

This letter concerns a change in registration of an aircraft due to the merger of a corporation into a limited liability company under the provisions of the Business Corporation Act. See 86 Ill. Adm. Code 152.101 and 805 ILCS 5/11.39 and 11.50. (This is a PLR.)

October 13, 2010

Dear Xxxxx:

This letter is in response to your letter dated October 14, 2009 and follow-up memo dated August 27, 2010, in which you requested a Private Letter Ruling on behalf of COMPANY. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

As counsel for and on behalf of COMPANY, we hereby formally request a Private Letter Ruling, pursuant to 2 Ill. Admin. Code §1200.110, from the Illinois Department of Revenue ('Department'), confirming that a transfer of an aircraft pursuant to an F reorganization would be exempt from the Aircraft Use Tax. COMPANY is not currently under audit by the Department regarding this issue. In addition, COMPANY is unaware of any authority contrary to its views expressed in this request. Furthermore, we ask that our client's name, address, and any contract or exhibits attached be kept confidential and deleted from the publicly disseminated version of the private letter ruling.

FACTS

COMPANY is a corporation that is a wholly-owned subsidiary of BUSINESS. COMPANY owns tangible assets including an aircraft that is registered in Illinois.

COMPANY plans to engage in a Type F Reorganization under the Internal Revenue Code whereby it would change its entity type from a corporation to a limited liability company. The limited liability company will still continue to be taxed as a corporation. In addition, the limited liability company will retain the same federal employer identification number as the corporation. The Federal Aviation Administration will not require COMPANY to re-register the aircraft because it treats F reorganizations as simply a name change.

FEDERAL LAW

The Internal Revenue Code ('IRC') generally provides that upon the exchange of property, gain or loss must be accounted for if the new property differs materially, in kind or extent, from the old property. 26 I.R.C. § 1001. Reg. §1.368-1(b). The purpose of reorganization provisions of the IRC is to provide for exceptions to this general rule for certain specifically described exchanges that are required by business needs and effect only a readjustment of continuing interests in property under modified corporate forms. See Reg. §1.368-1(b). For example, Section 368(a)(1)(F) provides that the term 'reorganization' includes a mere change in identity, form, or place of one corporation. This type of tax-free reorganization is referred to as 'F reorganization.' One court has described the F reorganization as follows:

[The F reorganization encompass[es] only the simplest and least significant of corporate changes. The (F)-type reorganization presumes that the surviving corporation is the same corporation as the predecessor in every respect, except for minor or technical difficulties.

Berghash v. Commissioner, 43 T.C. 743, 752 (1965). Although an F reorganization may involve an actual or deemed transfer of assets from one corporation or another, such transaction effectively involves only one corporation. An F reorganization is treated for most purposes of the IRC as if the reorganized entity were the same entity as the corporation in existence before the reorganization. Consequently, the taxable year of the corporation does not end on the date of the transfer and the losses of the reorganized corporation can be carried back to offset income of its predecessor. See Reg. §1.381(b)-1(a)(2).

ILLINOIS LAW

The Illinois Aircraft Use Tax [Law], 35 ILCS 157/10-1, et seq, provides that the transfer of ownership of an aircraft between two separate legal entities triggers the tax. However, the consequences of an F reorganization are not directly addressed by Illinois statute or regulation. By definition F reorganizations are not 'transfers;' they merely result in a change in identity, form, or place of organization of one corporation. 26 I.R.C. §368(a)(1)(F). Although an F reorganization may involve an actual or deemed transfer of assets from one corporation to another, such a transaction effectively involves only one entity.

A publication on the Department's website entitled 'Questions and Answers for 2006/2007 Illinois Department of Revenue Practitioners' Meetings' directly addresses Illinois Aircraft Use Tax consequences of the transfer of an airplane which occurred through a merger. In the publication, the Department specifically stated that the transfer of ownership between two separate legal entities triggers tax under the Aircraft Use Tax; provided, however, the form of the transfer may affect taxability. For instance, if

the transfer results from a transfer or merger under the provisions of Section 11.50 of the Business Corporation Act of 1983 ('BCA'), 805 ILCS 5/11.50, no tax is due. Under the provisions of the BCA, when corporations are merged or consolidated, the new corporation takes over the prior corporation's liabilities and benefits as if it were the prior corporation. The assumption of the assets and liabilities to the surviving or new company takes place as a matter of law and is not considered to be a transfer.

