purchase price of the aircraft. Neb. Reg. 1-067.067.06. However, in these instances, the purchaser can elect to pay use tax measured against the total "gross receipts" realized from the use of

such aircraft. "Gross receipts" are defined to include, but are not be limited to, charges for flying lessons, banner towing, crop dusting, patrols, air ambulance, etc. N.R.S. 77-2706.01; Neb. Reg. 1-067.067.07 and Neb. Reg. 1-067.067.04.

2. Purchase for lease.

a. Purchase for lease exemption.

A purchase of an aircraft for purposes of lease or rental generally is exempt from tax. See Sales and Use Tax Alert, Vol XI, No. 2 (February 1, 2002) (multistate analysis of incidence of sales/use taxes on lease transactions). This is because most states broadly define "sale" to include not only the transfer of ownership, but also the transfer of possession of an aircraft by lease or rental. Consequently, a purchase for rental or lease is treated as a non-taxable purchase for resale. See e.g. Mn Stat. Section 297A.61(4)(a) ("retail sale means any sale', lease, or rental for any purpose other than resale, sublease, or subrent.").

- i. Florida. The lease of an aircraft is taxable. A purchase for use exclusively for leasing is nontaxable if the purchaser provides a resale certificate to the seller. Rule 12A-1.007(14).
- ii. Indiana. Acquisition of aircraft by a limited liability company for purposes of rental is exempt from sales/use tax if the LLC provides proper exemption certificate to seller. Indiana Department of Revenue Ruling No. 2002-05ST (March 14, 2002).
- iii. South Carolina. Purchase for resale is not taxable, and a lease is treated as a taxable resale. Edisto Fleets, Inc. v. South Carolina Tax Commission, 256 S.C. 350 (1971). See also Reg. Section 117-174.254. However, if an aircraft is used for both leasing and chartering purposes, tax must be paid on either the purchase price of the aircraft or, at the taxpayer's election, on 50% of the chartering fees. Id. See also SC PLR 89-18 (September 27, 1989).
- iv. Wisconsin. Wisconsin provides a purchase for lease exemption, but the exemption applies only if the purchase is "solely for lease or rental." Wisconsin Administrative Code Section 11.29. The exemption is lost -- and use tax on an aircraft's purchase price is owed -- if the owner makes more than *de minimis* use of the aircraft. A

Wisconsin Circuit Court held that an owner "uses" an aircraft in a disqualifying manner if its lease terms are preferential to those offered to other lessees. G&G Trucking, Inc. v. Wisconsin Department of Revenue, Docket No. 01 CV 2962, CCH Wisconsin State Tax Reporter, ¶400-621 (July 9, 2002). In addition, the court held that owner's use of the aircraft for between 10 and 20 percent of the total annual charter hours during each of the periods at issue exceeded *de minimis* usage. It therefore held that the taxpayer owed Wisconsin use tax on its acquisition of the aircraft.

b. Election by lessor to treat purchase as exempt purchase for resale.

In some states the purchaser has the option to elect to treat its purchase for lease as taxable or as an exempt purchase for resale.

- i. California. General rule is that sale of aircraft to lessor is a taxable retail sale and purchase for resale exemption does not apply to purchase for lease. Ca. Rev. & Tax Code Sections 6094(d) and 6244(d); Ca. Reg. 1661(b)(1). However, lessor may elect to treat its purchase as a tax exempt purchase for resale and instead pay use tax on the fair rental value of the aircraft. Id. An electing lessor pays use tax on the rental value in all periods in which the property is leased, whether inside or outside California. Id.
- ii. Colorado. Purchase for lease of at least three years is a purchase for resale and lessor must charge sales tax on lease payments. Colo. Rev. Stat. Section 39-26-114(1)(a)(XII). Where the purchase is for purposes of lease of three years or less lessor can elect to either pay tax on purchase price or to purchase exempt from tax and collect sales tax from its lessee on lease payments. Id. See also FYI -- For Your Information-- Sales 56, Colorado Department of Revenue, November 2000; Western Electric Company v. Weed, 524 P.2d 1369 (Colo. 1974).

c. Purchase for resale exemption does not apply to purchase if subsequent use is not a lease.

A purchase for lease is not exempt under the purchase for resale exemption if the subsequent lease does not transfer possession and control of the aircraft to the lessee.

- i. Florida. The acquisition of a plane for use in providing flight instruction does not qualify for the sale for resale exemption. This use is not a true rental of the aircraft because it does not transfer possession and control of the aircraft to the student. TAA No. 02A-007 (January 30, 2002).
- ii. Ohio. Purchase of aircraft for use in "charter service" is taxable because it is not a purchase for resale. A.M. & J.B., Inc., Ohio Board of Tax Appeals, No. 99 -T-1387 (December 14, 2001); Laurel Transportation, Inc. 92 Ohio St. 3d 220; 749 N.E. 2d 296 (Ohio 2001). In Laurel Transportation Ohio Supreme Court ruled that the purchase of an airplane was not exempt under the purchase for resale exemption because the purchaser did not resell the airplane. The statutory definition of "sale" includes transfer of "title or possession, or both." Ohio R.C. 5739.01(B)(1). In this instance, in exchange for an hourly charter fee, the purchaser furnished an airplane to its customers, complete with a pilot selected by the purchaser. The court ruled that the purchaser was not transferring title or possession of the aircraft to its customers, but instead was providing a transportation service to them. Accordingly, the court ruled that the purchaser's acquisition of the plane was not an exempt purchase for resale, but instead was a taxable retail purchase.
- iii. Virginia. Aircraft tax does not apply to purchases made for qualifying "lease or rental." 23 Va. Code Ann. 58.1-1501. For this purpose, Regulation (23 VAC 10-220-5) defines qualifying "lease or rental" to constitute a period of "time substantially equal to the remaining life (80%) of the aircraft" as determined at the beginning of the lease or rental term.
- iv. Wisconsin. Purchaser/owner (G&G Trucking) of aircraft did not qualify for purchase for lease exemption. Court ruled that purchase of aircraft was taxable. Aircraft was not purchased exclusively for lease or rental because purchaser had preferential use of the aircraft it leased to a Charter company (*i.e* charter company could not deny G&G the right to use the plane to transport purchaser's own corporate employees). G&G Trucking, Inc. v. Wisconsin Department of Revenue, Docket No. 01 CV 2962, CCH Wisconsin State Tax Reporter, ¶400-621 (July 9, 2002).

d. Exemption of lease for re-lease.

In states in which a purchase for lease is exempt, the lease of an aircraft for purposes of re-lease is also exempt. However, the re-lease of the plane must be equivalent to the original lease of the plane in order for this exemption to apply to the re-lease.

Connecticut. Purchase for resale exemption did not apply to lease payments because Court found that lessee and lessor did not sell same services. The lessor leased the aircraft to the lessee, but the lessee sold time on the aircraft to its customers and, therefore, the lease was not a sale for resale. Air Tiger, Inc. v. Commissioner of Revenue Services, Connecticut Superior Court, No. CV99-0496956S (March 27, 2002).

e. Purchase for lease may be a taxable retail sale.

Some states do not define taxable retail sale as including lease or rental. Consequently, these states do not extend the sale for resale exemption to the sale of an aircraft for purposes of lease.

i. Illinois. A lessor is considered the end user of an aircraft purchased for lease, and consequently a purchase for lease is taxable, while the lease receipts are not. 86 Ill. Admin. 130.220(a).

ii. Oklahoma. Sale of aircraft for purposes of lease is subject to Oklahoma Aircraft Excise Tax. Under this tax, transfer of legal ownership, not lease, triggers taxation, measured by purchase price. Lease payments are not subject to Aircraft Excise Tax. Oklahoma Tax Commission Order No. 97-05-08-011 (May 8, 1997). While the lease of tangible personal property generally *is* subject to sales tax, effective July 1, 2000, the lease of an aircraft on which the owner has paid Aircraft Excise Tax is exempt from sales tax. O.S. Sec. 1355(9), Tit. 68.

3. Isolated/occasional sale of aircraft by non-retailer.

General Rule. While states frequently treat sales of tangible personal property by non-retailers as non-taxable "occasional" or "casual" sales, casual or occasional sales of aircraft frequently are excluded from this exemption (i.e., are taxable).

