

INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

Chief, Appeals Office

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification Number:

Taxable Periods:

Date of Conference:

Legend:

P =

X =

Y =

M =

\$a =

\$b =

\$c =

\$d =

\$e =

ISSUES:

1. Are amounts \$b and \$c, paid to P by X, Y, and the other partners in P as monthly fixed costs and hourly aircraft usage charges, respectively, subject to the excise tax on amounts paid for taxable transportation under § 4261 of the Internal Revenue Code?
2. Is the \$c hourly aircraft usage charge subject to the § 4261 tax for a flight in which an employee of one of the partners acts as a pilot of the aircraft?

CONCLUSIONS:

1. Amounts \$b and \$c, paid to P by X, Y, and the other partners in P as monthly fixed costs and hourly aircraft usage charges, respectively, are subject to the excise tax on amounts paid for taxable transportation under § 4261.
2. The \$c hourly aircraft usage charge is subject to the § 4261 tax for a flight in which an employee of one of the partners acts as a pilot of the aircraft.

FACTS:

X and Y, along with two other persons, formed P, a partnership, in order to own and operate an aircraft. Each of the partners owns an equal 25 percent interest in P. The partnership agreement provides that the fixed costs of operating the aircraft, approximately \$a per year, are shared equally by the partners and are paid in monthly installments of approximately \$b by each partner. In addition, each partner pays a usage fee of \$c for each hour that the aircraft is flown. This usage fee includes amounts for fuel, oil, maintenance and repairs, pilot services, and all landing fees. If a partner incurs any additional costs, such as layover expenses, meals and lodging of the pilot, or catering charges, those costs are paid by that partner.

P contracts with M to manage and operate the aircraft. For example, M cleans and maintains the aircraft, assists in scheduling, and provides pilot and crew for the aircraft. In addition, M will arrange for catering for flights when requested by a partner. Under the contract, P pays \$a to M annually for these services. In addition, P pays \$c to M for each hour that the partnership or one of the partners uses the aircraft. Occasionally, an employee of one of the partners acts as the pilot of the aircraft. For these flights, a pilot provided by M is also in the aircraft and the usage amount paid by

that partner is not reduced.

Under the contract, M is permitted to allow third parties to charter the aircraft when it is not being used by one of the partners. When a third party charters the aircraft, M charges \$d and pays \$e to P.¹ If the aircraft is unavailable to one of the partners (whether due to use by another partner or a charter by a third party) M makes a similar aircraft available to that partner and charges the § 4261 tax on the amount paid by that partner.

APPLICABLE LAW:

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

Section 4262(a)(1) defines the term "taxable transportation" as, *inter alia*, transportation by air which begins in the United States and ends in the United States. Section 4262(d) clarifies that the term "transportation" includes layover or waiting time as well as movement of the aircraft in deadhead service.

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.

RATIONALE:

As an initial matter, we note that P has possession, command, and control over the aircraft. P owns and maintains the aircraft, and employs one or more pilots to operate the aircraft. While the partners determine the schedule and destination of each of the flights by the aircraft, this fact is not material for purposes of determining possession, command, and control. Rev. Rul. 76-431, 1976-2 C.B. 328. Thus, P is engaged in providing transportation services, not merely leasing an aircraft.

In this case there are three separate types of payments made to P by the partners in connection with the operation of the aircraft. The first type of payment is paid monthly by each partner as its share of the fixed operating costs of the aircraft, here \$b. The amount of this payment is unrelated to the use of the aircraft by a particular partner. The second type of payment is directly related to the use of the aircraft by the paying partner. The amount is determined by multiplying \$c by the number of hours that the partner uses the aircraft. The third type of payment is paid by a partner for additional services, such as catering, performed by M under a contract with P. The amount paid for these services is not fixed in the contract and is

¹ When M allows third parties to charter the aircraft, M charges and collects the § 4261 excise tax on \$d, the full amount paid for the charter.

determined based on the actual needs of the paying partner. We must determine first whether these payments are paid for taxable transportation within the meaning of § 4261 and second whether the fact that these payments are made by a partner to its partnership renders these payments not subject to the § 4261 tax.

Generally, § 4261(a) imposes a tax on any amount paid for taxable transportation. Payments made for actual use of an aircraft, such as \$c, are clearly within the ambit of § 4261. In addition, where, as here, several persons share in the fixed annual expenses of an aircraft used by those persons, the amount paid for the fixed expenses is an amount paid for taxable transportation. Rev. Rul. 76-394, 1976-2 C.B. 355; Rev. Rul. 57-545, 1957-2 C.B. 749. Thus, the monthly payments of \$b are also subject to the § 4261 tax. Neither \$b nor \$c is adjusted where an employee of one of the partners acts as a pilot of the aircraft and the pilot contracted for by P is also on each of those flights. Thus, amounts \$b and \$c paid by a partner are subject to tax even where an employee of that partner acts as a pilot on a particular flight. The final type of payment, that for optional catering arranged by M, are not paid for taxable transportation and are not subject to the § 4261 tax. Rev. Rul. 57-545, 1957-2 C.B. 749.

Regarding whether an otherwise taxable payment is made nontaxable because it is made by a partner to its partnership, § 4291 requires that any person receiving a payment for a taxable service (such as air transportation) collect the amount of the tax from the person making the payment. Under § 7701(a)(1), partnerships are persons for purposes of the Internal Revenue Code. Thus, payments by a partner to its partnership for taxable air transportation are subject to the § 4261 tax.

CAVEAT:

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.