The Department has not amended its rules or issued another bulletin with respect to this issue. However, the Department has stated unless a tax act directs that a different test should be used to determine whether use tax is imposed as a result of a business transfer, the Department's policy is to analyze the taxation of such transfers under the provisions of the BCA. Such an approach can be seen in the Vehicle Use Tax Act, 625 ILCS 5/3-1001, et. seq., which provides that a reduced tax of \$15 is incurred when a 'motor vehicle which has once been subjected to the Illinois Retailers' Occupation Tax or Use Tax is transferred in connection with the organization, reorganization, dissolution or partial liquidation of an incorporated or unincorporated business wherein the beneficial ownership is not changed.'ⁱ Based on the Department's policy, this specific provision provides for a reduced tax and will take precedence over the general policy set forth in the BCA.

In this case, COMPANY is going to engage in a simple corporate change involving its entity form. COMPANY is going to retain its same FEIN and engage in the same type of business. The Illinois Aircraft Use Tax Act does not direct that a different test be used to determine if use tax is imposed on COMPANY's transfer of an aircraft than that outlined under the provisions of the BCA. Since the corporate change in this case is an F reorganization and the transfer of the aircraft is equivalent to those described pursuant to the BCA, no Illinois Aircraft use tax should be due on the transfer of the aircraft.

On behalf of COMPANY, we contacted Mark Russell, the Supervisor of the Aircraft Use Tax Division of the Department, for further guidance. Mr. Russell stated that while he does not have authority to bind the Department, he agrees that based on the facts of this case, COMPANY has a solid basis for not reporting the Aircraft Use Tax as a result of a [sic] F reorganization. Mr. Russell recommended that we submit a Private Letter Ruling ('PLR') in order to receive direct guidance to our scenario.

REQUEST FOR RULING

Pursuant to 2 Ill. Admin. Code Section 1200.110, it is respectfully requested that the Department of Revenue issue a private letter ruling, which declares that COMPANY's transfer of an aircraft pursuant to an F reorganization would be exempt from the Illinois Aircraft Use Tax.

If you concur, please issue your favorable ruling to the undersigned. If you do not concur, please advise so that we may discuss your reasoning before an adverse ruling is issued. A Power of Attorney authorizing our representation of COMPANY is enclosed.

In your memorandum of August 27, 2010, you state as follows:

BCA Application

IRC §368(a)(1)(F) provides for tax-free treatment of a mere change in identity, form, or place or organization of a corporation. 'F' reorganizations do not involve any transfers of tangible personal property by the organization. The corporation continues to exist, but has simply changed its identity, form or place of organization. The assumption is that in such transactions there has been no change in proprietary interest. As a result, no sales or use tax should apply.ⁱⁱ

Similar treatment is seen under Illinois law. If a transfer results from a merger or consolidation, then no tax is due. That result is in accordance with the provisions of Section 11.50 of the Business Corporation Act of 1983. 805 ILCS 5/11.50. That section reads, in part, as follows:

- (a) When such a merger or consolidation has been effected:

 - (2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

 - (4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as of [sic] public or a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.
 - (5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger [sic] or substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.

According to Section 11.50, when corporations are merged or consolidated, as a matter of law, the new corporation takes over the prior corporation's liabilities and benefits as if it were the prior corporation. There is not a 'transfer' between two separate legal entities; rather, one entity becomes another entity, or is consolidated into a separate entity, while the original entity ceases to exist. The assumption of the assets and

liabilities to the surviving or new corporation takes place as a matter of law and is not considered a transfer.

Section 11.50 applies when there is a merger of a domestic corporation and a limited liability company ('LLC') in Illinois. See 805 ILCS 5/11.39(f). Pursuant to Section 11.39(a), a domestic corporation may merge with or into an LLC. The plan of merger must [sic] set for the following:

- (1) The names of the domestic corporation or corporations and limited liability company or companies proposing to merge and the name of the domestic corporation or limited liability company into which they propose to merge, which is designated as the surviving entity.
- (2) The terms and conditions of the proposed merger and the mode of carrying the same into effect.
- (3) The manner and basis of converting the shares of each domestic corporation and the interests of each limited liability company into shares, interests, obligations, other securities of the surviving entity or into cash or other property or any combination of the foregoing.
- (4) In the case of a merger in which a domestic corporation is the surviving entity, a statement of any changes in the articles of incorporation of the surviving corporation to be effected by the merger.
- (5) Any other provisions with respect to the proposed merger that are deemed necessary or desirable, including provisions, if any, under which the proposed merger may be abandoned prior to the filing of the articles of merger by the Secretary of State of this State.

