



Impact & Takeaways of New IRS Rules Implementing FET Exemption for Aircraft Owner Travel on Own Aircraft

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New IRS Rules Implementing FET Exemption Disclaimer



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- ✓ Aircraft Purchase & Sale Transactions
- ✓ Aircraft Ownership & Operating Structures
- ✓ Federal & State Tax Planning
- ✓ Aircraft Financing
- ✓ IRS, State & FAA Audits & Enforcement Actions
- ✓ Aircraft Personal Use Guidelines
- ✓ Analysis & Preparation of Fringe Benefit Income Imputation & Entertainment Disallowance Calculations
- ✓ Structuring Aircraft Ownership Trusts

National Air Transportation Association

About Us

- ✓ In its 80th year serving the interests of the general aviation business community
- ✓ Representing over 2,700 business locations including FBOs, part 135/91K operators, MROs, repair stations and training providers
- ✓ NATA's mission is to help its members win in the marketplace
- ✓ Legislative and Regulatory advocacy at the national, state and local levels that is member-driven

National Air Transportation Association

About Us

- ✓ Members providing charter and aircraft management services look to us for assistance in meeting their obligations to collect and remit the federal excise taxes
- ✓ We recognize that as small businesses most don't have in-house expertise and are able to bridge the gap between the operator and government
- ✓ Practical guidance and access to our staff on tax and other regulatory matters is a key benefit we offer members

New IRS Rules Implementing FET Exemption Legislative & Regulatory

- The IRS has published these new regulations, but why?
How did we get here?
- IRS view of aircraft management was not always consistent with industry view of it being private/noncommercial
- In 2012, CCA asserted a position that would make most aircraft management agreement services subject to the air transportation 7.5% FET.
- Many businesses faced audit assessments or had potentially significant liabilities.

New IRS Rules Implementing FET Exemption Legislative & Regulatory

- 2013 – IRS suspended audit assessments
- 2017 – TCJA passes, includes aircraft management services exemption language
- Questions on implementation remained
- Pressed for rulemaking to address questions related to the law (Who counts as an owner? Are all services exempt?)
- July 2020 IRS issues NPRM
- NATA and NBAA submit extensive comments
- January 2021 final rule

New IRS Rules Implementing FET Exemption

FET High-Level Overview

What are Federal Excise Taxes?

- Taxes imposed on air transportation of persons or property
- Taxes imposed on fuels used in aviation (not addressed in this presentation)

New IRS Rules Implementing FET Exemption

FET High-Level Overview

- Taxes imposed on air transportation of persons or property
 - Transportation of Persons – Domestic
 - 7.5% of total amount paid (cash or in kind), plus
 - \$4.30 Segment fee per person per segment
 - Segment fee indexed to inflation
 - Some rural airports excepted
 - 225 Mile Zone – Canada and Mexico
 - Transportation of Persons – International Travel Facilities
 - \$19.10 per person per departure/arrival
 - Hawaii and Alaska: \$9.60 per person per departure (not arrival)
 - Fees are indexed to inflation
 - Transportation of Property – Domestic
 - 6.25% of amount paid
- Purpose of transportation (business vs. personal) is not relevant

New IRS Rules Implementing FET Exemption

FET High-Level Overview

- “Amount Paid” that is subject to 7.5% or 6.25% tax:
 - Includes amounts paid for layover time, waiting time, crew expenses, landing fees, other taxes and fees
 - Does NOT include amounts paid for services unrelated to operations of the aircraft if separately stated (e.g., catering, ground transportation services, flight phones)
- Collection of Tax
 - The party paying for the transportation is the taxpayer and is responsible for paying the tax.
 - The party receiving payment for the transportation must collect and remit the tax.

New IRS Rules Implementing FET Exemption

FET High-Level Overview

- Previously existing exemptions from FET on transportation
 - Affiliated/consolidated group operations – 80% voting and value
 - Small aircraft (under 6,000 pounds) on non-established line
 - Sightseeing aircraft
 - Seaplane operations
 - Skydiving
 - Fractional ownership programs, if taxed under 4043
 - Air ambulances/emergency medical flights
 - Oil, gas and mineral exploration and mining (helicopters only)
 - Forestry and logging operations

New IRS Rules Implementing FET Exemption

New Exemption for Aircraft Owners

- TCJA amended section 4261 to add a new section 4261(e)
- Section 4261(e)(5)(A) provides: “[n]o tax shall be imposed by [section 4261] or section 4271 on any **amounts paid by an aircraft owner for aircraft management services** related to –
 - (i) maintenance and support of the aircraft owner’s aircraft, or
 - (ii) flights on the aircraft owner’s aircraft”

