Avoiding Pitfalls: Aircraft Ownership and Operating Structures

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Major Considerations

• What type of operations are being considered?
• Who will be the user(s)?
• Are there any non-U.S. citizens?
What Type of Operations are Being Considered?

• Part 91 v. Part 135
  – Major distinction: “for compensation or hire”, some exceptions in Part 91
  – Operational Control
Part 135 Operations

• Requires a Part 135 Certificate
  – Owner can obtain its own certificate
  – Owner can enter into a charter management arrangement
    • All flights operated by air carrier under Part 135, or
    • Owner can retain the ability to operate its own flights under Part 91
What Does A008 Require in Charter Management?

• Owners Must Transfer “possession and custody” of the Aircraft to Air Carrier

• Air Carrier Must Have Knowledge of and Control:
  – All Attributes of All Part 135 Flights and Maintenance
  – All Individuals it Uses to Comply With the First Requirement
Some Tax Issues to Consider*

- Federal Excise Tax (7.5% plus segment fees) – 26 USC 4261
- Passive Activity Loss Rules – 26 USC 469
- Deduction Reduction for Entertainment Use
- State sales/use/property tax considerations

* The list of tax consequences addressed herein is not meant to be a complete and conclusive list.
Part 91 Structure Fundamentals

• Who will operate the aircraft?
  – Registered Owner?
  – Dry Lessee?
  – Multiple Operators?

• Operator versus User/Passenger
  – Operator accepts operational control
  – User/Passenger does not
Operational Control

• Operational Control - with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight
  – Includes the acceptance of responsibility for safety and regulatory compliance

• If a user is unwilling to accept operational control responsibilities then the user cannot “operate” the aircraft under Part 91
Sole-Purpose Entities

• Sole Purpose Entities may own aircraft, but may not operate aircraft on passenger carrying flights for compensation or hire
  – Compensation = every form of compensation, including but not limited to money, non-monetary exchange, and good will
  – Contributions by an LLC member to the LLC can be viewed as compensation
Illegal Sole Purpose Entity Structure

Ownership

Contributions

Widget Co.

Sole Purpose, LLC

Operator

Airplane

NBAA 2014

Business Aviation Convention & Exhibition

October 21, 22, 23 | Orlando, FL
Dry Leases

- Dry Lease = Lease of aircraft without crew
  - If the Part 91 operator is someone other than the registered owner generally that operator must dry lease the aircraft from the registered owner
  - Dry Leases for aircraft with an MTOW of more than 12,500 lbs must comply with Truth in Leasing requirements in § 91.23
Dry Lease

- Lease must be in Writing
- Copy of Lease must be mailed to FAA Technical Section within 24 hours of Execution
- Notify nearest FSDO at least 48 hours in Advance of First Flight
- Carry Copy of the Lease on the Aircraft
Part 91 Dry Lease Structure

- **Ownership**
- **Dry Lease**

Diagram:
- Widget Co.
  - *Operator*
  - Sole Purpose, LLC
  - Aircraft
Potential Tax Consequences to Consider*

- Federal Excise Tax (7.5% plus segment fees) – 26 USC 4261
- Deduction Reduction for Entertainment Use
- Passive Activity Loss Rules – 26 USC 469
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Other Part 91 Options

- 91.501(b)(5)
- Time Sharing
- Joint Ownership
- Interchange
91.501(b)(5)

• “Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company”
Nichols Interpretation

• Use of company provided aircraft for personal travel, normally not “within the scope of, and incidental to, the company’s business”, exception:
  – Company control over “high-level employee’s” schedule, AND
  – Ability to recall employee “at any time”

• Cannot be used for trips unlikely to be cancelled (i.e. weddings, funerals and urgent medical treatment).

• Must maintain records of determinations on a flight by flight basis, and a list of employees whose position requires that personal trips be routinely changed by the company.
  – FAA does not believe that all “specified individuals” will meet these requirements.
Time Sharing

• “an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of this section”
  – The items specified under (d) are essentially two times actual cost of fuel, plus a few other specific expenses

• Truth in Leasing is Applicable
Joint Ownership

• “an arrangement whereby one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement”
Interchange

• “an arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes”

• Truth in Leasing is Applicable
Potential Tax Consequences to Consider*

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U.S. Citizenship for Aircraft Ownership Purposes

• “citizen of the United States” means—
  – an individual who is a citizen of the United States;
  – a partnership each of whose partners is an individual who is a citizen of the United States; or
Continued...

• a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.
Scenario

User 1 – Individual, U.S. Citizen

User 2 – Company, U.S. Citizen, has a major enterprise
One Option – 91.501(b)(5)

User 1 – Individual, U.S. Citizen

91.501(b)(5) No Charge

User 2 – Company, U.S. Citizen, has a major enterprise

Operator

NBAA 2014
Another Option – Time Sharing

User 1 – Individual, U.S. Citizen

Timeshare Limited Reimbursement

User 2 – Company, U.S. Citizen, has a major enterprise

Operator
Another Option – Dry Lease

User 1 – Individual, U.S. Citizen

Operator

User 2 – Company, U.S. Citizen, has a major enterprise

Operator

Sole Purpose Entity

Dry Lease
Questions?

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