- a. States taxing isolated or occasional sales of aircraft.
 - i. Florida. Florida isolated/occasional sale exemption does not apply to aircraft sales. Law Sections 212.02(2) and (20), and 212.05(1)(a), and Rule 12A-1.007(1)(a).
 - ii. Maine. Casual sales of aircraft are specifically taxable. Tit. 36 M.R.S.A. Sec.1764.
 - iii. Oklahoma. Definition of event triggering Oklahoma Aircraft Excise Tax includes *any* transfer of legal ownership (i.e. taxable event *not* limited to *retailer's* transfer of legal ownership) to an aircraft registered with the FAA. Consequently, the Oklahoma Aircraft Excise Tax does not have an occasional sales exemption. See e.g. Oklahoma Tax Commission Order No. 97-05-08-011 (May 8, 1997) (refinancing by owner of aircraft was subject to tax because the Commission found that legal ownership was transferred to the refinancing institution; no argument that transfer by owner was exempt under occasional sales exemption).
 - iv. Rhode Island. Casual sales of aircraft are subject to use tax. RI. Stat. Sections 44-18-20(b) and 44-18-21(a).
 - v. South Carolina. Casual sales of aircraft are subject to a Casual Sales Excise Tax of 5%, however, like the general sales tax this casual sales tax is capped at a maximum tax of \$300. SC Stat. Sections 12-36-1710 and 12-36-2110.
 - vi. Vermont. Definition of exempt casual sale excludes sale of aircraft. Tit. 32 V.S.A., Sec. 9701(12)(B).
- b. States exempting isolated/occasional sale of aircraft.
 - i. Illinois. 35 ILCS 120/1, 105/2, 86 IAC 130.110 and 130.2005(a)(4)(B); Department v. Preferential Flight, Inc., UT 01-6 2001 STT 220-10 (November 14, 2001). An occasional or isolated sale of tangible personal property by persons who are not engaged in the business of selling such tangible personal property is not subject to Illinois sales or use taxes. 86 Illinois Administrative Code, Section 130.110. The regulation has been interpreted to apply to the sale of several aircraft where the seller used the aircraft in its chartering service. Department of Revenue v. Preferential Flight, Inc., UT 01-6 (May 31, 2001). While

not analyzed in the administrative law judge's decision, the regulation also provides that even routine sales of tangible personal property used by the seller, and which the seller does not otherwise sell, are nontaxable occasional sales. Under this provision, qualifying aircraft lessors or charterers of aircraft services should be able to make routine aircraft sales without having to collect Illinois sales tax and without aircraft purchasers having to pay Illinois use tax. (A different regulation provides that a lessor whose only sales are sales of items coming off lease that no longer are needed for rental inventory incurs no Illinois sales tax on the sale. 86 Ill. Adm. Code Sections 130.2013(e)(1) and (h)(1)(A). In addition, a lessor who incurs sales tax on the sale of an item can take a credit against that liability for any Illinois use tax paid to a supplier when he purchased the item. The credit is available to "all" lessors who are required to pay sales tax when selling an item after having used it for rental purposes 86 Ill. Adm. Code Section 130.2013(h)(2) and (4). While the provision does not separately identify aircraft lessors, its application to "all" lessors should make the credit available on their sale of their used aircraft.)

- ii. Kansas. Isolated or occasional sale of an aircraft is exempt from sales tax if the requirements of K.S.A 79-3602(j) and K.A.R. 92-19-14(a) are met. See also K.S.A. 79-3606(1).
- iii. Virginia. Aircraft tax has an occasional sale exemption. 23 Va. Code Ann. 58.1-1501. See also P.D. 88-103 (May 12, 1988). However, exemption applies only to licensed aircraft upon which Virginia Aircraft Tax has been paid upon acquisition or use by the transferor. Va. Admin. Code Section 10-220-5.

4. Financing transactions.

Financing transactions take a variety of forms including sale-leasebacks and synthetic leases (transactions treated as leases for financial accounting purposes but as loans for income tax purposes). The transactions have in common the transfer of title to a financing company (held as akin to a security interest) while possession and use of the aircraft remain with its true owner. If the transaction is analyzed component-by-component, a sales and use tax liability may be created inadvertently. For example, this may occur in states treating a lease as a taxable transaction because, while the financing company's acquisition of the aircraft title will be nontaxable as a purchase for resale, the leaseback from the financing company will be

taxable unless the lessee is an exempt entity or is putting the aircraft to an exempt use. Alternatively, in states not treating a lease as a taxable event, the financing company's acquisition of the aircraft may be taxable. While conceivably the parties may be able to change the location of the aircraft to qualify for tax-exempt treatment, doing so almost always is inconsistent with the true owner's desired use of the aircraft.

Examples of treatments of financing transactions include the following:

- a. Massachusetts (compare to Oklahoma ruling below). Through March 1, 2002, Massachusetts looked to the intent of the parties in determining whether a transaction is a nontaxable financing arrangement. See e.g., Letter Ruling 01-8 (September 11, 2001). (Effective March 1, 2002, Massachusetts exempts all aircraft sales.) In the ruling, the Department concluded that no sale occurred even though aircraft title transferred to the lender. Important facts demonstrating that the transaction was a financing arrangement included the continual possession of the aircraft by the lessee, the net lease arrangement under which the lessee was responsible for all registration, outfitting, maintenance, insurance and personal property taxes on the aircraft, the retention of risk of loss by the lessee, and the federal income tax treatment of the arrangement as a loan.
- b. New York. A company financing the acquisition of an aircraft may hold title to the aircraft and "lease" it to the true owner, without imposition of New York sales or use tax on the lease payments. TSB-A-02(47)S, (September 18, 2002).
- c. Oklahoma (compare to the Massachusetts ruling above). The Oklahoma Tax Commission has ruled that aircraft excise tax was owed on a transfer of an aircraft to a bank, which then was leased to same user that already was in possession of and using the aircraft. Order Number 97-05-08-011 (May 8, 1997). (Aircraft excise tax is imposed in lieu of Oklahoma sales and use taxes. 68 O.S. 1991, Section 6002.)

In the facts addressed by that Order, a subsidiary (ABC) providing flight services to its parent corporation purchased an aircraft which it hangared in Oklahoma. ABC paid aircraft excise tax on the purchase. The purchase was financed through a leasing company, and the aircraft was registered in the name of the leasing company. Nevertheless, ABC had exclusive possession and use of the aircraft. Approximately 3 years later, ABC negotiated with a bank to refinance the aircraft. Under the terms of the refinancing, ABC made periodic payments to the bank, which were treated as payments of interest and principal for income tax purposes. The aircraft was reregistered with the Federal Aviation Administration

in the bank's name, but ABC's possession and use of the aircraft was uninterrupted, ABC continued to be responsible for all costs and expenses of operating, maintaining and insuring the aircraft, ABC was responsible for all taxes on the ownership, use and operation of the aircraft, and ABC was considered the sole owner of the aircraft for federal, state, local and foreign tax purposes.

The Tax Commission first observed that under Oklahoma law excise tax is owed if there has been a transfer of "legal ownership" of the aircraft, but that the law does not define "legal ownership". The Commission then focused on the cost of ABC's purchase option, as compared to the maximum cost to ABC if it walked away from the aircraft. The Commission determined that, as a matter of absolute dollars, the cost of the purchase option was substantially greater than the walk-away price. It therefore concluded that the option price was not nominal and concluded that ABC was not under significant economic compulsion to exercise the option. As a result, the bank was treated as acting as more than a financier, and that aircraft tax was due on the bank's registration of the aircraft.

- d. Texas. Texas does not impose sales and use tax on financing arrangements if at termination of the lease, for little or no additional consideration, the lessee will become the owner of the leased assets. "Little consideration" means that the projected value of the property at termination of the lease must be determined at the inception of the lease, and the purchase option amount must be less than 10 percent of the estimated value of the property at the time that the purchase option is exercised. Texas Administrative Code 3.294 (a)(1)(ii). If the lessee does not have such an option but instead is required to pay consideration under the terms of the contract, the transaction will be viewed as a financing arrangement even if the amount of the required payment is greater than 10 percent of the estimated value. Texas Administrative Code 3.294(a)(1)(i). See also Texas Private Letter Ruling 9904335L (April 23, 1999).

