INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.: TAM-140746-02/CC:PSI:B08

December 18, 2002

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No.:

Taxable Periods:

Conference Held:

Legend:

X =

A =

Issues

(1) Are amounts paid for the transportation X provides with its fleet of aircraft exempt from the air transportation tax imposed by § 4261 of the Internal Revenue Code by virtue of the exemption provided by § 4281 for small aircraft operated on nonestablished lines?

(2) If the transportation at issue is not exempt from the § 4261 tax, is X required to collect and pay over to the government the excise tax imposed by § 4261 on amounts paid to X, whether paid by persons purchasing that air transportation directly from X or by persons purchasing that air transportation through third parties?

(3) If the transportation at issue is not exempt from the § 4261 tax, is X liable for the § 4261 tax by reason of § 4263(c)?

(4) If the transportation at issue is not exempt from the § 4261 tax, is X liable for the § 6672 penalty for willful failure to collect and pay over the tax?

(5) If the IRS rules adversely to X on Issues (1), (2), and (3), will the IRS grant X's request to apply this technical advice memorandum on a nonretroactive basis under § 7805(b)(8)?

Conclusions

(1) Amounts paid for the transportation X provides with its fleet of aircraft are not exempt from the air transportation tax imposed by § 4261 by virtue of the exemption provided by § 4281 for small aircraft operated on nonestablished lines.

(2) X is required to collect and pay over to the government the excise tax imposed by § 4261 on amounts paid to X both by persons purchasing that air transportation directly from X and by persons purchasing that air transportation through third parties.

(3) X is liable for the § 4261 tax by reason of § 4263(c) to the extent that the tax was not paid when an amount was paid for the air transportation.

(4) The question of whether X is liable for the § 6672 penalty for willful failure to collect and pay over the tax is one of facts and circumstances to be determined by the Director.

(5) X's request to apply this technical advice memorandum on a nonretroactive basis under § 7805(b)(8) is denied.

Facts

X operates a fleet of aircraft providing scenic tours in state A. X provides up to 80 tours per day, depending on customer demand. All of the aircraft operated by X have a maximum certificated takeoff weight of less than 6,000 pounds. X offers a variety of specific tours covering various points of interest in A. The scenic tours originate and terminate at the same airport. The approximate duration and cost of each tour is set forth in the promotional literature published by X and on X's internet site. The precise route taken to the points of interest of the tours may vary somewhat depending on the passengers' interests during the tour.

Reservations for the tours may be made either by telephone or by internet. In addition, X's tours are sold by third parties such as travel agents and "tour desks." Of the total number of tours sold, X sold approximately 30 percent directly and third parties sold approximately 70 percent.

Law

Section 4261(a) imposes a tax on the amount paid for taxable transportation (as defined in § 4262) of any person by air.

Section 49.4261-1(c) of the Facilities and Services Excise Tax Regulations provides that the transportation need not be between two definite points to be taxable. That section further provides that, unless otherwise exempt, a payment for continuous transportation beginning and ending at the same point is subject to the tax.

Section 4281 provides, inter alia, that the tax imposed by § 4261 shall not apply to transportation by an aircraft having a maximum certificated takeoff weight of 6,000 pounds or less, except when such aircraft is operated on an established line.

Section 49.4263-5(c) defines the term "operated on an established line" to mean operated with some degree of regularity between definite points.[1] Further, that term does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc.

Section 4263(c), effective for transportation beginning on or after October 1, 1997, provides that where any tax imposed by § 4261 is not paid at the time payment for transportation is made, to the extent the tax is not collected under any other provision of Subchapter C of the Code, the tax shall be paid by the carrier providing the initial segment of air transportation beginning or ending in the United States.

Section 4291 requires any person receiving any payment for taxable services (such as taxable air transportation) to collect the amount of the tax from the person making the payment.

