



Texas Sales and Use Tax Issues

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Senate Bill 1396

84th Texas Legislature 2015

- Bill Analysis provides that the bill is a product of work between the Texas Comptroller and industry groups;
- Signed by Governor Abbott on June 16, 2015.



Certificated Carriers

- ***SB 1396 / Section 163.001***
- Clarifies that the persons that are authorized to buy or lease aircraft under the exemption in Section 151.328(a)(1) include persons operating under the authority of C.F.R. Part 121, 125, 133, or 135.
- ***Analysis:*** sale of an aircraft to a person that will lease the aircraft to a certificated carrier.



Sale for Resale Clarified and Expanded

[But It's Not Completely Open-Ended]

- ***SB 1396 / Section 163.002***
- Clarifies treatment for certain transactions and overturns several of the administrative hearing legal determinations and certain of the positions in Texas Comptroller (*proposed*) Rule 3.280:
 - (a) leases supporting purchase for resale can be to one or more lessees;



Sale for Resale (Cont.)

- (b) consideration can be more than just cash;
- (c) operational control is tied exclusively to FAA definition (and this should presumably clarify impact of inaccurate flight log entries, etc.);



Sale for Resale (Cont.)

(d) purchase for resale exemption is not destroyed if a purchaser/lessor leases the aircraft, and also operates the aircraft so long as:

for a period of one year beginning on the date the purchaser buys the aircraft, more than 50% of the aircraft's departures are made under the operational control of one or more lessees pursuant to written lease agreements

(e) ***“Divergent use” doctrine does not apply to aircraft purchased for resale.***



Use Tax

Presumption of Texas Use

- ***SB 1396 / Section 163.003***
- Clarifies what will be considered Texas “use” for purposes of the Texas use tax:
 - (a) aircraft brought into Texas solely for repair, or restoration is not considered to be stored, used, or consumed here;
 - (b) there is no presumption of use in this state if the person bringing in the aircraft did not acquire it from a seller by “purchase;”



Use Tax (Cont.)

(c) Use tax safe harbor if:

- Aircraft is predominantly used out of state for one year beginning on later of (i) purchase or (ii) substantially complete and conducted first passenger/cargo flight.
- Where “predominantly” means more than 50% of departures are out of state.
 - *Example / Discussion.*

Related Party Transactions

- ***SB 1396 / Section 163.006***
- Carefully crafts and defines the sales and use tax standard for “***exemptions***” and ***transactions “that would not be subject to tax”*** to be in parity with the treatment on such transactions afforded to “unrelated persons.”

Related Party Transactions (Cont.)

- ***Section 163.006(b)***
- Provides that use of an aircraft by the title holder's members, owners, or affiliates is not taxable if:
 - the owner ***paid tax*** on the purchase; or
 - the acquisition was an exempt ***other than by virtue of a sale for resale*** or an ***occasional sale (unless the aircraft user also qualified for the occasional sale at issue had it been the purchaser)***.



Related Party Transactions (Cont.)

- ***Section 163.007(c)***
- Uses the definition of “affiliate” from the Texas franchise tax, which is, generally speaking, any entity that can trace >50% ownership to a single common owner, either direct or indirect.



Fractional Ownership

- ***Section 163.007***
- Clarifies that no Texas sales or use tax is due with respect to aircraft operated pursuant to 14 C.F.R. 91, Subpart K.



Effective Date

- New law takes effect September 1, 2015.
- Legislative history (i.e., the House Research Organization Bill Analysis) includes the following statement:

“This bill is purely prospective in its authority and would not affect any ongoing litigation.”



Occasional Sale

- “One or two sales of taxable items . . . during any 12-month period by a person who does not hold himself out as engaged (or who does not habitually engage) in the business of selling taxable items are [exempt] occasional sales.” Rule 3.316(b)(1).
- Exemptions are strictly construed against the taxpayer.



Common Occasional Sale Problems

1. Seller has a permit in Texas or some other state or is in the business of selling some type of tangible personal property or taxable service.
2. Buyer has a permit or will have to obtain a permit in order to lease the aircraft upon acquisition.
3. Beware of sales tax permitted broker taking title, even for a moment.
4. Buyer gives Occasional Sale Certificate or Affidavit, and it turns out to not be true.



Trade-In

- A buyer can legitimately avoid Texas sales tax on the trade-in value of an aircraft, but only if the transaction complies with Comptroller 3.302(g):

“The sales price of a taxable item ***does not*** include the value of a trade-in that a seller takes as all or part of the consideration for a sale of a taxable ***item of the same type that is normally sold in the regular course of business.***” For example, sales tax will be due only on the difference between the amount allowed on an old piano taken in trade and the sales price of a new piano.

Trade-In (Cont.)

- The sales price of a taxable item does include the value of a trade-in that a seller takes as all or part of the consideration for the sale of a taxable item, if the trade-in is a different type from the type normally sold in the regular course of business.

