Greater Washington
Business Aviation Association News

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GWBAA Hosts Fifth Annual Golf Tournament

Golfers Enjoy Another Year of Play, Despite the Chill, for a Good Cause


On September 29, sixty participants made their way to GWBAA's fifth annual golf tournament at the Herndon Centennial Golf Course. Those that attended last year's event no doubt remember the huge frost delay – to avoid the cold for this year's golf tournament, our Board decided to move the date up a month. But believe it or not the day was actually chilly (and the pro shop sold many sweatshirts that morning)! Thankfully, the cold didn't delay our play or our fun We enjoyed a wonderful day of golfing, networking, door prizes, and the famous BBQ lunch.

GWBAA wants to sincerely thank those who made this year's golf outing possible – especially our major sponsors Gulfstream, Bombardier, and Sharp Details. Thank you to all our sponsors and volunteers for making this golf tournament a success! GWBAA is again proud to contribute a portion of the golf tournament proceeds to the Aero Club Foundation of Washington. The funds will be used to support aerospace education programs at public schools in the District of Columbia.

Airspace Reminder from NBAA and FAA for DC Area Operators

NBAA, on behalf of FAA, has issued a reminder that the CASANOVA transition (on the OTT6 and RAVNN3 STARs) for arrivals into Baltimore/Washington International Thurgood Marshall Airport (BWI) conflicts with the DC flight restricted zone and is therefore prohibited for use by general aviation (GA) aircraft. This reminder is also printed on charts for the Nottingham Six (OTT.OTT6) and the RAVNN Three RNAV (RAVNN.RAVNN3) approaches. Washington Center (ZDC) has had to take GA aircraft off this transition on a regular basis, which creates an extra workload for the center personnel and significant additional airborne mileage for the aircraft taken off the route within ZDC. For more information, contact NBAA's Operations Service Group at info@nbaa.org.

Regional News Round-Up

U.S. Customs and Border Protection will be available to perform aircraft clearances at **Manassas Regional Airport** starting December 1. Airport Manager Juan Rivera has informed NBAA that the customs service will be on-call seven days a week from 6am to 12 midnight. For more information, contact Rivera at jrivera@ci.manassas.va.us or NBAA's Harry Houckes at hhouckes@nbaa.org.

In other Manassas-related news, the airport has received a $3.4 million federal grant for improvements to the airport's east apron. The grant is funded by the American Recovery and Reinvestment Act. According to Rivera, the apron currently is "riddled with cracks with grass growing up in between the cracks," which creates the risk of debris that can damage aircraft. The Manassas City Council also has voted to accept a $42,643 FAA grant to build a road connecting the east and west sides of the airport, which will allow airport fuel trucks and service vehicles to move from one side of the airport to the other without crossing active runways.

The Prince George's County Council has approved a master plan that envisions the redevelopment of **Hyde Field/Washington Executive Airport.** Nabil Asterbadi, the developer, plans to build 270,000 square feet of commercial space and more than 2000 residential units. For the project to proceed, would also require that the airport be rezoned by the county; towards that goal, a study of the impact of the traffic impacts is under way.

Due to the ongoing rehabilitation of Runway 1C/19C at **Washington Dulles International Airport**, certain taxi procedures temporarily changed effective October 19. The FAA expects the changes will be in effect for approximately 60 days; specific procedures may be altered as conditions dictate. To review the FAA's presentation to NBAA outlining these procedures, please visit http://www.nbaa.org/ops/airspace/regional/northeast.

The City of Frederick has received $1 million from the federal Airport Improvement Program for its runway expansion project at **Frederick Municipal Airport**. The grant reimburses the City for property that already has been purchased for the expansion. Frederick is already the second busiest airport in Maryland, measured by takeoffs and landings. Airport Manager Kevin Daugherty told the *Frederick News-Post* that the actual start of the project remains several years in the future.

The Maryland State Police by the end of the year will relocate its "Trooper 6" medevac helicopter from the Centerville barracks to a hangar at **Easton Airport**. Colonel Terrence B. Sheridan, Superintendent of the Maryland State Police, stated that the move was being made in the interest of safety; the airport has a precision guidance instrument landing system, several runways that can be used for emergency landings, and has tower controllers on duty 16 hours each day.

The Maryland Department of the Environment is considering whether to issue a stormwater discharge permit that is need for construction at **Maryland Airport** in Charles County The airport plans to expand its runway by 1,300 feet, among other projects. Local environmentalists have expressed concern that the project could negatively impact the nearby Mattawoman Creek.