805 ILCS 5/11.39(b)

Articles of Merger must be executed by each constituent corporation and LLC. 805 ILCS 5/11.39(d). The articles of merger must be filed with the Illinois Secretary of State and the merger becomes effective for all purposes of the law of Illinois. *Id.*

Applying Section 11.50 conversion rules, it appears when a corporation has been converted, merged into or with an LLC, the surviving or new entity, whether it is a corporation or LLC, for all purposes is deemed to be the same entity as the converting entity. Pursuant to Section 11.50, the new corporation takes over the prior corporation's liabilities and benefits as if it were the prior corporation. There is not a 'transfer' between two separate entities; instead, one entity becomes another entity or is consolidated into a separate entity while the original entity ceases to exist. The assumption of the assets and liabilities to the surviving or new company take places [sic] as a matter of law and is not considered a transfer. Therefore, when a Section 11.39 merger takes place, the separate existence of the corporation and LLC shall cease and the new corporation or LLC will assume the prior corporation or LLC's liabilities and benefits as if it were the prior corporation or LLC.

As previously disclosed in the Private Ruling Request, COMPANY is an Illinois corporation. As such, the rules of Illinois will dictate the steps to accomplish the 'F'

reorganization/conversion from a C corporation to an LLC. Under Article 5.1 of the Illinois Limited Liability Company Act ('LLC Act'), a new limited liability company would be formed in Illinois. Then, an agreement and plan of merger would be drafted, pursuant to Article 11.39(b) of the Business Corporation Act. A written Board of Directors and Shareholders Consent together with a written Member and Manager Consent would be obtained from each respective entity. Next, the Illinois Articles of Merger (under the LLC Act) would be prepared, and the Plan of Merger would be attached. The entire document would then be filed with the State of Illinois, pursuant to Article 37.25 of the LLC Act. The result of this filing would be a dissolution of the corporation. As the LLC is a surviving entity, no post-merger documentation is filed with the State of Illinois in connection with the merger. This is the form that would be filed to reflect the merger of the C corporation into the LLC, with the LLC surviving. Because this is a type of reorganization contemplated in Section 11.50 described above, this would qualify as a merger, and a transfer of aircraft would not be subject to the Illinois aircraft use tax.

FAA Application

The Federal Aviation Administration ('FAA') does not provide written guidance on the treatment of 'F' reorganizations or other conversions for registration purposes. However, pursuant to numerous discussions with a representative at the FAA, we were assured that the FAA treats an 'F' reorganization as merely a name change and not as a re-registration. A name change only requires a certified true copy or Photostatic copy of the instrument approving the name change and, in this case, the FAA would also require one of the following:

- a. Copy of the document evidencing the organization of the above LLC (e.g., Certificate of Formation, Articles of Organization, or Operating Agreement). The submitted document must include the name of each of the members and clearly state how management of the LLC will be vested (i.e., by the members, by a manager, by officers, etc.). Information as to citizenship of each entity should also be provided, either in a cover letter or separate statement, OR,
- b. A written representation, in letter form, that the LLC qualifies as a citizen of the United States. This written representation must show signature and title of a knowledgeable party. Satisfactory evidence must include the following information and representations:
 1. The full name of the LLC
 2. The State in which the LLC is lawfully organized.
 3. The date the LLC was legally formed or organized.
 4. The Name of each of the members of the LLC and the type of entity of each member (i.e., individual, corporation, partnership, LLC). NOTE: If a partnership (either general or limited) is involved in the LLC as a member, manager, or officer, the statement should represent whether the partnership is comprised entirely of individuals (natural persons).

5. Whether the LLC is managed by its members or by manager(s) or officer(s).
6. The name of the manager(s) or officer(s), if applicable, and type of entity.
7. Whether the members, manager(s), or officer(s) may act independently. NOTE: A non – citizen member/manager cannot act independently in a management capacity.
8. A description as to how each legal entity within the LLC structure supports a determination that the LLC is a citizen of the United States as required by 48 U.S.C. Section 40102(a)(15)(c). NOTE: If a partnership is involved in the LLC, the statement should represent the citizenship of each partner.

When the registered owner's name is changed, an application for registration in the new name should be submitted for each aircraft owned, in addition to the name change document. There is a \$5 fee for each aircraft if a merger is involved.

In this case, COMPANY must file the application of registration, because it is changing from a corporation to an LLC. Most importantly, however, the FAA does not consider this a new registration of the aircraft because actual ownership of the aircraft does not change. Rather, it is treated as a name change. The 'registration' was required for in-house purposes only, as the FAA must have the appropriate 'operating papers' on file to correspond with the Aircraft Registration Certificate ('Certificate').