New IRS Rules Implementing FET Exemption TCJA Exemption

- Section 4261(e)(5)(B) defines “aircraft management services” to include:
 - (i) assisting an aircraft owner with administrative and support services, such as scheduling, flight planning, and weather forecasting;
 - (ii) obtaining insurance;
 - (iii) maintenance, storage, and fueling of an aircraft;
 - (iv) hiring, training, and provision of pilots and crew;
 - (v) establishing and complying with safety standards; and
 - (vi) such **other services** as are necessary to support flights operated by an aircraft owner

New IRS Rules Implementing FET Exemption TCJA Exemption

- Section 4261(e)(5)(C)(i) provides that the term “**aircraft owner**” includes a person who leases an aircraft other than under a “**disqualified lease**”
- Section 4261(e)(5)(C)(ii) defines “disqualified lease” as “a lease from a person providing aircraft management services with respect to the aircraft (or a related person (within the meaning of section 465(b)(3)(C)) to the person providing such services) if the lease is for a term of 31 days or less”

New IRS Rules Implementing FET Exemption Final Regulations

Final regulations implementing and clarifying Section 4261(e) were published in the Federal Register January 19, 2021, with an effective date of January 14, 2021.

86 FR 4990



New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- Who is an “**Aircraft Owner**”?
 - Holder of legal title to an aircraft
 - Holder of a lease in an aircraft, other than a lessee under a disqualified lease
 - “Lease” is not defined, but should likely be in writing and contain provisions clearly identifying a leasing arrangement
 - Holder of the substantial incidents of ownership for a period of more than 31 days
 - Beneficiary of an owner trust that holds legal title

- Exemption applies to amounts paid by the aircraft owner for a flight even if the aircraft owner is not on the flight.

New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- Exemption only applies to amounts paid **BY** an aircraft owner, or by an agent of the aircraft owner in a principal agent scenario in which the aircraft owner is the principal.
 - Principal-agent relationship analyzed under state agency law principles
- Exemption does NOT apply to amounts paid by other parties **ON BEHALF** of an aircraft owner, including amounts paid by disregarded entities, members of an affiliated group, family members, or the member of a single member LLC that qualifies as an aircraft owner.

New IRS Rules Implementing FET Exemption Overview of Final Regulations

- The “**other services**” referred to in 4261(e)(5)(B)(vi) are defined by the Final Regulations as any service (including, but not limited to, purchasing fuel, purchasing aircraft parts, and arranging for the fueling of an aircraft owner’s aircraft) provided directly or indirectly to an aircraft owner in order to provide air transportation to the aircraft owner on the aircraft owner’s aircraft at a level and quality of service required under the agreement between the aircraft owner and the aircraft management services provider.

New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- Final Regulations clarify that the TCJA exemption applies only to Private Aviation.
 - Includes, but is not limited to, civilian flights operated under 14 CFR Part 135
 - Does NOT include scheduled passenger service for which tickets (or substitutes equivalent to tickets) are sold on a seat-by-seat basis to the general public

New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- What about fractional aircraft owners?
 - Fractional program owners are not included in the TCJA exemption if they are exempt under 4261(j).
- What about flights on a substitute aircraft? (e.g. – owner’s aircraft is unavailable due to maintenance)
 - Exemption does NOT apply.
 - FET applies to that pro rata portion of the amounts paid that are related to the flight services provided on a substitute aircraft.
- What if an aircraft owner allows third-party charter on their aircraft?
 - This will not disqualify the aircraft owner from the exemption (although the third-party charter is still subject to FET).

New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- Record Keeping Requirements
 - Aircraft owner and aircraft management services provider must maintain adequate records to show that the amounts paid relate to aircraft management services for the aircraft owner's aircraft or for flights on the aircraft owner's aircraft
 - Example of records to satisfy the above requirement include:
 - the agreement between the aircraft owner and the aircraft management services provider
 - evidence of aircraft ownership
 - evidence that amounts paid for aircraft management services came from the aircraft owner
 - the aircraft management services provider's fee schedule
 - documents to support any allocations required under the pro rata allocation rule

New IRS Rules Implementing FET Exemption

Overview of Final Regulations

- Other Key Takeaways
 - The “Possession, Command, and Control Test” is not relevant to the application of 4261(e).
 - The method or manner by which an aircraft owner is billed for aircraft management services (e.g. – monthly fees, hourly fees for actual flight time, billed with a certain built-in markup, etc.) does not affect whether the exemption applies.