5. Nonresident's relocation of aircraft acquired within the state to outside the state.

A number of states have adopted an exemption for the sale of airplanes delivered to nonresidents in the state for subsequent transportation and use outside the state. However, these exemptions are varied and require a purchaser to examine carefully the exemption in a particular state in which it plans to receive delivery. Limitations can include: the time period the plane can remain in the state prior to removal; the use to which the plane

can be put while in the state; and purchase price and size of the plane to which the exemption applies.

- a. Alabama. Aircraft is exempt if delivered to a purchaser not permanently domiciled in Alabama that removes it from the state within three days of delivery. Section 40-23-4(a)(37).
- b. Arizona. Aircraft is exempt if delivered to a nonresident who will not "use" the aircraft in Arizona. Nonresident defined to include corporations not incorporated in Arizona if their principal corporate office is located outside the state. AZ Law Section 42-5061(B)(7) and 42-5159(B)(7). The Arizona Department of Revenue has interpreted this exemption to extend to the sale of aircraft that will remain in Arizona after title has passed from the manufacturer to the purchaser for purposes of permitting the aircraft manufacturer to complete the manufacture of the aircraft by customizing the interior to the specifications of the purchaser. In this regard, the Department found that under its definition of "use," which was to "put into action or service ; employ," the purchaser was not using the aircraft in Arizona simply by permitting the manufacturer to complete the manufacturing process. Therefore, the Department ruled that the aircraft qualified for the exemption. See Arizona Private Letter Ruling LR 01-003 (January 10, 2001).
- c. Arkansas. While aircraft sales generally are taxable (Law 26-52-505(a), Reg. GR-14(A)), the sale of new aircraft manufactured or substantially completed in Arkansas to a purchaser for use exclusively outside the state is exempt from tax if possession is taken in Arkansas for the sole purpose of removing it from the state under its own power. Law Section 26-52-505(c), Reg. GR-14(G).
- d. California. Sales or leases of aircraft to nonresidents for use outside California are exempt. Rev. & Tax Code Sections 6366, 6366.1 and Reg. 1593.
- e. Connecticut. Sales of aircraft to nonresidents who will not use such aircraft in Connecticut other than in the removal of the aircraft from Connecticut are exempt from sales tax. Conn. Stat. Section 12-412(20).
- f. Florida. Sales tax does not apply to aircraft sold through a registered dealer to a purchaser who, at the time of taking delivery, is: i) a Florida nonresident that does not make his or her permanent place of abode in Florida, and is not engaged in carrying on in Florida any employment, trade, business or profession in which the aircraft will be used in the state; ii) a corporation, none of the

officers or directors of which is a resident or maintains a permanent place of abode in Florida; or iii) a non-corporate entity that has no individual vested with authority to participate in the management, direction, or control of the entity's affairs who is a resident of Florida. Fla. Law Section 212.05(1)(a)(2). The purchaser must remove the aircraft from Florida within 10 days after the date of purchase, or, if the aircraft is altered, within 20 days after completion of the alterations, as well as meet certain documentation requirements regarding removal and registration of the aircraft in another state. Id. Use tax will be imposed on the purchase price of the plane if it is brought back into Florida within six months of purchase, except if it is returned to Florida for repairs within this six month period. Id.

- g. Idaho. Aircraft is exempt if delivered to a nonresident for use outside of Idaho. The aircraft must be taken outside of Idaho and registered immediately in another state and not used in Idaho for more than 90 days in any 12-month period. IC § 63-3622GG.
- h. Kansas. Aircraft is exempt if delivered to a nonresident and the aircraft does not remain in Kansas more than 10 days after the sale. K.S.A. 79-3606(k). See also Kansas PLRs P-1999-145 (June 24, 1999) (addressing delivery to purchaser that will resell it to nonresident) and P-2000-007 (February 28, 2000) (extending exemption to a nonresident that purchases aircraft for immediate resale to another nonresident).
- i. Louisiana. Effective August 21, 1992, the sale of a passenger aircraft that is manufactured or assembled in Louisiana and that has a capacity in excess of 50 persons is exempt if the aircraft is ultimately received by the purchaser outside of Louisiana after all transportation, including transportation by the purchaser, has been completed. (Sec. 47:301(10)(m), La R.S.)
- j. Minnesota. A nonresident can take possession of the aircraft in Minnesota and keep it in the state for 10 days without subjecting the sale to tax provided: i) the aircraft is removed from the state and subsequently registered in another state or country, and ii) the aircraft is used exclusively for training purposes during the 10-day period. Minn. Stat. 297A.82(4)(e).
- k. Nebraska. Nonresident's purchase of aircraft is exempt from sales and use taxes if the aircraft is removed from Nebraska within 10 days of its purchase. N.R.S. 77-2704.26.

- l. Oklahoma. Nonresident's purchase of aircraft with selling price in excess of \$2.5 million is not taxable if the aircraft is immediately transferred outside of Oklahoma. O.S. 6003(16), Tit. 68.
 - m. Texas. Sale for use or registration in another state is nontaxable if aircraft is not used in Texas for any purpose other than flight training and transportation outside the state. Tx. Code § 151.328(a). Aircraft hangedared outside of Texas and used more than 50% of time outside the state are exempt from use tax. 34 TAC 3.297(c)(3).
 - n. Utah. Sale for delivery and use outside of Utah is nontaxable even if title passes in Utah. Utah Code Ann. Sec. 59-12-104(33).
6. Relocation of aircraft acquired outside the state to inside the state.

Some states provide exemptions for aircraft purchased and used outside of the state for a set period of time before being brought into the state. (In some cases, the exemption may be thought of as a conclusive presumption that the aircraft was not purchased for use in the state.)

- a. California provides such an exemption/conclusive presumption. Under Regulation Section 1620(B)(4), no California sales or use tax will be owed on an aircraft purchased outside of the state if (a) the aircraft is first functionally used" outside of California and (b) it is not brought into California within 90 days after its purchase (exclusive of the time of shipment to California or storage for shipment to California). "Functional use" means the use for which the aircraft is designed or intended. See e.g. SBE Annual Taxpayers' Bill of Rights Hearing, 1998 Cal. Tax Lexis 300 (September, 1998). Aircraft purchased and used for commercial purposes are not "functionally used" until they are used for the commercial purpose for which they are designed. SBE Annotation No. 325.0013.200 (August 10, 1992).

Even if an aircraft that is purchased outside of California and first functionally used outside California enters California within that 90 day period, it still may be exempt from use tax if it is used, stored, or both used and stored outside of California "one-half or more of the time during the six-month period immediately following its entry into the state." Also, California use tax will not be owed on an aircraft purchased outside California and first functionally used outside of the state if more than half of its flight time during the six-months immediately following its entry into California is commercial flight time traveled in interstate commerce.

- b. Illinois. Aircraft relocated to Illinois by nonresident *individuals* who acquired the aircraft outside the state and used it outside the state for at least 3 months after purchase are exempt from Illinois use tax. 35 ILCS 105/3-70. Aircraft similarly acquired and used outside of Illinois by *businesses* are excluded from this exemption (*i.e.*, are taxable). Id.
- c. New Jersey. Aircraft "purchase" by a corporation while a "nonresident" of New Jersey is exempt from tax. N.J.S.A. 54:32B-11(2). The New Jersey Tax Court has interpreted this exemption to extend to a corporation that acquired title to an aircraft while a nonresident, but did not acquire possession of the aircraft until after it became a New Jersey resident. Diamondhead Corporation v. Director, Division of Taxation, 4 NJ Tax 255 (1983). The court based this ruling on its finding that the statutory definition of "purchase" included the transfer of "title or possession," and its determination that the purchaser had clearly acquired title to the aircraft while it was still a nonresident of New Jersey. See First National City Bank v. Taxation Division Director, 5 N.J. Tax 310 (1983) (the term "nonresident" as used in exemption interpreted to exclude corporation that is "actively engaged in business" in the state).
- d. Wisconsin. Statutory exemption for aircraft relocated from another state to Wisconsin applies if the following conditions are met: i) aircraft purchased in another state; ii) aircraft owner paid all sales/use taxes imposed by state in which purchased; iii) purchaser and affiliates do not have real or tangible property in Wisconsin other than property connected with aircraft and hangar; and iv) purchaser not formed to qualify for this exemption. Wis. Stats. 77.53(17r).

