INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
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CASE MIS No.: TAM-122096-00/CC:PSI:B8

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification Number:

Taxable Periods:

Date of Conference:

Legend:

X =

ISSUES:

(1) What is the correct method of calculating the tax imposed by § 4261(b) of the Internal Revenue Code on domestic segments where one person charters an aircraft and more than one person is a passenger on that aircraft?

(2) If X has calculated the tax on domestic segments incorrectly, is X entitled to relief from retroactive application of the tax under § 7805(b)(8).

CONCLUSIONS:

(1) The § 4261(b) tax on domestic segments is calculated by multiplying the rate of tax set forth in § 4261(b)(1) by the product of multiplying the number of domestic segments by the number of passengers on the chartered aircraft.

(2) X is not entitled to relief from the retroactive application of this ruling under § 7805(b)(8).

FACTS:

X operates an air charter service that provides taxable air transportation to various companies and individuals. X has six aircraft available for charter, with each aircraft having a seating capacity of between six and eight passengers. X charges each

charterer a fixed per-hour rate for the use of the aircraft. X has collected the percentage tax imposed by § 4261(a) on the amounts paid to it for the charter of its aircraft. It has also collected the segment tax imposed by § 4261(b), calculating that tax by multiplying the number of segments that the aircraft will travel by the rate set forth in § 4261(b)(1), without reference to the number of passengers on the aircraft. Other than the segment tax collected by X, no other amounts have been paid under § 4261(b) by any person.

LAW:

Section 4261(a) imposes a percentage 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 4261(b)(1) imposes a tax on the amount paid for each domestic segment of taxable transportation. The term “domestic segment” is defined in § 4261(b)(2) as consisting of one takeoff and one landing that is taxable transportation described in § 4262(a)(1).

Section 49.4261-2(b) of the Facilities and Services Excise Tax Regulations provides that the § 4261 tax is determined by the amount paid for transportation with respect to each person. Thus, where a single payment is made for the transportation of two or more persons, the taxability of the payment and the amount of tax, if any, payable with respect to that payment, must be determined on the basis of the portion of the total payment properly allocable to each person transported.

Section 4263(c) provides that, where any tax imposed by § 4261 is not paid at the time payment for transportation is made, to the extent that the tax is not paid under any other provision of subchapter C of chapter 33 of the Code, the tax shall be paid by the carrier providing the initial segment of the air transportation that begins or ends 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 7805(b)(8) allows the Secretary to prescribe the extent, if any, to which any ruling shall be applied without retroactive effect.

RATIONALE:

As an initial matter, we note that X has possession, command, and control over the aircraft. X operates and maintains the aircraft and employs one or more pilots to operate the aircraft. While its customers 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, X is engaged in providing transportation services to those chartering its aircraft, not merely leasing those aircraft.

In general, § 4261(a) imposes a percentage tax on any amount paid for taxable transportation. Payments made for actual use of an aircraft, such as the amounts paid to X for the use of its aircraft, are clearly within the ambit of § 4261. X has properly calculated and collected the § 4261(a) tax. In addition to the percentage tax, § 4261(b)(1) imposes a tax on the amount paid for each domestic segment of taxable transportation. The term "domestic segment" is defined in § 4261(b)(2) as consisting of one takeoff and one landing that is taxable transportation described in § 4262(a)(1). The question here is how to calculate the segment tax on charters. X has calculated the tax by multiplying the rate set forth in § 4261(b)(1) by the number of segments on a particular flight, regardless of the number of passengers on that flight. We disagree.

Section 49.4261-2(b) provides that the § 4261 tax is determined by the amount paid for transportation with respect to each person. This is a fundamental principle of the excise tax on the air transportation of persons. Thus, when a person purchases several tickets on a scheduled flight, it is clear that the segment tax applies to each of the passengers, notwithstanding that one person paid one amount for all of the tickets. The same analysis applies to charters, where a single amount is paid for air transportation on a particular aircraft, but several persons will be passengers on that flight.

This conclusion is buttressed by the conference report to the Taxpayer Relief Act of 1997, 1997-4 (Vol. 1) C.B. 2 (the Act). In illustrating the applicability of the Act, the conference report stated, "A passenger traveling from Los Angeles to Honolulu in December 1997 would be taxed at 9 percent of the fare applicable to U.S. territorial miles plus $1 per flight segment plus $6." H.R. Conf. Rep. No. 105-220, at 555 (1997), 1997-4 (Vol. 2) C.B. 2025. This legislative history makes clear that the Congress intended that the segment tax apply to each passenger on a flight, not just one segment tax per flight.

In addition, Rev. Rul. 72-309, 1972-1 C.B. 348, addresses the calculation of the international travel facilities tax imposed by § 4261(c) in the context of a single payment for a charter. The international travel facilities tax is similar to the § 4261(b) segment tax inasmuch as it is not calculated as a percentage of the amount paid, but as a single amount imposed on the amount paid by each person. That revenue ruling concluded that when a single amount is paid for a charter a separate international travel facilities tax applies to each passenger because "implicit in the charter fee is an amount paid for the transportation of each passenger actually on the flight." We believe that the same analysis applies to the calculation of the § 4261(b) segment tax in the context of a charter payment. Thus, X must calculate the § 4261(b) tax due by multiplying the rate of tax set forth in § 4261(b)(1) by the product of multiplying the number of domestic segments by the number of passengers on the chartered aircraft.

Section 4263(c) provides that where any tax imposed by § 4261 is not paid at the time payment for transportation is made, to the extent that the tax is not paid under any other provision of subchapter C of chapter 33, the tax shall be paid by the carrier providing the initial segment of the air transportation that begins or ends in the United States. The customers of X did not pay the correct amount of tax due under § 4261(b) at the time that they paid for the air transportation. Further, the tax has not been paid under any other provision. X provided the initial segment of air transportation that began or ended in the United States. Therefore, X is liable for the § 4261(b) tax due on the air transportation provided to its customers.

X requests that this technical advice memorandum 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 section 17.02 of Rev. Proc. 2001-2, 2001-1 I.R.B. 79, 104. There is no prior technical advice memorandum or letter ruling to X. However, X argues that this memorandum should not be applied retroactively because the IRS has not issued guidance on the interpretation of § 4261(b). 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:

Temporary or final regulations pertaining to one or more of the issues addressed in this memorandum have not yet been adopted. Therefore, this memorandum will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in the memorandum. See section 17.04 of Rev. Proc. 2001-2, 2001-1 I.R.B. 79, 104. However, a technical advice memorandum that modifies or revokes a letter ruling or another technical advice memorandum generally is not applied retroactively if the taxpayer can demonstrate that the criteria in section 17.06 of Rev. Proc. 2001-2, are satisfied.

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.