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Committee on Finance and Tax

REVIEW OF TAX LAW REGARDING AIRCRAFT TEMPORARILY IN STATE FOR TRAINING AND REGARDING FRACTIONAL AIRCRAFT OWNERSHIP

Statement of the Issue

Chapter 212, F.S., imposes sales tax on every person who purchases tangible personal property in Florida. It also imposes use tax on every person who imports tangible personal property for use in Florida.¹ Use tax is due when personal property is imported into Florida and comes to rest in the state.² The use tax complements the sales tax, eliminating a tax incentive to buy goods out-of-state. There is a partial exemption from sales tax for aircraft purchased in Florida by a non-resident. The person must agree not to use the aircraft in Florida within the first six months of ownership and may only return to Florida for repairs during that time.³

Some non-residents are concerned about being assessed use tax if they come to Florida with a plane that was recently purchased out of state. Concern also has been raised about taxing a non-resident's aircraft returning to Florida for flight training purposes within the first six months of ownership. Imposing use tax (and penalties) on these planes is thought to unduly discourage beneficial economic activity. A related concern has been raised about taxing airplane sales made by companies that market and manage fractional aircraft ownership programs. When these airplanes are sold and used in Florida, they do not qualify for a sales tax exemption. Industry members claim they are being discouraged from operating in Florida because of the lack of a sales tax exemption.

During the 2008 regular legislative session, several bills were filed to deal with these concerns. Two bills providing use tax exemptions for aircraft used for flight training moved forward but ultimately failed.⁴

Discussion

Taxing Aircraft Used in Florida

Use tax is due when a private airplane is purchased outside Florida, enters this state and is subsequently used. Credit is given for tax paid to another state to make the overall tax burden on all goods purchased for use in Florida identical. There is a presumption against imposing a use tax when an aircraft is used outside Florida for more than 6 months before being imported by a non-resident.⁵ To enjoy the presumption, the aircraft must be used in another state under conditions that give rise to that state's taxing jurisdiction.⁶

Use tax minimizes lost in-state business - and associated tax revenue - by eliminating an incentive to purchase an item tax free out of state when it is used in-state. Discounting for collection difficulties, a complementary use tax

¹ Secs. 212.02(18), (20); 212.06, F.S. (2007).

² Sec. 212.06(1), F.S. (2007); see, *Dept. of Revenue v. G.R. Swan Enterprises, Inc.*, 506 So.2d 455 (Fla. 1st DCA 1987).

³ Sec. 212.08(11), F.S. (2007).

⁴ CS/CS/HB 1379 (2008), provided an exemption for aircraft owned by a nonresident if the aircraft entered or remained exclusively for purposes of flight training, repairs, alterations, refitting, or modifications. It also provided an exemption for aircraft brought into Florida within the first six months of purchase that remained in Florida for less than 21 days; see SB 2788 (2008). CS/HB 217 (2008), provided an exemption from tax on the sale, maintenance, or use of aircraft used in a fractional aircraft program; see CS/SB 380 (2008).

⁵ Sec. 212.06(8)(a), F.S. (2007).

⁶ See *United Engines, Inc. v. Department of Revenue*, 508 So.2d 459 (Fla. 1st DCA 1987); *Department of Revenue v. G.R. Swan Enterprises*, 506 So.2d 455 (Fla. 1st DCA 1987); *Wanda Marine Corp. v. State Dept. of Revenue*, 305 So.2d 65 (Fla. 1st DCA 1974); Rule 12A-1.007(2)(a). Fla. Admin. Code.

provides a neutral scheme of taxation. It offers no tax advantage as to the place of purchase for goods used in Florida. Every state imposing a sales tax also imposes a complementary use tax.

Some non-residents are concerned about being assessed Florida use tax if they briefly visit Florida with a plane that has been recently purchased out of state. Whether they are subject to tax depends on the amount of time or the types of activities they undertake in Florida within the first six months of ownership. Florida law does not explicitly exempt “temporary use.”⁷ Non-residents who purchase a plane out of state and then come into Florida on a regular and recurring basis may be assessed use tax.