7. Transfer to grantor trust.

In general, state sales and use tax statutes do not specifically address the taxability or non-taxability of transfers of aircraft to grantor trusts, a method frequently used to hold ownership to an aircraft. The taxability of these transfers is typically a matter of state administrative interpretation as to whether consideration was received in exchange for the transfer to the trust and whether an ownership change has taken place that triggers a tax.

- a. No consideration/No change in ownership.

California. The sale of an aircraft to a revocable trust is non-taxable if the sale: i) does not change the beneficial ownership of the property; ii) the trust provides that upon revocation the property reverts to the transferor; and iii) the only consideration for

the sale is the assumption by the trust of an existing loan for which the transferred property is the sole collateral. Rev. & Tax Code Section 6285. See also Annotation 495.0483 (December 1, 1971) ("Since the only assets are transferred to the trustee with no measurable consideration, such as cash, notes, or assumption of liabilities flowing to the trustee, no sale occurs") and Annotations 585.0275 (March 25, 1992) and 495.0490 (March 25, 1992) ("If a donation of the aircraft to the trust is for no consideration, the transaction would not be subject to use tax.") These latter rulings stated that consideration was received if the trust assumes a liability for an outstanding loan; however, California law has since been amended to allow for such assumption of indebtedness if the property being transferred is sole collateral for the assumed loan. Cal. Rev. & Tax Code Section 6285 (b) (4).

b. Change in ownership

Illinois. The Illinois Department of Revenue has treated trusts as entities distinct from their owners and therefore a transfer to a grantor trust might constitute a change in ownership sufficient to trigger a sales/use tax. See e.g. IL Dept. of Rev. PLR 00-005 (March 20, 2000). However, Illinois has a broad occasional sales exemption that may apply to exempt an otherwise taxable transfer of ownership to a grantor trust.

c. Special aircraft tax exemption for transfer to grantor trust.

Oklahoma. The special Aircraft Excise Tax adopted by the State of Oklahoma contains an exemption for aircraft transferred without consideration by an individual to a trust that the individual has a right to revoke. O.S. Section 6003(17), Tit. 68.

8. Contributions/transfers to Newco. Many states do not impose sales and use taxes on transfers of aircraft to subsidiaries, partnerships and limited liability companies in exchange for an ownership interest in the transferee. Other states, however, have interpreted their sales and use tax statutes to deem a sufficient transfer of "ownership" or "title" to have taken place to trigger a tax.

a. States exempting contributions/transfers to Newco.

i. California. Contributions to commencing corporations, LLC, partnerships or joint ventures are exempt from California sales and use taxes. Rev. & Tax Code Section 1595(b)(4). The exemption will be lost to the extent that the transferor receives any consideration as part of the transfer, including an assumption of indebtedness by the

transferee. Beatrice Company v. State Board of Equalization, 6 C4th 767 (1993).

- ii. Colorado. Transfers of assets from a parent corporation to a subsidiary owned 80% or more by the parent, in exchange solely for stock or securities of the subsidiary, are exempt from Colorado sales and use taxes. Co. Stat. Sections 39-26-102(10)(e).
 - iii. New York. Transfers of stock to a corporation upon its organization in consideration for the issuance of its stock, and transfers of property to a partnership in consideration for a partnership interest are exempt from New York sales and use taxes. Tax Law Section 1101(b)(4)(iv). Note that the New York State Department of Taxation and Finance has ruled that, for sales and use tax purposes, contributions of property to a limited liability company (including a single member limited liability company) on its formation must be treated as a contribution to a partnership. TSB-A-98(2)S (January 30, 1998).
 - iv. Minnesota. Transfer of an aircraft in exchange for stock or a partnership interest, as defined under IRC Sections 351 or 721, is exempt from tax. Minn. Stat. Section 297A.82(4)(b).
 - v. Oklahoma. Transfer of aircraft to corporation for purposes of organizing corporation is exempt from Oklahoma Aircraft Excise Tax if the former owners of the aircraft are in control of the corporation in proportion to their ownership interest in the aircraft. O.S. Section 6003(7), Tit. 68.
- b. States not exempting contributions/transfers to Newco.
- i. Florida. Florida Department of Revenue ruled that transfer of airplane title by corporation to its wholly owned limited liability company was a taxable transfer of "ownership" for "consideration." The Department went on to advise that transfer of title to the limited liability company by way of statutory merger would be exempt. TAA No. 02A-007 (January 30, 2002).
 - ii. Iowa. In the Matter of Legislake Ltd., No. 88-30-6-0439 (October 18, 1988) the Iowa Department of Revenue ruled that transfer of airplane to Newco by individual joint owners in exchange for Newco stock was subject to Iowa

use tax. The Department based this ruling on its determination that there had been a change in ownership because the individuals transferring title to the corporation were "different entities" from their corporation for a variety of legal purposes (tort liability, income tax law, etc.). The Department stated that "So long as the law considers them to be two differing persons in other areas the director will refrain from stating that they are the 'same person' for the purposes of sales and use tax law."

9. Commercial carrier/rolling stock exemption.
 - a. Many states adopt what are generically referred to as "rolling stock" exemptions for the acquisition and use of an aircraft in transporting passengers or freight in interstate commerce.
 - i. California. Gross receipts from sale of aircraft to common carriers, or to persons who will lease to common carriers, are exempt from tax. Ca. Code Sections 6366 and 6366.1(a); Ca. Reg. 1593(c) provides qualification requirements.
 - ii. Colorado. Sales, storage, use or consumption of aircraft used or purchased for use in interstate commerce by a commercial airline are exempt from sales and use taxes. Colo. Rev. Stat. Sec. 39-26-114(1)(a)(XXII) and 39-26-203(1)(aa). Commercial airline is an airline carrying freight or passengers for a fee on regularly scheduled flights. Reg. 26-114.1(a)(XXII).
 - iii. Florida. The sale or lease of an aircraft weighing more than 15,000 pounds maximum certified takeoff weight for use by a common carrier is exempt from sales and use tax. Fla. Law Section 212.08(7)(uu). See also Fla. Law Section 212.08(7)(tt), extending the exemption to sales of replacement engines, parts and equipment used in the repair and maintenance of such aircraft.
 - iv. Hawaii. Effective July 1, 2001, amounts received for lease of aircraft used for interstate or inter-island transportation of passengers or goods are exempt from general excise (sales) tax. Hawaii Rev. Stat. Section 237-24.3(12). This statutory exemption extends the previously existing statutory exemption that had exempted aircraft purchased by common carrier for use in the commercial transportation

of passengers and/or goods. Department of Taxation Announcement No. 2001-12.

- v. Idaho. Sale or lease of aircraft primarily used to transport passengers or freight for hire is exempt from sales and use taxes. Effective July 1, 2001 the exemption includes repair and replacement materials and parts installed in or affixed to such aircraft, but not tools and equipment used in such repair. IC Sec. 63-3622GG; Rule 35.01.02.037.03.
- vi. Illinois. Purchase or use of aircraft by interstate carrier for hire as rolling stock moving in interstate commerce or by lessors under a lease of one year or longer executed and in effect at the time of purchase is exempt from tax. 35 ILCS 105/3-55(b); 35 ILCS 2-5(12). Purchaser must include interstate carrier's FAA registration number on exemption certificate (RUT-7) by which it claims the rolling stock exemption.
 - (1) Administrative Decision UT 01-7, 2001 STT 135-16 (May 18, 2001). Rolling stock exemption not applicable to aircraft acquired by corporation, Fahrquar, that leased it primarily to affiliated lessee, Rocketboy, which had FAA certification to operate as an air carrier. Rolling stock exemption not applicable because lease to Rocketboy was not for statutorily required one-year or longer period -- Rocketboy did not have exclusive possession of aircraft, its possession was dependent upon the lessor's use in that Rocketboy paid hourly rate and could only use aircraft when Fahrquar did not have it prescheduled for its own use.
 - (2) Administrative Decision UT 99-1. Rolling stock exemption not applicable to purchase of aircraft because: purchaser's lease of aircraft to charter service was not entered until *after* purchase; lease was not for a year or longer duration, but instead was a *month-to month* lease; and purchaser introduced no evidence that lessee was interstate carrier for hire. [Note: this administrative decision was affirmed by the First District Illinois Appellate Court in its unpublished decision, Midwest Fastener Corporation v. Department of Revenue, No. 1-00-1677 (June 29, 2001)].

