ST 15-0020-PLR 12/22/15 AIRCRAFT USE TAX

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.)

December 22, 2015

Dear Xxxxx:

This letter is in response to your letter dated September 28, 2015, in which you request information. 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 ABC 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 ABC, Inc., 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:

> We hereby request issuance of a private letter ruling by the Illinois Department of Revenue (the "Department") to ABC, Inc. confirming that Illinois Aircraft Use Tax will not apply to the statutory merger described below. As required by 2 Ill. Admin. Code Section 1200.110, this letter ruling request contains a complete statement of facts and other information pertinent to this request and a statement of legal authority supporting this request.
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> ABC is not currently under audit by the Department regarding the issue addressed herein, nor has ABC previously submitted to the Department a request for, nor has the Department previously issued, a private letter ruling addressing the same or similar issue. We are not aware of any authority contrary to the views expressed in this request. We ask that ABC's name, address, and any business documents provided to the Department in connection with this request be kept confidential and deleted from the publicly disseminated version of the private letter ruling. A copy of the power of attorney authorizing our representation of ABC in this matter is enclosed.

STATEMENT OF FACTS

1. ABC is a privately held Illinois corporation organized under Illinois Business Corporation, Act 805 ILCS 5/2.05 et seq.

2. ABC's operating businesses consist of leading brands in residential and commercial door and gate openers, lighting & convenience products, and access control systems.

3. On Month 25, 20XX, ABC acquired a AIRCRAFT (serial number #) from COMPANY1. ABC paid Illinois sales tax equal to $ on its purchase of the AIRCRAFT from COMPANY1.

4. ABC currently plans, for corporate governance reasons, to reorganize itself as a Delaware corporation.

5. In accomplishing this reorganization, a nominee will form a new Delaware corporation ("COMPANY2"). COMPANY2 will form COMPANY3 as a wholly-owned limited liability company organized as such under the Delaware Limited Liability Company Act. Del. Code Ann. Tit. 6 § 18-201 et seq.

6. ABC will then merge with and into COMPANY3, which will be the survivor of this merger. The shareholders of ABC will receive all of the shares of COMPANY2. Under Del. Code Ann. Tit. 6, § 18-209(g) the assets and liabilities of ABC will become the assets and liabilities of Company 3, as the survivor of this merger, and ABC will thereafter cease to exist. COMPANY3 will then distribute all of its assets and liabilities, other than the AIRCRAFT and its membership interest in COMPANY4**,** to COMPANY2**.**

7. For federal and Illinois income tax purposes this merger will be treated as a tax-free F Reorganization under Internal Revenue Code Section 368(a)(1)(F), whereby ABC will change its place of organization from Illinois to Delaware.

LAW AND APPLICATION TO FACTS

The Illinois Aircraft Use Tax Law, 35 ILCS 157/ imposes a tax on the transfer of ownership, after June 30, 2003, of an aircraft between two separate legal entities by way of "gift, transfer or purchase." 35 ILCS 157/10-15. For this purpose the statute does not define "transfer," however it states that for property acquired by gift or transfer, the tax is imposed on the fair market value of the aircraft on the date the aircraft is acquired or the date the aircraft enters the state, whichever is later.

The Department's regulations do not address whether the merger of a corporation holding title to an aircraft into another legal entity will generate an Aircraft Use Tax liability. Nonetheless, the Department has consistently concluded that mergers *do not* generate an Aircraft Use Tax liability. In *Questions and answers for 2006/2007, Illinois Department of Revenue Practitioners' Meetings* published on the Department's website at http://tax.illinois.gov/TaxProfessionals/ForumsAndSeminars/2006-2007qna.pdf, the Department stated that while a transfer of aircraft ownership between two legal entities was taxable, a merger of a corporation holding title to aircraft into another legal entity was not:

> …the transfer of ownership between two separate legal entities triggers tax under the Aircraft Use Tax. However, the form of the transfer may affect taxability. As explained last year, if the transfer results from a transfer or merger under the provisions of Section 11.50 of the Business Corporation Act of 1983, 805 ILCS 5/11.50, no tax is due. Under these provisions, 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.

(emphasis added). The Department similarly ruled in Illinois PLR ST 10-0007 (10/13/2010) that the merger of a corporation into a limited liability [sic] did not generate an Aircraft Use Tax liability. In this letter ruling a Illinois corporation, which owned an aircraft, planned to engage in a so called "F reorganization" in which it would "change its entity type" from an Illinois corporation to an Illinois limited liability, taxed as a corporation for federal and state income tax purposes. As explained in the letter ruling "F reorganization" refers to federal income tax free reorganizations under Internal Revenue Code ("IRC") Section 368(a)(1)(F), which encompasses mere changes in corporate identity, form, or place of incorporation. 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. *Berghash v. Commissioner,* 43 T.C. 743, 752 (1965) 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. *Id.* The Department has ruled that Illinois adopts the federal income tax treatment of F reorganizations as part of Illinois income tax law's general adoption of federal income tax law. Illinois Private Ruling ("PLR") IT 88-0228 (8/11/1988).

The Department ruled in PLR ST 10-0007 that an Aircraft Use Tax would not be generated by this merger, relying once again on an analysis of this transaction under Illinois Business Corporation Act ("BCA") Section 11.50. Under this statutory provision, which governs the legal effect of a merger of an Illinois Corporation into an Illinois limited liability company, the Department observed that the surviving limited liability company assumes the assets and liabilities of the corporation merged into it. The Department concluded tax did not apply to such a merger because there was no taxable transfer on which to impose tax:

> [t]here 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.

The Department accordingly ruled that tax was not generated by this F reorganization.

Relevant facts and applicable law similarly require the conclusion that Aircraft Use Tax will not be generated as a result of ABC's merger into COMPANY 3. Similar to PLR ST 10-0007, ABC is merging into COMPANY 3 to change its state of incorporation, an F reorganization. Under Del. Code Ann. Tit. 6, § 18-209-(g), as under BCA Section 11.50, COMPANY3, as the survivor of the merger, assumes the assets and liabilities of ABC. As in PLR ST 10-0007 there is no taxable transfer here of assets between separate legal entities on which to impose tax.

REQUESTED RULING

Pursuant to 2 Ill. Admin. Code Section 1200.110, we hereby request a ruling that Illinois Aircraft Use Tax will not apply to the AIRCRAFT in connection with the merger of ABC into COMPANY 3. If you agree with the application of law to the facts set forth above, please issue a favorable ruling. If you have factual questions or disagree with this analysis, please contact me prior to issuing an adverse ruling. Thank you for your consideration of this request.

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 Month 30, 20XX. 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 Month 30, 20XX 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:
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> * * *

(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 an Illinois corporation and an Illinois 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).

Your letter states that ABC will merge with and into COMPANY3, which will be the survivor of the merger. It is our understanding that ABC will then cease to exist. Based on the descriptions in your letter, the change in ownership of the aircraft from ABC to a limited liability company as a result of the merger of ABC into the limited liability company would not be considered a purchase, gift, or transfer under the Illinois Business Corporation Act if the merger were to take place in Illinois. You indicate that this merger will take place under Delaware Law. Our review indicates that the provisions of the Delaware law regarding mergers are similar to those of Illinois' Business Corporation Act. See Del. Code Ann. Tit. 6 § 18-209(g). Therefore, this change in ownership of the aircraft does not subject the aircraft to Illinois 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 in 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.

Very truly yours,

Richard S. Wolters
Chairman, Private Letter Ruling Committee

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