Stafford Regional Airport has reported that since the county tax rate on aircraft was reduced earlier this year, hangar rentals have significantly increased – only 6 of the 40 hangars remain vacant, and the aircraft based at the airport have increased from 34 to 56. However, the *Free Lance-Star* reports that the airport continues to rely on subsidies from Federicksburg, Stafford, and Prince William County, and local opposition to the airport remains. Airport Authority Chair Walt George stated that "due to the downturn in the economy, our marketing efforts haven't grown any fruit. We envision taking it up to two years for us to really get back on track."

GUEST VIEWPOINT:
An Update on Sales and Use Tax Planning for Aircraft Purchases

GWBAA is pleased to present the following discussion from Keith G. Swirsky of GKG Law, P.C.

The economic downturn has affected most areas of public and private life including state budgets. California, for example, was only recently able to pass its state budget after weeks of intense negotiations. States must increase revenues in order to continue to operate at near historic levels. Aircraft, due to their high purchase prices and comparatively minimal collection effort are clearly a partial solution to state budget deficits.

Most states impose sales and use taxes between 3% and 10% on the purchase of tangible personal property (i.e. aircraft). The tax rate for the use tax in any specific state will be identical to such state's sales tax rate. Sales taxes and use taxes are mutually exclusive. States may impose a sales tax, or complementary use tax, but not both on an aircraft purchase. Sales tax is a transaction-based tax and will apply only in the state where the transaction occurs (i.e. the aircraft delivery location).

A state may impose a use tax on the use, storage, or consumption in the state, of property acquired outside the state and subsequently brought into the state. Use tax nexus normally attaches to the locations where the aircraft is used, meaning where it is "based" or hangared. However, taxable aircraft use can also be on the first flight activity of the aircraft after title transfers, flight activity within a certain time period (i.e. six months), or the flight activity of the aircraft for a specified number of days.

Aircraft may be used, and, therefore, technically subject to use taxation, in any state where there is flight activity. As a practical matter, a state is unlikely to attempt to assess a use tax against an aircraft owned by a nonresident who operates the aircraft within the state only occasionally, but rebutting the presumption of state sales taxation can be difficult and the process for doing so varies from state to state. Tools to rebut the applicability of state sales taxation include, evidence of delivery outside the state, complete, accurate, and up to date flight logs, evidence of state sales tax paid to another state, and evidence of personal property tax paid to another state.

Planning Considerations

Sale for Resale

Structuring an aircraft purchase and subsequent ownership varies depending on the needs of the client. Some clients own aircraft directly in their operating businesses but many choose to form an entity solely for the purpose of aircraft ownership. Reasons for forming a "special purpose entity" (SPE) include, but are not limited to: federal and state tax planning and creditor protection. Liability protection is often cited as a reason, however, may not be an achievable objective.

Aircraft that are placed in an SPE typically utilize the "Sale for Resale" Exemption for state sales tax planning purposes. The Sale for Resale Exemption allows for use tax to be paid on the rent from a stream of lease payments in lieu of paying the entire tax on the aircraft's purchase. The payment of use tax on the flight activity instead of on the aircraft's purchase price normally results in significant overall tax savings. To qualify most states the aircraft owner/lessor must be registered with the state's taxing authority as a reseller/dealer at the time of purchase so it may issue the aircraft's seller a valid resale certificate in lieu of the tax.

Qualifying for the Sale for Resale Exemption is not without its pitfalls. Some states have acceleration clauses on leases (the requirement that sales/use tax must be paid on the entire lease term upfront) while others overly scrutinize leases between related parties, to confirm that the lessor has a profit motive and that the leases are made with ordinary (arm's-length) commercial terms. It is vital that all lease payments be made on time, and that all other lease formalities be followed.

It is important to remember that the sale for resale exemption does not result in the complete avoidance of sales and use taxes. Rather, the payment of the sales tax is deferred and is paid based on the amount of each monthly lease payment. Thus, the exemption becomes less valuable the longer the period of time the aircraft is owned and leased (because sales tax will continue to be paid as lease payments continue).

Interstate Commerce and Common Carrier Exemptions

Several states have exemptions for aircraft that are used in interstate commerce and/or used as a common carrier. Interstate Commerce Exemptions may apply to both FAR Part 91 and 135 on-demand use but Common Carrier Exemptions are typically restricted to scheduled carriers with some states allowing use by on-demand carriers to qualify for exemption. If it is possible to qualify for both an Interstate Commerce Exemption and Common Carrier Exemption in a given state, it is important to review the requirements of the respective exemptions as the documentation requirements tend to be quite different. Further, each states' provisions concerning qualification for and implementation of these exemptions vary.

California

As an example, California has both an Interstate Commerce Exemption (Regulation 1620) and Common Carrier Exemption (Regulation 1593). The requirements for the Interstate Commerce Exemption include: (i) after delivery, "functionally using" the aircraft outside of California for commercial use (ii) then upon the aircraft's return to CA, using the aircraft for more than one-half of the flight hours during a six month test period for commercial flight time traveled in interstate or foreign commerce. The regulation provides that for purposes of this exemption, the term "commercial" applies to business uses (including not-for-profit business), and excludes personal use. Supporting documentation is required to evidence the commercial activity.