- (3) Department General Information Letter ST 01-0081-GIL (April 27, 2001). Rolling stock exemption extends to airplanes purchased for: i) one- year lease to aviation management companies that are FAA Part 135 charter service certified; and ii) where approximately 75% of the airplanes' total use was by the management company for travel in interstate commerce for hire.
 - (4) Department General Information Letter 97-0281-GIL. Rolling stock exemption extends to replacement parts on aircraft used by interstate carriers, but not fuel, although there is a separate exemption for fuel certified by a carrier for use on an international flight. 35 ILCS 505/2-5(22).
 - (5) Amendment to Rolling Stock Regulation (86 Ill. Admin. Code § 130.340). Department recently amended its rolling stock exemption regulation to reflect Illinois Appellate Court's unpublished decision, AJF Warehouse Distributors, Inv. v. Illinois Department of Revenue, Dckt. No. 1-92-2126 (November 2, 1994) This decision extended rolling stock exemption to lessors that lease rolling stock for periods of less than a year to an interstate carrier. See 26 Ill. Reg. 8423, effective May 24, 2002.
- vii. Kansas. Aircraft used in interstate or foreign commerce are exempt from sales tax, including remanufactured and modified aircraft, aircraft repair, and modification and replacement parts and services. KSA Code Section 79-3606.
- viii. Maine. Aircraft used as instrumentalities of interstate or foreign commerce are exempt from tax. 36 M.R.S.A. Sections 1752(21), 1760(41).

Aircraft purchased out-of-state was not exempt under rolling stock exemption because it was brought into Maine and placed in interstate commerce by purchaser's aircraft management company, not the purchaser. J&E Air Inc. retained the management firm, Telford Aviation, to operate the plane for it. The state revenue department agreed that the plane was used in interstate commerce, but disallowed the statutory interstate commerce exemption because Telford, not the purchaser, as required by the statutory

exemption, brought the aircraft into Maine and placed it in interstate commerce. The court rejected the purchaser's arguments that Telford was acting as J&E's agent (court found that Telford was not subject to J&E's (the purchaser's) control). J&E Air Inc. v. Tax Assessor, Maine Supreme Judicial Court, No. 2001 ME 95, June 22, 2001.

- ix. Maryland. The sale of an aircraft that is used principally to cross state lines in interstate or foreign commerce is not taxable. Md. Sec. 11-208(c).
- x. Michigan. Aircraft used by interstate carriers are subject to Michigan sales/use tax if taxation meets the four-part test used to determine the constitutionality of taxation under the United States Constitution's Commerce Clause set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Rev. Admin. Bull. 1993-8 (April 15, 1993).

Michigan Court of Appeals ruled that use taxation of aircraft parts delivered and installed on aircraft in Michigan did not violate Commerce Clause of United States Constitution, despite subsequent use of the parts almost exclusively outside Michigan. Court found that use taxation met four-part Complete Auto Transit test for taxation, specifically that taxation: i) had substantial nexus with Michigan -- parts received and installed on aircraft in Michigan; ii) was fairly apportioned -- no other state would impose tax on parts since they were delivered and installed on the aircraft in Michigan and if such a tax was imposed Michigan adopted a credit to offset this tax; iii) did not discriminate against interstate commerce -- undisputed by taxpayer; and iv) was fairly related to services provided by Michigan -- tax commensurate with services provided to taxpayer's Michigan aircraft repair facility. Zantop International Airlines, Inc. v. Michigan Department of Treasury. Michigan Court of Appeals, No. 217513 (unpublished opinion), April 24, 2001), petition for cert. denied U.S. Sup. Ct. Dckt. No. 01-1284 (May 13, 2002).

- xi. New York. Air carrier exemption extends to commercial aircraft primarily engaged in intrastate, interstate or foreign commerce as well as machinery or equipment to be installed on such aircraft and property used by or purchased for the use of such aircraft for maintenance and repairs and flight simulators purchased by commercial airlines. Tax Law Section 1115(a)(21).

- (1) Exemption is broad enough to permit corporations to use it to exempt from tax their purchase of corporate aircraft. This is done by setting up a separate subsidiary to acquire the aircraft, which then uses the aircraft to provide air transportation services (i.e. provide aircraft and flight crew) to affiliate/parent corporation in exchange for compensation reflecting costs of the subsidiary's operation of the aircraft. To meet the requirements of the statutory exemption, over 50% of aircraft's use must be for transportation services. Pasquale & Bowers, TSB-A-96(49)S (August 1, 1996), (purchase of aircraft exempt from tax under Tax Law Section 1115(a)(21) where used by owner (TAD) primarily (greater than 50%) to provide transportation services to two corporations owned by same shareholders; exemption applied even though TAD not required to hold FAA 135 air commercial; however, in order for exemption to apply TAD had to be respected as a separate legal entity (i.e. not be an alter ego) separate from the entities to which it provided transportation services).
- (2) The fact that aircraft is used exclusively to transport one customer is immaterial for purposes of sustaining the exemption. John J. Bischoff, TSB-A-99(20)S (April 8, 1999), (Aircraft leased by owner, Company A, to Company B acting as Company C's agent. Company C held Part 135 FAA Air Carrier Operating Certificate. Company C entered into agreement under which aircraft was to be used exclusively to provide air transportation services to Company D for three years. Lease of aircraft from A to B qualified for air carrier exemption under Tax Law Section 1115(a)(21). Department stated "It is immaterial that the aircraft is for the exclusive use of one customer.") See also TSB-A-00(6)S (February 1, 2000) (similar facts to Bischoff -- aircraft used to provide air transportation services to Ernst & Young, which owned a "large part" of the entity that owned the plane); Citiflight, Inc., TSB-A-00(30)S (August 3, 2000) (purchase of aircraft exempt from tax where used to provide transportation services for compensation to related companies even though owner did not hold FAA Part 135 air operator operating certificate); Phillip

Morris Management Corp., TSB-A-00(38)S (October 11, 2000) (aircraft exempt under similar facts to Citiflight -- compensation paid transportation service provider based on IRS prescribed Standard Industry Fare Level rates; aircraft exempt even though an insubstantial portion of the aircraft's use was for apparently non-exempt purposes (use by former employees and elected officials)).

- xii. South Dakota. Aircraft used in regularly scheduled flying in interstate commerce exempt are from sales/use tax. 50-11-19 SDCL.
- xiii. Texas. Sale of aircraft to or use of aircraft by a certificated or licensed air carrier. Tx. Code Sections 151.328(a)(1), 151.328(b).

Texas Comptroller's Decision No. 39,831 (July 6, 2001) -- Comptroller ruled that because purchaser was not a licensed/certificated common carrier under part 135 of FAA regulations, purchase of aircraft did not qualify for rolling stock exemption.
- xiv. Tennessee. Aircraft, parts, accessories, materials and supplies purchased or leased by interstate or international air carriers are exempt. Tn. Code Sections 67-6-302 and 67-6-217.
- xv. Utah. Sale of aircraft, as well as parts and equipment sold for installation thereon, to common carrier is exempt. Utah Code Section 59-12-104(5); Rule R865-19S-97.
- xvi. Vermont. Sale of aircraft and equipment to common carrier is exempt. Section 9741(a)(29), Tit. 32 V.S.A.
- xvii. Washington. Use of aircraft primarily in transporting property or persons for hire within interstate commerce is exempt from tax. Tit. 82, Ch. 82.12 Wa. Code Section 82.12.0254.

However, the Washington Department of Revenue held that aircraft used to transport corporate executives did not qualify for exemption as instrument of interstate commerce. The aircraft was not available for hire. Petition for Correction Assessment, No. 98-029, 1998 Wash. Tax Lexis 1030 (February 27, 1998).

- xviii. Virginia. Sale of aircraft, as well as replacement and maintenance parts for such aircraft, to common carrier is exempt from aircraft transfer tax. Va. Code Section 58.1-1505.
- xix. Wyoming. Aircraft purchased by interstate air carriers that hold valid U.S. Civil Aeronautics Board permits are exempt. W.S. 39-15-105(a)(ii)(B); W.S. 39-16-105(a)(ii)(A).