Common Trade-In Issues

1. Title to trade-in aircraft and new aircraft must be exchanged directly between buyer and seller.
2. No three-party transactions. No middlemen.
3. Seller must be in the business of selling aircraft in the normal course of business.



Sale For Resale

- Rule 3.285 (a)(2) A sale for resale is exempt from Texas sales tax and is defined as follows:
 - “(A) tangible personal property to a purchaser who acquires the property for the purpose of reselling it in the United States or Mexico in the normal course of business . . .; [or]
 - (B) tangible personal property to a purchaser who ***acquires the property for the sole purpose of leasing or renting*** it in the United States or Mexico to another person . . .”



Common Sale For Resale Issues

1. Purchaser / Lessor must have Texas sales tax permit to lease tangible personal property in Texas (*contrast limited doctrine in Hearing 29,172*). Note that obtaining the permit can destroy certain types of occasional sales.
2. Purchaser should provide Resale Certificate to seller at the time of the transaction.
- ~~3. If purchased for resale, the buyer cannot use the aircraft other than for retention, demonstration, and display. If you want to rely on this, you must have clear flight logs to prove usage.~~



Common Sale For Resale Issues

(Cont.)

4. If purchased for **lease**, the Comptroller is enforcing several new internal policies including:
 - ~~The lease must be a true “dry lease” ceding exclusive possession and control to the lessee.~~
 - ~~If the lease is to a related party the transaction must be supported by an independent legitimate business purpose other than achieving a state tax result, which requires that the lease contain a flat monthly fair rental value.~~
 - ~~The Comptroller’s fair rental value benchmark is a flat monthly rental payment somewhere between 1.1% and 1.5% of the fair market value of the aircraft per month. Hourly or daily rates are routinely challenged.~~

Common Sale For Resale Issues

(Cont.)

- ***Some minimal standards may still be in effect for lease to support sale for resale if that standard would apply to a third party lease.***
- ~~Traditional charter management agreements are being treated as “service agreements” rather than true leases. Need to review new law under terms of specific charter management arrangement at issue.~~
- Sales tax is due on the lease payments unless the flights are otherwise exempt (such as when made by a Part 135 Certificated Carrier and the lessor obtains an exemption certificate).



Part 135 Certificated Carriers

- Under Tex. Tax Code Section 151.328 and Rule 3.297 (some parts of current Rule 3.297 are inconsistent with the new law and will need to be updated), Texas sales tax is not due
 - (i) on the sales price of aircraft sold to a certificated carrier (See new definition in Section 163.001); or
 - (ii) on lease payments made by a certificated carrier.



Part 135 Issues

1. Certificated carrier can incur sales tax liability for using aircraft in non-exempt manner.
2. If a non-certificated carrier entity buys an aircraft and leases it to a certificated carrier, the original acquisition is not exempt as a purchase by a certificated carrier. It may be exempt as a sale for resale if all other requirements are met.



Fly Away Exemption

- Comptroller Rule 3.297(c)(9):

“Texas sales or use tax is not due on aircraft sold to a person ***for use and registration in another state or nation before any use in Texas.*** Flight training in the aircraft in Texas and flying the aircraft out of state does not constitute a use of the aircraft in Texas.”



Fly Away Exemption Issues

1. There is no *di minimis* safe harbor. One personal or business intra-state flight in Texas can destroy qualification for the exemption.
2. Clear records and flight logs matter.



Texas Use Tax

- Use tax is due in Texas for an item bought out of state and brought back for first use in Texas.



Texas Use Tax Issues

1. Aircraft subject to Texas use tax are identified by:

Comptroller Rule 3.297(c)

“An aircraft is not subject to use tax if it is hangared outside this state and is used more than 50% outside this state . . .”



Texas Use Tax Issues (Cont.)

2. [***subject to new Section 163.005***] 50% Use

Comptroller Rule 3.297(c)

- (A) In determining whether an aircraft is used more than 50% outside this state, the comptroller will consider all flight time in this state, including the portion of interstate flights in Texas airspace.
- (B) The comptroller may examine all flight, engine, passenger, airframe, and other logs and records maintained on any aircraft brought into this state to determine whether it is used more than 50% in this state.



Texas Use Tax Issues (Cont.)

3. Where Hangared

Comptroller Rule 3.297(c)(4)

. . . Some factors to be considered in determining whether an aircraft is hangared in this state include:

- (A) Where the aircraft is rendered for ad valorem taxes;
- (B) Whether the owner owns or leases hangar space in this state; and
- (C) Declarations made to the Federal Aviation Administration, an insurer, or another taxing authority concerning the place of storage of the aircraft.



Full Text

S.B. No. 1396

AN ACT

relating to the sales and use taxation of aircraft.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle E, Title 2, Tax Code, is amended by adding Chapter 163 to read as follows:

CHAPTER 163. SALES AND USE TAXATION OF AIRCRAFT

Sec. 163.001. CERTIFICATED OR LICENSED CARRIERS. (a) For purposes of Chapter 151, "certificated or licensed carrier" means a person authorized by the Federal Aviation Administration to operate an aircraft to transport persons or property in compliance with the certification and operations specifications requirements of 14 C.F.R. Part 121, 125, 133, or 135.

