



BARBERA & WATKINS, LLC
www.bwaerolaw.com

- FAA Leasing Advisory Circular: The FAA released a Truth in Leasing Advisory Circular (AC No. 91-37B) that replaces a 1978 Advisory Circular on the subject, addresses the truth-in-leasing requirements under Federal Aviation Regulation (FAR) 91.23, and also generally provides information for lessees and conditional buyers of U.S.-registered aircraft of all sizes regarding operational control. FAR 91.23 applies to conditional sales contracts and leases, including both dry leases (leases of aircraft without crew) and wet leases (leases of aircraft with at least one crewmember provided by lessor, such as time sharing agreements and interchange agreements) for large aircraft (aircraft with MCTOW of more than 12,500 lbs) operated under FAR Part 91.

The Advisory Circular indicates increased FAA scrutiny of the issue of operational control, which could include additional ramp checks. Owners and operators of large aircraft should review their agreements to ensure that the truth-in-leasing requirements under FAR 91.23 are met, including that the agreements contain truth-in-leasing language and that a copy of each agreement is carried on board the aircraft. General aircraft operators should review their operating structures and ensure that the passengers and crew (who may be questioned by the FAA during a ramp check) know who is in operational control of the aircraft for each flight. A copy of the Advisory Circular can be found at

https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/1028946.

- Like Kind Exchange Chief Counsel Advice Memoranda: The IRS released Chief Counsel Advice Memorandum (CCA) 20160517 that addresses the requirement that aircraft be held for productive use in trade or business or for investment in order to qualify for an Internal Revenue Code (IRC) Section 1031 (like kind) exchange. We note that this CCA addresses an aircraft owned by an individual for income tax purposes (or an entity disregarded to an individual) and does not discuss aircraft owned by a separate taxpayer. The CCA provides that the determination of whether an aircraft is held for productive use is based on the facts and suggests that an examiner consider: “(1) measurement of business/investment use versus personal use based on flight hours, not just flights; (2) percentages of business/investment use versus personal for flights and flight hours for the year before the year of the exchange; and (3) which flights and flight hours were determined to be repositioning flights and the nature of the flight following the repositioning flight.” Under the specific facts presented, the CCA provides that “Assuming the examiner determines that over 50 percent of the use of the aircraft was for personal purposes, the Chief Counsel agrees that the aircraft was not held for productive use in a trade or business or for investment.” However, the IRS includes a footnote that the sentence should not be read to imply that a taxpayer whose personal use of property is less than 50 percent has met the “held for” requirement, but there should be close scrutiny of any property the taxpayer uses for personal purposes.

This follows the release of CCA 201601011, which addresses the requirement that aircraft be held for productive use in trade or business or for investment in order to qualify for an Internal Revenue Code (IRC) Section 1031 (like kind) exchange. This CCA provides that an aircraft-owning partnership that leases an aircraft to a related partnership that is the primary business entity in a group of related entities for an amount that is insufficient to make an economic profit is still holding the aircraft for productive use in a trade or business.

Please note that chief counsel advice memoranda are not formally binding, but generally indicate the IRS’s position on the issues addressed.

3/7/2016