10. Tax credits.

- a. Credit for taxes paid to other states.

In order to limit the risk of cumulative tax burdens on interstate transactions, states typically adopt a tax credit that permits taxpayers to offset, against the use tax due on their aircraft, sales/use taxes they previously paid on the aircraft to other states.

Vermont. Vermont adopts a tax credit against use taxes due on aircraft brought into Vermont for sales/uses taxes previously paid on the aircraft to other states. § 9744(a)(2), Tit. 32 V.S.A. The Vermont Supreme Court held that this tax credit was the mechanism chosen by the Vermont legislature to avoid the risk of unconstitutional multiple taxation of interstate commerce and ruled that a Vermont taxpayer was required to pay use tax on 100% of its acquisition price of an airplane where the taxpayer failed to document that had previously paid any sales or use taxes on the plane to other states. Whitcomb v. Commissioner, 144 Vt. 466, 479 A.2d 164 (Vt. Sup. Ct. 1984). The court overturned the trial court's ruling that had allowed the taxpayer to pay tax on an apportioned tax base equal to 17% of the plane's purchase price based upon the taxpayer's determination that only about 17% of the plane's use was attributable to Vermont. The court held that the United States Constitution's "Commerce Clause does not require apportionment in addition to a tax credit" in order to "ameliorate the risk of cumulative tax burdens upon interstate commerce."

b. Other credits

States also adopt tax credits as incentives encouraging capital investment in the state.

Oklahoma. Effective July 1, 2001, Oklahoma allows a credit against the Oklahoma Aircraft Excise Tax on aircraft with a selling price in excess of \$2.5 million for expenditures by those persons owing the tax for the benefit of airports in Oklahoma.

Expenditures in excess of aircraft excise tax due may be carried forward 10 years as a credit against future aircraft excise taxes. O.S. Section 6003.1., Tit. 68.

11. Other.

a. Trade-in offset against purchase price.

States permit taxpayers to reduce the retail purchase price of new planes on which the taxpayers pay sales/use tax by the fair value of the old aircraft traded-in for the new aircraft.

i. Illinois. PLR ST-01-0126-GIL (2001 Ill. PLR Lexis 81). Department ruled that Advance Trade-In Regulation, 86 Ill. Admin. Code 130.425, applies to aircraft as well as the motor vehicles specifically referenced in the regulation. In this instance, two Falcon aircraft were traded in by a taxpayer for two Lear Jets. The taxpayer was not certain that at time it traded in second aircraft whether it would have identified aircraft it wanted to purchase. It wanted to know whether it would still qualify for reduction in taxable purchase price of new aircraft based upon trade-in value of old aircraft as long as it entered a contract to purchase a new aircraft at the time it traded in the old aircraft (advance trade-in). The Department ruled that the taxpayer would qualify for advance trade-in reduction of purchase price if requirements of regulation met (trade-in and purchase must be recorded as one transaction on books of retailer).

ii. Maine. A trade-in credit is available for aircraft. Section 1765, Tit. 36 M.R.S.A.

b. Miscellaneous exemptions.

States provide a variety of miscellaneous exemptions for aircraft that include exemptions for vintage aircraft, aircraft used in mineral exploration, kits acquired to construct aircraft, and aircraft sold to family members.

- i. California. Sales to certain family members where the seller is a parent, grandparent, child (but not stepchild), grandchild, or spouse of seller are exempt from sales and use taxes. Sales and Use Tax Counsel Annotation 585.0020; Ca. Rev. & Tax Code Section 6285 and Ca. Reg. 1610(b)(2). Seller must not be in the business of selling the property for which exemption is claimed. Reg. 1610(b)(2).
- ii. Connecticut. No sales or use tax is due when an aircraft is sold to the seller's spouse, mother, father, sibling or child. Conn. Stat. Section 12-431.
- iii. Louisiana. Sales of airplanes more than 25 years old, maintained by private collectors, and not used in commerce are exempt. La. R.S. Section 47:6001(A), (B). [Note: this exemption has been suspended.] Also, helicopters used for mineral production or exploration and acquired through a lease transaction that might be considered a conditional sale are exempt. La R.S. Section 47:302.1
- iv. Missouri. Sales to a qualified purchaser of a new light aircraft, light aircraft kits, parts or components manufactured or substantially completed within the state are exempt from sales and use taxes. Mo. Code Section 144.043. A light aircraft is defined as an airplane that seats no more than 4 person with a gross weight of 3,000 pounds or less that is primarily used for recreational flying or flight training. Id.

E. Documentation.

1. Arkansas. Record keeping requirements are provided in Law Sections 26-52-514 and 505; Reg. GR-114.
2. Connecticut. In general, sales or use tax must be prepaid to the Commissioner of Transportation on sales of aircraft. Conn. Gen. Stat. Section 12-430(3). Documentation is described in Conn. Reg. section 12-426-16a.
3. Illinois. At time of application for Illinois registration with the Department of Transportation for aircraft purchased or leased (as lessee if lessee assumes this responsibility), must submit either payment of tax or proof of exemption. Exemption for aircraft used outside of Illinois for more than three months applies only to individuals moving into Illinois.

Use of broker/agent may change a nontaxable sale to a taxable sale if broker/agent takes title.

See also Falcon Helicopter, Inc. v. Department of Revenue, Ill. Circuit Court 01 CH 3578 (March 26, 2002). Administrative review rejecting the taxpayer's argument that purchase was for resale. The Court stated that

"When trying to prove entitlement to an exemption from use tax when a large purchase is made from an out-of-state retailer and is made without the benefit of a registration or resale number from the Department, the taxpayer better come 'armed for bear' to the hearing. In this case, the only ammunition that the taxpayer brought to the administrative hearing was the testimony of its owner, Andy Kolasa, that he thought he could buy the helicopter and resell it for a profit. The court believes that the Department did not err in failing to accept this testimony for a number of reasons, including the following: 1) The purchase of the helicopter was from a registered aircraft dealer/retailer in Florida and there is nothing in the record to support the underlying assumption in taxpayer's position that the purchase price of nearly \$370,000 was below market-value; 2) Prior to such a large purchase, the taxpayer failed to take the rudimentary step of securing a registration or resale number from the Department of Revenue, though Mr. Kolasa was a successful businessman; 3) Mr. Kolasa was neither a helicopter pilot nor a helicopter mechanic; and, 4) While the helicopter was purchased in May of 1996, it appears from the flight log of the craft that flights for demonstration or repair purposes did not begin until late November of that year. In the court's view, these considerations make it understandable why the Department rejected the taxpayer's position that the helicopter was purchased with the intent to resell it for a profit. Accordingly, the Department's determination that the taxpayer is not entitled to the so-called demonstration exemption is not clearly erroneous. See, 35 ILCS 105/2."

IV. Like-kind exchanges and other transactions in which title passes through intermediary to purchaser.

As discussed in Section III. above, many states adopt a casual or occasional sales exemption for airplanes acquired by a purchaser from a non-retailer. However, the seller or purchaser may choose to pass title to the purchaser through an intermediary-retailer. There are a variety of reasons for using an intermediary that include: i) satisfying Internal Revenue Code ("IRC") Section 1031 like-kind exchange requirements for deferring federal income tax gain on the purchaser's/seller's disposition of its old aircraft;

ii) using a broker to assist in the acquisition or disposition of a plane; and iii) facilitating the financing of the aircraft acquisition. Discussed below are judicial and administrative decisions interpreting the tax effect of passage of title to a purchaser through an intermediary-retailer, and where applicable its impact on any casual sales exemption to which the purchaser may otherwise be entitled.