(b) Section 151.328(a)(1) applies with respect to a certificated carrier's acquisition of an aircraft, without regard to whether the certificated carrier acquired the aircraft by purchase, lease, or rental.



S.B. No. 1396 (Cont.)

Sec. 163.002. RESALE OF AIRCRAFT. (a) For purposes of Section 151.006, "sale for resale" includes the sale of an aircraft to a purchaser who acquires the aircraft for the purpose of leasing, renting, or reselling the aircraft to another person in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the form or condition in which it is acquired.

(b) The leasing or renting of an aircraft under Subsection (a) includes the transfer of operational control of the aircraft from a lessor to one or more lessees pursuant to one or more written agreements in exchange for consideration, regardless of whether the consideration is in the form of a cash payment and regardless of whether the consideration is fixed, variable, or periodic. For purposes of this subsection, "operational control" has the meaning assigned by the Federal Aviation Regulations and includes the exercise of authority over initiating, conducting, or terminating a flight.



S.B. No. 1396 (Cont.)

(c) Subsection (a) applies to a purchase of an aircraft regardless of whether the purchaser, in addition to leasing, renting, or reselling the aircraft to another person, also uses the aircraft if, for a period of one year beginning on the date the purchaser purchases the aircraft, more than 50 percent of the aircraft's departures are made under the operational control of one or more lessees pursuant to one or more written agreements as described by Subsection (b).

(d) Section 151.154(a) does not apply to a purchaser of an aircraft.



S.B. No. 1396 (Cont.)

Sec. 163.003. USE OF AIRCRAFT. For purposes of the tax imposed under Subchapter D, Chapter 151, an aircraft that is brought into this state for the sole purpose of being completed, repaired, remodeled, or restored is not brought into the state for storage, use, or other consumption in this state.

Sec. 163.004. NO PRESUMPTION OF USE. For purposes of the tax imposed under Subchapter D, Chapter 151, there is no presumption that an aircraft was purchased for storage, use, or consumption in this state if the person bringing the aircraft into this state did not acquire the aircraft directly from a seller by means of a purchase, as that term is defined by Section 151.005.



S.B. No. 1396 (Cont.)

Sec. 163.005. NO IMPOSITION OF TAX FOLLOWING OUT-OF-STATE USE. (a)

No tax is imposed under Subchapter D, Chapter 151, with respect to an aircraft that is brought into this state if the aircraft is predominantly used outside of this state for a period of one year beginning on the later of:

(1) the date the aircraft was acquired, whether by purchase, lease, rental, or otherwise, by the person bringing the aircraft into this state; or

(2) the date the aircraft:

(A) was substantially complete in the condition for its intended use; and

(B) conducted its first flight for the carriage of persons or property.

(b) For purposes of this section, an aircraft is predominantly used outside of this state if more than 50 percent of the aircraft's departures are from locations outside of this state.



S.B. No. 1396 (Cont.)

Sec. 163.006. CERTAIN TRANSACTIONS BETWEEN RELATED PERSONS. (a) For purposes of the tax imposed under Chapter 151, a sale, lease, rental, or other transaction between a person and a member, owner, or affiliate of the person involving an aircraft that would not be subject to tax or would qualify for an exemption from tax if the transaction were between unrelated persons remains not subject to tax or exempt from tax to the same extent as if the transaction were between unrelated persons.

(b) No tax is imposed under Chapter 151 with respect to the use of an aircraft by an owner or member of the purchaser of the aircraft, by an entity that is an affiliate of the purchaser of the aircraft, or by an owner or member of an affiliate of the purchaser of the aircraft if:

(1) with respect to the purchase of the aircraft, the purchaser paid the tax imposed under Chapter 151; or



S.B. No. 1396 (Cont.)

(2) the purchaser's purchase of the aircraft was exempt from the tax imposed under Chapter 151, other than under:

(A) Section 151.302; or

(B) Section 151.304, unless the purchase would have been exempt from tax under Section 151.304 if the owner, member, affiliate, or owner or member of the affiliate who is using the aircraft had been the purchaser.

(c) For purposes of this section, the term "affiliate" means an entity that would be classified as a member of the purchaser's affiliated group under Section 171.0001.



S.B. No. 1396 (Cont.)

Sec. 163.007. AIRCRAFT OPERATED UNDER FRACTIONAL OWNERSHIP PROGRAMS. No tax is imposed under Chapter 151 with respect to the purchase, sale, or use of an aircraft that is operated pursuant to 14 C.F.R. Part 91, Subpart K.

Sec. 163.008. NO IMPOSITION OF TAX UNDER THIS CHAPTER. Nothing in this chapter shall be construed to impose a tax.

Sec. 163.009. CONFLICTS WITH OTHER LAW. This chapter controls over Chapter 151 to the extent of any conflict.

SECTION 2. This Act takes effect September 1, 2015.