Once all the proper documentation is received, the FAA will issue a new Certificate with a new date. This is also what happens when a name change occurs. Contrastingly, if a conveyance, assumption, assignment or sale occurs, the FAA insists that the aircraft be re-registered and requires much more documentation, including evidence of new ownership and method/proof of conveyance. As stated above, the FAA treats the 'F' reorganization contemplated here as merely a name change with a minimal amount of documentation.

DEPARTMENT'S RESPONSE:

Under the Aircraft Use Tax Law, a tax is imposed on the privilege of using, in this State, any aircraft as defined in Section 3 of the Illinois Aeronautics Act acquired by gift, transfer, or purchase after June 30, 2003. This tax does not apply if the use of the aircraft is otherwise taxed under the Use Tax Act. 35 ILCS 157/10-15. The tax is imposed on the use of aircraft in this State regardless of whether the aircraft is actually registered under the Illinois Aeronautics Act. See 86 Ill. Adm. Code 152.101(a).

There is no exemption under the Aircraft Use Tax Law for aircraft transferred between related parties. Any transfer of an aircraft between separate legal entities, even related entities, that is not otherwise exempt under the Law, is subject to Aircraft Use Tax. This point is demonstrated in the example found in the Aircraft Use Tax regulations:

"3) A multi-state corporation leases a corporate aircraft from a related entity to transport its corporate executives on business travel throughout the United States. The aircraft is registered and hangered outside Illinois. As part of a corporate restructure, ownership

of the aircraft will be moved to a new entity. The transfer of both possession and ownership of the aircraft will occur outside Illinois after June 30, 2003 and the transfer of the aircraft to the new entity will qualify as a tax-free capital contribution under the Internal Revenue Code. After completion of this restructuring the aircraft will be based in Illinois. This transfer is a taxable event in Illinois and Aircraft Use Tax is incurred.” 86 Ill. Adm. Code 152.101(a)(3).

While a transfer of aircraft between related entities is taxable under the Aircraft Use Tax Law, if ownership of an aircraft changes as a result of a merger or consolidation, then no tax is due. That result is in accordance with the provisions of Section 11.50 of the Business Corporation Act of 1983 related to the merger or consolidation of corporations, which reads in part:

“(a) When such merger or consolidation has been effected:

* * *

(2) The separate existence of all corporation parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

* * *

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as of a public or a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.

* * * ” 805 ILCS 5/11.50.

When corporations are merged or consolidated, as a matter of law, the new corporation takes over the prior corporation’s liabilities and benefits as if it were the prior corporation. The assumption of the assets and liabilities by the surviving corporation or new company takes place as a matter of law. There is not a “transfer” between two separate legal entities, rather, one entity becomes another entity, or is consolidated into a separate entity, while the original entity ceases to exist. A transfer that is taxable under the Aircraft Use Tax does not occur in these instances.

This reasoning applies to a merger between a corporation and a limited liability company as well. Section 11.39 of the Business Corporation Act governs mergers between a corporation and a limited liability company. Subsection (f) of Section 11.39 states that “Section 11.50 of this Act shall, insofar as it is applicable, apply to mergers between domestic corporations and limited liability companies.” 805 ILCS 5/11.39(f).

As described in the letter request, the change in ownership of the aircraft from COMPANY to a limited liability company as a result of the merger of COMPANY into the limited liability company under the provisions of the Business Corporation Act is not subject to Aircraft Use Tax liability.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules, or the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department’s Taxpayer Information Division at (217) 782-3336.

Sincerely,

Terry D. Charlton
Chairman, Private Letter Ruling Committee

TDC/SJM:msk
Enc.

ⁱ This specific provision is drafted broadly and includes mergers and consolidations, which is a type of reorganization with no change in beneficial ownership. If the IDOR intended for such a provision to apply to the Aircraft Use Tax, it could have specifically provided for it.

ⁱⁱ The Florida Department of Revenue has addressed ‘F’ reorganizations. In TAA 00(A)-049 (Sept. 14, 2000), the Florida Department of Revenue determined that the conversion of a corporation to a limited liability company, and the boats, aircraft, and motor vehicles transferred as a result of the conversion, were exempt from sales and use tax because only the legal form of the entity changed and no transfer of ownership occurred. Fla. TAA 00(A)-049. (‘The mere conversion of a corporation to a LLC, where the controlling law states that the LLC shall for all purposes be deemed the same entity as the converting entity, is similar to a corporate reorganization...’).