A. Title passes through IRC Section 1031 like-kind exchange "Qualified Intermediary".

1. Like-kind exchange is a taxable sale.

a. Illinois Appellate Court. The Illinois Appellate Court ruled that a use tax was due on the acquisition by a purchaser, Weber-Stephen, of a Hawker aircraft where title passed from Chase Manhattan, the original owner of the Hawker, to Weber-Stephen through an intermediary-retailer. In this transaction Weber-Stephen deferred federal income taxes on its disposition of its old aircraft, a Westwind, under IRC Section 1031, by exchanging the Westwind plus cash with the intermediary for the Hawker. Weber-Stephen argued that its purchase was non-taxable under the occasional sales exemption. It argued that this transaction must be taxed based on its substance, which it characterized as a purchase by it of the Hawker directly from Chase Manhattan, a non-retailer. The court's opinion in this case has been the subject of conflicting interpretations by the Illinois Department of Revenue and taxpayers. The Department has read this opinion to hold that while the government has the right to assert taxation of a transaction based on its substance, taxpayers are bound to the form they choose. Under this reading, the form of this purchase, a bare transfer of legal title by a retailer to Weber-Stephen, generated a use tax. Taxpayers have read the opinion to hold that use taxes are due based on the transfer of substantive ownership, but not on mere formal ownership. Under this reading, use tax was due; because the court determined that the intermediary-retailer had transferred substantive ownership, as well as legal title to the aircraft, to Weber-Stephen. Weber-Stephen Products, Inc. v. Department of Revenue No. 1-99-2578, 324 Ill. App. 3d 893, 756 N.E.2d 321 (1st Dist. 2001).

2. Like-kind exchange is *not* a taxable sale.

a. Illinois Appellate Court. Subsequently, the Illinois Appellate Court clarified its decision in Weber-Stephen. It ruled in JJ Aviation v. Department of Revenue, (1st Dist.) No. 1-01-2123 (September 26, 2002) that the sale of a plane by a non-retailer, Richland, to JJ Aviation was a non-taxable occasional sale even though title

passed to JI Aviation through an intermediary-retailer in order to accommodate Richland's IRC Section 1031 like-kind exchange. The court held that not just the government, but taxpayers too have the right to assert taxation based on the substance and economic realities of a transaction rather than its form. The court explained that its decision in Weber-Stephen was based on its determination that the intermediary-retailer had transferred substantive ownership of the aircraft to Weber-Stephen. By contrast, the court ruled that the intermediary-retailer in this case transferred only bare legal title, not substantive ownership, to JI Aviation, and therefore that JI Aviation's aircraft purchase from Richland was a non-taxable occasional sale. The court's determination that the intermediary-retailer did not transfer substantive ownership to JI Aviation was based on the following six factors: i) the written agreement between the parties defined the limited role of the intermediary; ii) the intermediary immediately re-conveyed title to JI Aviation; iii) the intermediary assumed no liability for good title; iv) the intermediary re-conveyed the purchase price to Richland; v) the intermediary retained no portion of the purchase price; and vi) the intermediary did not pay any closing costs.

- b. Illinois Circuit Court. The Cook County Circuit Court ruled that passage of title to a purchaser through an intermediary-retailer did not generate a use tax. Gulfstream et. al. v. Illinois Department of Revenue, Cook County Cir. Ct. Dckt. No. 00L51052 (August 15, 2002), *appeal docketed*, No. 02-2833 (1st Dist. Ill. App. Ct.) . In this case the purchaser, Ameritech, acquired title to two aircraft through an intermediary, KC Aviation, an affiliate of Gulfstream Aerospace Inc. Ameritech had contracted to acquire the two aircraft from the manufacturer, Bombardier. As is a common business practice in the aircraft industry, Ameritech acquired "green" aircraft requiring substantial additional outfitting work, including interior furnishings and avionics, to meet Ameritech's specific needs. In order to accommodate Ameritech's deferral of federal income taxes under IRC Section 1031 on the gain it would otherwise recognize from the disposition of its old planes, the airplane outfitter retained by Ameritech to complete work on the new aircraft, KC Aviation, agreed to accept title to the new aircraft from Bombardier, and re-convey title to Ameritech. Ameritech paid Bombardier for the new aircraft and self-assessed Illinois use tax based on its purchase price of the aircraft. The Department assessed a second use tax against Ameritech based on KC Aviation's transfer of legal title to Ameritech. Ameritech argued that no tax was due because KC Aviation did not transfer substantive ownership of the planes to Ameritech. The

Department argued that transfer of bare legal title generated a use tax. In a one page order, the Circuit Court found, without explanation, that no use tax was due on Ameritech's acquisition of title from KC Aviation.

- c. Illinois Administrative Decision. In a Department of Revenue administrative decision, Ill. Dept. of Rev. Admin. Decision UT 01-3 (February 20, 2001), a Department administrative law judge ("ALJ") ruled as taxable a taxpayer's acquisition of title to a plane from a seller through a qualified intermediary-retailer in an IRC Section 1031 like-kind exchange that deferred gain on the purchaser's disposition of its old plane. The ALJ ruled that the purchaser as a matter of law was not entitled to argue substance over form because the taxpayer's characterization of this transaction as a purchase directly from the owner was inconsistent with its characterization of this transaction for federal income tax purposes as an exchange with the intermediary-retailer of its old aircraft for a new aircraft. Furthermore, the ALJ ruled that even if the purchaser could successfully argue substance over form it had not proven that the seller was a non-retailer, and that the occasional sales exemption would therefore apply to its purchase. [Note: this decision was affirmed by the Cook County Circuit Court in JM Aviation v. Illinois Department of Revenue, Dckt. No. 01L 50537 (January 10, 2002) and is on appeal to the Illinois Appellate Court docketed as Case No. 02-0379).]

B. Title passes through aircraft broker.

Sale taxable because broker acquired and transferred substantive ownership to the purchaser.

Texas. A Texas administrative law judge ruled that the occasional sales exemption did not apply to the purchaser's acquisition of an airplane from an aircraft broker who had in turn acquired the aircraft from a non-dealer. This ruling was based on the ALJ's determination that the broker, a retailer, had acquired from the non-dealer, and re-conveyed substantive ownership of the airplane to the purchaser. Administrative Hearing Decision No. 36,323 (December 19, 1997).

C. Passage of title through financing intermediary.

1. Sale taxable because parent of intermediary acquired and transferred substantive ownership to the purchaser.

Illinois. The United States Court of Appeals, Seventh Circuit, ruled under substance over form doctrine that casual sales exemption did not apply to purchase of an aircraft by a taxpayer, Chandler, from a parent corporation retailer, JPA, and its non-retailer financing affiliate, PLI. Court found that transaction was taxable based on its substance which it determined to be a purchase of the aircraft from JPA, a retailer, in which title flowed to Chandler from JPA through PLI, a non-retailer. In Re Stoecker, 179 F.3d 546 (1999).

2. Sale nontaxable because intermediary did not acquire and transfer substantive ownership to the purchaser.

Arizona. Arizona Board of Tax Appeals ruled that passage of title from seller to purchaser through intermediary finance company at *seller's* request did not make unavailable the casual sale exemption. The Board of Tax Appeals determined that the substance of this transaction was that the seller conveyed substantive ownership of the aircraft to the purchaser notwithstanding passage of title through the financing intermediary. Marley Cattle Company v. Arizona Department of Revenue, Arizona Board of Tax Appeals Docket No. 386-85-U (Sept. 18, 1986) (1986 Ariz. Tax Lexis 13).

D. Other transactions in which purchase price or title passes through intermediary.

1. Sales taxable.

- a. Illinois. Administrative law judge ruled that casual sale exemption did not apply to Illinois taxpayer's purchase of an aircraft. Taxpayer entered purchase contract with non-retailer, Aeronautics, but unbeknownst to purchaser actual title to aircraft was held by and transferred to taxpayer by retailer, ZZ. Administrative law judge ruled in Department's favor that this was not a casual sales exemption because he found that all of the evidence regarding the sale of the aircraft demonstrated that the taxpayer had acquired ownership of the plane from ZZ. Illinois Department of Revenue Administrative Decision UT-00-2.

- b. Illinois. ALJ ruled that under substance over form doctrine passage of title through intermediary titleholder, a non-retailer, must be ignored because this was an attempt by the purchaser to turn a taxable purchase from the original owner, a retailer, into a non-taxable occasional sale by the intermediary, a non-retailer. Illinois Department of Revenue Administrative Hearing Decision UT 95-7 (January 1, 1995).

2. Sale nontaxable.

New York. Department of Taxation ruled that qualified intermediary was not a retailer where its activities were limited to receipt and conveyance of funds, but not conveyance of title (title passed directly from seller to purchaser), in order to further purchaser's like-kind exchange of old leasing inventory for new leasing inventory. Ford Motor Credit Co., TSB-A-02(20)S, June 26, 2002.