Section 6672(a) provides that any person required to collect, truthfully account for, and pay over any tax imposed by this title that willfully fails to collect such tax, or

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[1] The term "operated on an established line" was originally used in reference to motor vehicles in § 554(b) of the Revenue Act of 1941. This term was extended to small aircraft by § 134 of the Excise Tax Technical Changes Act of 1958, 1958-3 C.B. 92, 109, which section was codified as § 4263(f) of the Internal Revenue Code of 1954. Section 4263 was repealed by § 205(c)(1) of the Airport and Airway Revenue Act of 1970, 1970-1 C.B. 361, 364, and the substance of the small aircraft exemption was added to the Code as § 4281 by § 205(a)(1) of that Act. 1970-1 C.B. 363. Thus, although § 4263 no longer contains the small aircraft exemption, the regulations originally promulgated under that section have continued vitality in interpreting § 4281.

truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Section 7805(b)(8) allows the Secretary to prescribe the extent, if any, to which any ruling shall be applied without retroactive effect.

Rationale

Issue 1

As an initial matter, under § 49.4261-1(c), circular transportation such as the tours at issue here is clearly air transportation and subject to tax under § 4261 unless exempted by another provision of the Code. The aircraft providing the transportation at issue here all have a certificated takeoff weight of less than 6,000 pounds. Therefore, the transportation is not taxable transportation and the amount paid for that transportation is exempt from tax unless the aircraft are "operated on an established line." In order for there to be an established line, air transportation must occur (1) with some degree of regularity, and (2) between definite points. § 49.4263-5(c).

With respect to the first requirement, § 49.4263-5(c) interprets the "some degree of regularity" requirement quite broadly. The regulation does not require that strict regularity of schedule be maintained, that the full run always be made, that a particular route be followed, or that intermediate stops be restricted. The regulation does require that the person rendering the service maintain and exercise control over the direction, route, time, number of passengers carried, etc. Here, X regularly flies up to 80 tours per day over the various points of interest in A. It determined that it would offer air transportation to certain points of interest, rather than simply offering aircraft to be chartered and have the route and destination determined by customers. It advertises particular tours, giving the approximate duration of the tours and the prices for those tours. While there is some variance in the exact route followed to the points of interest, § 49.4263-5(c) does not require that a particular route be followed in order for transportation to be operated on an established line. Thus, X controls the direction, route, time, and number of passengers carried within the meaning of § 49.4263-5(c). Rev. Rul. 72-219, 1972-1 C.B. 350, holds that once an air transportation provider establishes a line, as X has done with its advertised tours, all other flights by that provider over that route are also part of that established line.[2] Thus, the transportation

[2] Contrast that revenue ruling with Rev. Rul. 72-617, 1972-2 C.B. 580, which holds that where an air carrier enters into a contract to provide overnight mail service between two cities not otherwise served by the provider, the contractor (and not the carrier) controlled the route, time, direction, and cargo carried, and had exclusive use of the aircraft with respect to the flights. Such an arrangement is, in effect, a charter of the

at issue here is operated with some degree of regularity, within the meaning of § 49.4263-5(c).

With respect to the second requirement, that the transportation be between definite points, the transportation at issue here, although circular, is between definite points. Section 49.4261-1(b) provides that transportation need not be between two definite points to be taxable, and that unless otherwise exempt, a payment for continuous transportation beginning and ending at the same point is subject to the tax.

A factual situation similar to that at issue here was considered by the court in Lake Mead Air, Inc. v. United States, 991 F. Supp. 1209 (D. Nev. 1997). In Lake Mead the court considered whether aircraft flights providing scenic tours of the Grand Canyon were considered to be operated on an established line. Lake Mead advertised the air tours of the Grand Canyon but the time of departure was determined by customer demand. The court recognized that there were two main components of "operated on an established line," "some degree of regularity" and "between definite points." Id. at 1212. The crux of the phrase "operated on an established line" for the court was transportation "that the public can rely on . . . because of a regularity determined by the provider, not the customer." Id. The court described the type of transportation that would satisfy the § 4281 exemption as an air taxi, "an airplane for hire, subject to the whims of a particular customer. Except to the hiring customer, its route is wholly unpredictable and unreliable." Id.