The Common Carrier Exemption provides that if an aircraft is used as a common carrier for more than 50% of its flight hours involving transportation of persons or property during the 12 month period commencing with the first flight of the aircraft, the carrier's principal use of the aircraft will be deemed to be that of a common carrier. The documentation requirements to prove the Common Carrier Exemption are more detailed than the requirements for the Interstate Commerce Exemption, which include, but are not limited to: information regarding flights not claimed for exemption, the Part 135 operator's pilot information, customer billing information, and load manifests.

In comparing the two exemptions, the Interstate Commerce Exemption is superior. First, the Interstate Commerce Exemption test period is only six (6) months compared to twelve

(12) months for the Common Carrier Exemption. Second, while it is necessary to document the purpose of each flight for the Interstate Commerce Exemption, the level of documentation is significantly less. Finally, there Common Carrier Exemption contains gross receipt requirements.

New York

The 2009-2010 Budget for the State of New York, signed into law on April 7, 2009, changed the requirements to qualify an aircraft for exemption from sales and use taxes under New York's so-called "commercial aircraft" exemption. These changes primarily affect aircraft owners and operators who utilize their aircraft to provide transportation services to affiliated companies, whether under FAR Part 91 or 135, and who previously relied on the "commercial aircraft" exemption to avoid paying sales/use taxes on the original purchase price of the aircraft. Effective June 1, 2009, transportation services provided to *affiliated* companies can no longer be counted for purposes of determining whether the aircraft meets the requirement that, to be exempt from taxation, the aircraft must be used primarily (i.e., more than 50% of the flight hours) to transport persons or property for hire (which formerly included flights provided by one company to an affiliated company on a compensatory basis under FAR 91.501(b)(5)). Under the amended law, companies are *affiliated* if one company directly or indirectly owns more than 5% of the interests in the other company, or if one person or group directly or indirectly owns more than 5% of the interests in both companies.

According to guidance published by the New York Department of Taxation and Finance, in the context of a leased aircraft, an aircraft operator who holds a leasehold interest in an aircraft and uses that aircraft under Part 91 primarily to provide transportation services to the aircraft operator's own affiliates no longer qualifies for the “commercial aircraft” exemption and is required to pay sales tax on each lease payment that is paid or becomes due on or after June 1, 2009. This is true regardless of whether the aircraft is leased from a commercial financial institution, or another affiliate of the aircraft operator. When entering into a lease, however, it is important to understand that for leases of one year or longer, all tax due on all rent payments to be paid over the entire term of the lease must be paid in advance at the commencement of the lease.

In the context of aircraft that are owned (rather than leased), by a company that uses the aircraft under Part 91 primarily to provide transportation services to the aircraft owner-operator's own affiliates for compensation, the new law and guidance are, at best, ambiguous as to whether an aircraft owner-operator who qualified for the commercial aircraft exemption prior to June 1, 2009, will continue to be exempt (i.e., be grandfathered), even though such taxpayers may not qualify under the new law, <u>or</u> whether such taxpayers suddenly became liable for use taxes on their aircraft after June 1. While the new law and the new guidance is ambiguous on this issue, GKG Law has contacted various representatives of the New York Department of Taxation and Finance and we have been advised in telephone conversations and e-mail exchanges that taxpayers in such situations should not become liable for use taxes on their aircraft after June 1. However, please note that such telephone conversations and e-mail exchanges are informal in nature and are not binding on the Department.

Florida

Recent discussions with the Florida Department of Revenue have provided insight regarding the new, unpublished, internal policies on aircraft taxation. Florida’s sales and use tax law contains a presumption of taxability for any aircraft that enters Florida during the first six (6) months of ownership. Overcoming the presumption in an audit, especially if the owner has contacts with the state, will be difficult. However, the Department of Revenue conceded that it will not claim taxable nexus on new aircraft purchasers, that otherwise had no contacts with the state, for trips related to aircraft repairs, fuel stops, and “short” vacations. Since this position is premised on departmental internal policy, and not published rulings, each auditor will bring his or her own subjectivity to each case.

California Personal Property Tax

California is attempting to assess personal property tax on fractional aircraft per Senate Bill 87 (the "Bill"). There are four separate actions challenging the constitutionality of the Bill which are now going to be heard by the same judge in Orange County Superior Court. A motion to consolidate the four separate proceedings into a single action and have it treated as "complex litigation" was rejected earlier this summer by an Orange County judge specifically assigned to rule on that issue only. However, the litigants have effectively achieved the same end result because the two actions that were filed by Flexjet and CitationShares in Santa Barbara Superior Court are now in the process of being transferred to Orange County. They will be heard by the same trial court judge who already has the NetJets and Flight Options cases on his docket and procedurally will be treated as "related litigation." However, as the actions are "related" rather than "consolidated," the judge could, theoretically, enter different orders in the different cases depending on different facts and circumstances, although that seems relatively unlikely since the issues before the court are all essentially the same.