New IRS Rules Implementing FET Exemption Open Issues



- NATA/NBAA January 28 letter to IRS



January 28, 2021

Ms. Stephanie N. Bland
Branch Chief, Branch 7 (Passthroughs & Special Industries)
Office of the Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Final Rules on Excise Taxes; Transportation of Persons by Air;
Transportation of Property by Air; Aircraft Management Services

Dear Ms. Bland:

On behalf of the National Air Transportation Association ("NATA") and National Business Aviation Association ("NBAA"), thank you for completing the rulemaking project on amendments to the Facilities and Services Excise Tax Regulations (26 CFR Parts 40 and 49). We appreciate your careful consideration of our comments and believe that the final rule provides much-needed clarity on air transportation excise tax responsibilities for aircraft management companies and their customers.

Both of our associations are currently performing significant outreach to the general aviation community on the impact of the final rule to aircraft management arrangements. For example, we have conducted webinars with nearly 800 registered attendees and are developing articles and other website resources to continue the education process. As the IRS creates additional resources on the final rule, such as updates to publications or forms, we welcome the opportunity to be engaged in the process.

For example, guidance expanding on the types of information sufficient to support a conclusion that payments indeed originate from an eligible aircraft owner are of great importance to aircraft management providers.

Also, as the IRS interacts with taxpayers on the final rule, we hope to maintain an open line of communication for common questions or areas of confusion. Since NATA and NBAA represent most aircraft management companies, we can quickly reach our members with best practices or address common issues in the field.

In our comments to the July 31, 2020, proposed regulations, we also provided feedback on updates to regulations regarding payment and collection rules based on your request. While we understand and appreciate that the final rules did not address these changes due to their broad implications for industry, the issues are still critical for our members.

The final rules indicate that issues surrounding § 4263(c) should be the subject of a separate rulemaking project, and we welcome the opportunity to begin working with you on that effort. We understand that a rulemaking project could be desirable, however we are open to guidance options that provide answers to common industry questions more expeditiously.

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National Air Transportation Association and National Business Aviation Association
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In summary, we believe that existing regulations and guidance regarding federal excise tax (FET) collection responsibilities under § 4291 and liability for unpaid FET on audit under § 4263(c) are unclear and create confusion for taxpayers and the IRS. Guidance or regulations that provide greater clarity on these two issues will offer taxpayers certainty regarding their collection and filing responsibilities and promote efficient tax administration.

As we described in our comments from September 29, 2020, within the air charter industry, intermediaries chartering aircraft from the certificated air carrier performing the flights are known as brokers. These air charter brokers can act as agents of the carrier, agents of the passengers, principals reselling transportation service, or principals facilitating the passenger's purchase of the service directly from the air carrier. There is currently little guidance to determine whether charter brokers are responsible for collecting FET and filing Forms 720.

Another area of confusion is that under § 4263(c), if FET is not collected, then the air carrier providing the initial flight segment in the U.S. is responsible for paying the tax. This obligation on the air carrier's part to pay the tax if the party responsible for collecting it fails creates confusion and unfair liability exposure for the air carrier in instances where a broker is collecting payment from the passenger.

To alleviate the confusion and unfairness to air carriers, we suggest that the regulations provide that if an air carrier documents that it informed the charter broker of its obligation to collect FET and file Form 720, then the carrier will not be liable for uncollected tax under § 4263(c). Also, under an audit scenario, the air carrier should be entitled to obtain information from the IRS on whether the asserted FET has been paid by the charter broker or any other party.

As a first step in approaching these complex issues, we respectfully request a call to determine how NATA and NBAA can best engage with the IRS on a guidance or rulemaking effort. During our conversations on the § 4261(e)(5) rulemaking, we began to discuss ways to provide more certainty to the general aviation community on excise tax collection responsibilities and look forward to continuing those conversations.

We appreciate your attention to these issues, and we look forward to meeting with you.

Sincerely,

Scott O'Brien
Senior Director, Government Affairs
NBAA

Jacqueline E. Rosser
Senior Advisor, Regulatory Affairs
NATA

cc: Michael Beker, Attorney, IRS Associate Chief Counsel, Passthroughs and Special Industries

New IRS Rules Implementing FET Exemption

Open Issues

- Request additional IRS action on:
 - Records needed to show payments are from an “owner”
 - Proper party to collect/remit when a broker is involved in a charter
 - Liability for nonpayment (particularly with a broker involved)
- IRS willing to meet with us to discuss questions about the rules
- Those providing management services need to review policies and processes with staff involved in management agreements, payment processing and tax filing to ensure awareness and flag possible issues when they occur.



Q&A

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