V. Leases.

States follow a variety of approaches to taxing aircraft leases. Tax treatments can be affected by the duration of the lease, the size of the aircraft, the use of the aircraft, and numerous other factors. Examples of possible treatments are identified below:

- A. Colorado. Leases of three years or more are treated as a continuing retail sale to the lessee and sales and use taxes must be based on lease payments made by the lessee. Co. Stat. Section 39-26-102(23). Purchases made for retail sale are exempt from tax. Co. Stat. Section 39-26-102(18) and (19); Colorado regulation 26-102.19.
- B. Connecticut. Taxpayer purchased an aircraft which it leased to its corporate affiliate, which then chartered the aircraft (i.e., sold flight time) to both related and unrelated parties. The Connecticut Superior Court rejected the taxpayer's arguments for sale for resale treatment and held that lease payment were taxable. Air Tiger, Inc. v. Commissioner of Revenue Services, Connecticut Superior Court, No. CV99-0496956S 2002 Conn. Lexis 976 (March 27, 2002). Note that Connecticut law was changed in 1997 so that leases of aircraft having a maximum certificated takeoff weight of 6,000 pounds or more are exempt from sales tax. Conn. Gen. Stat. 12-412(99).
- C. Hawaii. Amounts received as rent for the rental or leasing of aircraft or aircraft engines used by the lessees or renters for interstate air transportation of passengers and goods are exempt from Hawaii General Excise Tax. The exemption applies to both operating leases and finance leases. Hawaii Law Section 237-24.3(12). See also Hawaii Announcement No. 2001-12 (June 8, 2001).

- D. Indiana. Purchase of aircraft for lease is exempt. IC 6-2.5-5-8 and Revenue Ruling No. 2002-05ST (March 14, 2002).
- E. Kentucky. The Kentucky Court of Appeals addressed the tax consequences of change in Kentucky tax law from (a) the imposition of tax on the purchase of tangible personal property for lease, to (b) the imposition of tax on the lease transaction. Kentucky v. Ashland Oil, Inc., Kentucky Court of Appeals, no. 92-CA-3033-MR (July 29, 1994). The statutory change at issue was effective on August 1, 1985. Here, prior to August 1, 1985, the taxpayer's affiliate purchased an aircraft for lease to the taxpayer. (In an earlier case, the affiliate unsuccessfully contested the imposition of Kentucky use tax on that purchase. Therefore, the affiliate paid use tax on its purchase of the aircraft.) The lease agreement provided the Taxpayer, as lessee, with an option to extend the lease term. The Taxpayer exercised the option after the effective date of the new law. The Kentucky Court of Appeals concluded that sales tax was due on lease payments due under the option period. It determined that there was no double taxation, as the first tax was on the lessor's purchase, and the second tax was on the lessee's payment for use of the aircraft. On this last point, compare to the Illinois Supreme Court's analysis in Philco Corporation v. Department of Revenue, 40 Ill.2d 312 (1968).
- F. Michigan. The sale of aircraft is exempt from Michigan sales and uses taxes if it is sold to a person for subsequent lease to a domestic air carrier operating under a certificate issued by FAA for use in regularly scheduled transportation of passengers. Michigan law Sections 205.54x(2) and 205.94(y) (Acts 39 (S.B. 491) and 40 (S.B. 492), Laws 2001, effective July 11, 2001).
- G. Minnesota. The sale of aircraft and repair parts by an incorporated nonprofit flying club or association to be used solely for leasing to its shareholders is tax exempt as property purchased for resale. However, the leasing of the aircraft to the shareholders is taxable. Minn. Stat. 297A.82(6).
- H. Missouri. A Missouri purchaser that buys tangible personal property (including aircraft) for the purpose of leasing the property has two options: The purchaser may pay sales tax on its purchase of the property, but not on subsequent lease receipts. Or, the purchaser may purchase for resale and then must collect sales tax on the lease gross receipts. Missouri law Sections 144.010.1(8) and 144.020.1(8). See also Letter Ruling LR 8651 (January 24, 1996).
- I. Mississippi. The purchase of an aircraft for rental by a licensed retailer is exempt from tax, and the subsequent rental of the aircraft is subject to the same reduced rate of tax, 3%, that would be imposed on a taxable purchase of the aircraft. Mississippi Tax Rule 46.

- J. New York. A special sales tax of 5 percent is imposed on the lease, for one year or more, of noncommercial aircraft in lieu of the general sales tax. NY Tax Law Section 1111(i). The lease tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease. Id.
- K. Ohio. Effective February 1, 2002, Amended House Substitute Bill 405 amended Ohio sales and use tax law sections 5739.01(H)(4) and 5741.01(G)(4), and added section 5739.01(VV), to require the imposition of the taxes at the inception of a lease. At inception, the taxes must be calculated and paid based on total payments due over the lease term.
- L. Virginia. Virginia's structure for taxing sales and leases of aircraft is complex and involves two types of taxes: the general retail sales and use tax and a special aircraft sales and use tax. (Where the aircraft sales and use tax applies, the Commonwealth's general retail sales and use tax does not apply. VA. Code Ann. Section 58.1-609.1(5); 23 VAC Section 10-210-70.) The only leases treated as sales are those for a period of time substantially equal (80% or more) to the remaining life of the aircraft or in which the aggregate lease payments substantially equal (80% or more) to the value of the aircraft. VAC 10-220-5. For such leases, the lessee is taxable on the aggregate of the lease payments. If, instead, the lease is not treated as a sale, a lessor who is a registered dealer in aircraft is liable for tax on all charges for the use of the aircraft except separately stated charges for pilots. Other lessors pay tax on their purchase of the aircraft. Determining whether tax is imposed on the lessor or lessee is important, as certain exemptions may be available to the lessee which are not available to the lessor.

The Virginia Department of Taxation ruled that an aircraft lease was not subject to Virginia sales and use taxes because the lessee leased the aircraft outside the Commonwealth and the value of the lease did not exceed 80% of the value of the aircraft. P.D. 01-107 (August 17, 2001).

VI. Other and local taxes.

- A. California. California Emergency Rule 138 clarifies that certified aircraft owned by air carriers that are temporarily out of service and stored and maintained in California are eligible for the property tax exemption provided by Rev. & Tax. Code Section 220. 2001 STT 235-3 (December 6, 2001). This Rule was issued in response to the numerous aircraft remaining idle following the terrorist attacks.
- B. Iowa. Effective July 1, 1999, Iowa subjects transfers of aircraft to its use tax rather than its sales tax. Sec. 423.2, Code of Iowa; Iowa Rule 701 --31.6(423). Local Iowa taxes are limited to sales, not use, taxes. Sec. 422B.8, Code of Iowa. Consequently, the sale of aircraft in Iowa is subject strictly to the 5% state use

tax. Iowa Rule 701--31.6 (423).

- C. Texas. For property tax purposes, tax assessor must allocate fair market value based on actual use of business aircraft in Texas -- (number of departures from Texas/total departures). Section 21.055 of Texas Property Tax Code.

VII. Foreign sellers, purchasers and users.

- A. Arizona. Sales of aircraft are deducted from the retail classification tax base and are exempt from the use tax, Law Section 42-5061(B)(7) and 42-5159(B)(7), when sold to persons holding certain federal certificates or any foreign government for use outside the state or any nonresident who will not use the property in Arizona, including corporations not incorporated in Arizona if the principal corporate office is located outside the state.
- B. California. Sales or leases of aircraft to foreign governments or nonresidents for use outside California are exempt. Rev. & Tax Code Sections 6366, 6366.1 and Reg. 1593.
- C. Illinois. PLR 92-0463 (September 1, 1992), 1992 Ill. PLR Lexis 1401 -- Illinois Department of Revenue ruled that use tax did not apply to aircraft leased by Bermuda corporation to European affiliate that twice a month ferried that affiliate's executives to meetings in Illinois at common parent's worldwide headquarters. Department found that "under the U.S. Supreme Court's decision of Complete Auto Transit, as well as the case law developed under the Foreign Commerce Clause of the U.S. Constitution, that Illinois would be barred by federal supremacy from asserting tax" based on these facts.
- D. Kansas. Aircraft sold to foreign governments for use outside the United States are exempt tax, including parts and services to remanufacture, modify, and repair the aircraft. KSA Section 79-3606(g).

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