Sales Tax Credits

While no state that lacks nexus may tax an aircraft, an aircraft may have nexus with more than one state. In these circumstances, often a credit may be received for tax paid to the other states. However, it is rare that states will have the exact same sales and use tax rate. Therefore, in a situation where sales tax was paid on an aircraft purchase in Virginia, where the tax rate is 2%, but the aircraft spends a significant portion of its time in Florida, and Florida claims taxable nexus of the aircraft, a credit for tax paid to Virginia should be claimed (although, it is not guaranteed).

The situation varies drastically from state-to-state where a Sale for Resale structure is in place. In a situation where the aircraft has nexus with two different states and the aircraft owners elect to pay use tax to both states based on flight/leasing activity, the owner may, receive credit for the use taxes paid to the other state. However, the aircraft owner runs the risk of being accused of noncompliance for not registering as a retailer (and obtaining a vendor's resale license) and for not filing returns and remitting tax on the lease rental stream, thereby allowing the state where registration was not done to claim that the resale exemption has not been fully complied with. Failure to comply with the resale exemption could subject the entire purchase price to sales tax.

The attorneys at GKG Law have been involved, over the years, in thousands of transactions that implement the various structures discussed in this article saving our clients time and money and can provide advice based on their expertise and practical experience.

Upcoming Aviation Events

- **November 1:** 32nd Gaithersburg Transportation Show at the Montgomery County Fairgrounds. For more information, please visit http://www.gserr.com/shows.htm.
- **November 2:** National Aeronautic Association annual fall awards at the Crystal Gateway Marriott. For more information, please visit http://www.naa.aero/html/events/index.cfm?cmsid=76.
- **November 2-5:** Air Traffic Control Association 53rd annual conference at the Marriott Wardman Park. For information, visit http://www.atca.org/annualconference.aspx.
- **November 4:** International Aviation Club luncheon featuring Randy Babbitt, FAA Administrator, at the Grand Hyatt. For more information, please visit http://www.iacwashington.org/events.html.

- **November 6:** Committee for Dulles 43rd anniversary gala, featuring the Honorable Tim Kaine, Governor of Virginia, at the Landsdowne Resort. For more information, please visit http://www.committeefordulles.org/09galainfo.html.

- **November 7:** Virginia Airport Owners Association meeting at Dogwood Airpark. For more information, please visit http://www.vaoa.us.

- **November 14:** Potomac Consolidated TRACON "Operation Raincheck" tour. For more information, please visit http://www.faa.gov/about/office_org/headquarters_offices/ato/tracon/pct/raincheck.htm.

- **November 19:** The Royal Aeronautical Society of Washington will host a lecture by Robert Birmingham, President of L-3 Communications' Simulation and Training Group, on "Warfighter Readiness Enhanced by Simulation Advancements" at the British Embassy. For more information, please visit http://www.raeswashington.org.

- **November 23:** Aero Club of Washington luncheon featuring Larry Kellner, Chairman and CEO of Continental Airlines. For more information, please visit http://www.aeroclub.org/luncheons.htm.

- **December 1:** International Aviation Club holiday reception, at the residence of the French Ambassador. For more information, please visit http://www.iacwashington.org/events.html.

- **December 1-3:** International FAA Runway Safety Summit, co-sponsored by the American Association of Airport Executives, at the Omni Shoreham. For more information, please visit http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91107&RecID=754.

- **December 3:** Airport Council International-North America international aviation issues seminar at the Fairfax Embassy Row. For more information, please visit http://www.aci-na.org/conferences/detail?eventId=153

- **December 9:** The FAA Safety Team will present a seminar on "What Went Wrong?" at the Sheraton Baltimore North in Towson, Maryland at 7 pm. For more information, please visit http://www.faasafety.gov/SPANS/event_details.aspx?eid=27870.

- **December 10-11:** Ninth Annual American Association of Airport Executives Aviation Security Summit at the Omni Shoreham. For more information, please visit http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91205&RecID=683.

- **January 27:** ABA Forum on Air and Space Law Update Conference at the Ritz-Carlton. For more information, please visit http://www.abanet.org/forums/airspace/home.html.

GWBAA Offers Online Benefits

We continue to add member information for GWBAA's electronic membership directory – http://www.gwbaa.com/directory.html. This service is available to GWBAA members at no cost.

Please contact Jol Silversmith (jasilversmith@zsrlaw.com) if you want to post your company's information.

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