Accordingly, the aircraft providing the transportation at issue here are operated on an established line within the meaning of § 4281, and they therefore do not qualify for the exemption provided by § 4281.

Issue 2

Section 4291 requires any person receiving any payment for taxable air transportation to collect the amount of the tax from the person making the payment. For the approximately 30 percent of the tours sold directly by X, X must collect the § 4261 tax from the person making the payment for the transportation service. Regarding the remaining 70 percent of the tours sold, the tours are sold to the actual passengers by third parties such as travel agents or tour desks. The travel agents and tour desks receive the payments for taxable transportation on behalf of X and must collect the tax on behalf of X and pass that tax through to X, which then pays the tax over to the government. Rev. Rul. 75-296, 1975-2 C.B. 440.

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aircraft, and the overnight mail service is not "operated on an established line."

Issue 3

Section 4263(c), effective for transportation beginning on or after October 1, 1997, provides that where any tax imposed by § 4261 is not paid at the time payment for transportation is made, then, to the extent the tax is not collected under any other provision of Subchapter C of the Code, the tax is paid by the carrier providing the initial segment of air transportation beginning or ending in the United States. X argues that this section of the Code is not operative until regulations are promulgated. However, there is no ambiguity in the statute regarding the circumstances under which a provider of air transportation is liable for tax that must be clarified by regulations. The requirement for regulations implementing § 4263(c) is only to provide guidance on when and where the payment should be made. The fact of liability is established by the statute, and courts generally do not hold that a statute is inoperative until explanatory regulations are issued. See, for example, Occidental Petroleum v. Commissioner, 82 T.C. 819, 829 (1984), in which the Tax Court concluded that the failure of the IRS to promulgate regulations for eight years after the effective date of the statute "can hardly render the . . . provisions of Section 58(h) inoperative."

In addition, X argues that the IRS must seek to recover the tax from the person making the payment subject to tax and only after all possible remedies against that person are exhausted is the provider liable for the tax. Nothing in the statute provides this. Rather, the statute provides a clear statement of when the provider is liable: whenever the § 4261 tax is not paid at the time the payment for the transportation is made.

Here, X is providing taxable transportation. For the approximately 30 percent of the tours that it sold directly and for which the tax was not paid, X is liable for the tax under § 4263(c). For the remaining 70 percent of the tours sold, if the tax was not paid when the amount was paid for the transportation, then X is liable for the tax on those amounts as well.

Issue 4

Under § 6672, a 100 percent penalty applies where persons willfully fail to collect or pay over to the government certain taxes. Here X has failed to collect excise taxes on air transportation. The only issue is whether such failure was willful within the meaning of § 6672. Under that section, all that is necessary is that the decision not to collect the taxes be "voluntary, conscious, and intentional." Bloom v. United States, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960). Reasonable cause or justifiable excuse plays no part in the determination of willfulness. However, the determination of whether X acted willfully is a matter of facts and circumstances to be determined by the Director.

Issue 5

X requests that if the conclusion reached in this technical advice memorandum is adverse, it not be applied retroactively under the authority of § 7805(b)(8). Relief under § 7805(b)(8) usually is granted only if a taxpayer relied to its detriment on a published position of the IRS or on a letter ruling or technical advice memorandum issued to that taxpayer. See sections 18.02 and 18.06 of Rev. Proc. 2002-2, 2002-1 C.B. 82, 110. There is no prior technical advice memorandum or letter ruling issued to X. X did not seek a ruling before deciding to interpret the statute as it has. Rather, X relied on its own interpretation of the law. A taxpayer's erroneous interpretation of the law is not a basis for relief under § 7805(b)(8).

Caveats

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent. Under § 6110(c), names, addresses, and identifying numbers have been deleted.