Tax is due “as of the moment of commingling with the general mass of the property in this state.” Judicial opinions, mostly involving watercraft, exclude purely transitory activity from use tax. For example, the courts have held that sailing a yacht into Florida waters and docking at various marinas for extensive repairs and alterations was not sufficient for tax to be imposed.⁸ The Department of Revenue has provided administrative guidance to pilots indicating that a brief visit to the state will not give rise to a use tax assessment. Nevertheless, these determinations are fact specific.

However, the regular and recurring importation of an aircraft over a period of weeks or months, for the purpose of flight training, does not qualify as de minimus activity. Non-residents may purchase an aircraft in Florida that is exempt from tax in Florida if they agree to immediately remove the plane. When a non-resident makes a Florida purchase using the so-called “fly away” exemption,⁹ the exemption statute requires the assessment of a penalty equal to the tax due if the aircraft returns to Florida during the first 6 months of ownership other than for repair.¹⁰ A statutory exemption is required for the regular and recurring importation of an aircraft within that time for the purpose of flight training.

Fractional Ownership

Fractional aircraft ownership programs follow requirements prescribed by federal regulation.¹¹ A person entering into an agreement to purchase a fractional interest in an aircraft is the legal owner of a partial interest in an identified aircraft, typically as a tenant in common.¹² The owner pays for his or her fractional interest, for the monthly management fees reflecting fixed costs and for aircraft usage. The fractional member has an insurable ownership interest in an aircraft. However, they rarely exercise control over the operation and maintenance of the aircraft.

The aircraft may be part of a fleet. A fractional owner contracts with the fractional program to manage the aircraft. When the owner wants to fly, he or she tells the program manager when and where the aircraft is needed. Agreements involving multi-state programs typically permit a plane to be stationed at various airports to permit maximum flexibility.

Based on these common fractional aircraft ownership practices, Florida sales tax is due at the time of purchase of a fractional ownership interest in an aircraft when delivery of the plane is taken in Florida, unless the airplane is held out exclusively for resale, or another exemption applies to the sale of that aircraft in Florida. The grant of an ownership interest in consideration for the payment is inconsistent with characterizing that payment as a charge

⁷ Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that it shall be presumed that tangible personal property used in another state, territory of the United States, or District of Columbia for 6 months or longer being imported into this state was not purchased for use in this state. Sec. 212.06(8)(a), F.S. (2007).

⁸ *Department of Revenue v. Yacht Futura Corp.*, 510 So.2d 1047 (Fla. 1st DCA 1987)(if five-day trip was a vacation rather than sea trial it's a de minimis use insufficient to impose the use tax).

⁹ Sec. 212.05(1)(a)2., F.S. (2007). The “fly-away” exemption requires removal within 10 days of purchase, or within 20 days of repair or alteration. Florida residents do not qualify for this exemption.

¹⁰ Sec. 212.05(1)(a)2., F.S. (2007), see *Yes Dear, Inc. v. Department of Revenue*, 523 So.2d 1235 (Fla. 1st DCA 1988).

¹¹ 14 Code of Federal Regulations, Part 91, Subpart K, sec. 91.1001 et seq.

¹² There are times when the separate interests of the aircraft owner and the operator are clearly recognizable, such as when a loss occurs due to improper maintenance. There, the aircraft owner would usually seek recovery from the party responsible for maintaining the aircraft, which in the case of a fractional situation, would be the aircraft operator.

for a non-taxable transportation service.¹³ The owner has purchased a depreciable asset and, pursuant to federal Subpart K regulations, the owner is deemed to be in operational control of the aircraft. The fractional ownership arrangement is also inconsistent with treatment of the aircraft as a rental, or treatment of the aircraft as a commercial aircraft. Therefore, a statutory exemption is required to exempt the Florida sale of a fractional ownership interest in an aircraft from tax.

¹³ See, *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165 (Mo. 2003).