

Business Aircraft Transactions... Five of the Hottest Issues

- 1 The recession started December 2007 and ended June 2009. See: "Business Cycle Dating Committee," National Bureau of Economic Research (NBER), available at <http://www.nber.org/cycles/dec2008.html> [Accessed October 16, 2013]. NBER, Meeting Minutes (Sept. 20, 2010), available at <http://www.nber.org/cycles/sept2010.html> [Accessed Oct. 16, 2013]. The minutes stated in part: "[T]he committee determined that a trough in business activity occurred in the U.S. economy in June 2009. The trough marks the end of the recession that began in December 2007."
- 2 David G. Mayer, "From Recession to Recovery: Aircraft Transactions Build Momentum Despite Industry Challenges," Equipment Leasing & Finance Foundation (2013) at 21, 24 available at http://www.leasefoundation.org/positive/index.cfm?fuseaction=display_article&artID=20959 [Accessed October 16, 2013] (study). Most aircraft have not recovered value decline or have further deteriorated in value post-recession. Before the recession, residual/collateral value was the darling of deal-doers, propelling deal volume and excessively high aircraft value assumptions. [The study research consists of original surveys of customers and financiers distributed to, and collected by, the National Business Aviation Association (NBAA) and the Equipment Leasing and Finance Association, from their respective members. In addition, the study includes more than 23 hours of confidential interviews with at least 26 industry experts and leaders and 271 authoritative endnotes from experts and secondary sources.]
- 3 Study at 24.
- 4 According to the study: "[I]n 2013 through 2016, even if residual/collateral values stabilize ... [p]rudent financiers will generally follow a long-term trend of applying strict approval criteria to transactions, adjusted to compete in prevailing market conditions within established company policy guidelines."
- 5 A state charges use tax for the storage, use or consumption of the aircraft in its home state when the taxpayer purchases the aircraft in another state. See: NBAA State Aviation Tax Report, available at <http://www.nbaa.org/admin/taxes/state/> [Accessed October 15, 2013].
- 6 See: 14 C.F.R. Parts 91, 119 and 135 at the FAA website, http://www.faa.gov/regulations_policies/faa_regulations/ with explanations [Accessed October 15, 2013].
- 7 Aircraft purchasers reason, in part, that the SPE will (1) protect them from potential regulatory or civil liability in an accident or incident involving operations of the aircraft, and (2) facilitate operating cost reimbursements and funding of the SPE.
- 8 Marketing is often called "holding out" in reference to providing rides to the public. "Certain cost reimbursable operations permitted by FAA under Part 91, Subpart F, will require a United States Department of Transportation (DOT) permit under Part 375. Other operations may be prohibited by DOT because of the statutory prohibition against cabotage (i.e., the carriage by a non-citizen operator of passengers or property for compensation between two points in a country other than its own)." See: *Managing and Operating Your Aircraft*, at Slide 24, Business Aircraft Finance, Registration & Legal Conference, Bonita Springs, FL, presentation on Thursday, February 7, 2013, by James M. Meyer, Harper Meyer, and Eileen M. Gleimer, Crowell & Moring. See also: 14 C.F.R. §375 - Navigation of Foreign Civil Aircraft Within The United States, available at <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=536898ef1677c05939ae6b0619493b9a&rgn=div5&view=text&node=14:4.0.1.4.60&idno=14> [Accessed September 26, 2013].
- 9 Financiers mostly, if not totally, prohibit commercial operations such as charters (any operations under FARs Part 135) due in large part to downward pressure on residual/collateral value. Under 14 C.F.R. §1.1 "commercial operator means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this title. Where it is doubtful that an operation is for "compensation or hire," the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit." See: <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=c6c6ef6dd15619485de5b71474637aa8&rgn=div8&view=text&node=14:1.0.1.1.0.1.1&idno=14> [Accessed September 26, 2013].
- 10 Kevin Y. Jung, FAA Interpretation (Letter), dated March 22, 1996, the text of which is available at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/1996/K.Jung.pdf [Accessed September 26, 2013]. This letter emphasizes that 14 C.F.R. 91.501(b)(5) applies to operators, not owners.
- 11 See: 18014 C.F.R. §13, Investigative and Enforcement Procedures, available at <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=58760d9e29a4377c1d62790d67fbb196&ty=HTML&h=L&r=SECTION&n=49y9.1.3.3.5.10.1> [Accessed November 1, 2013].
- 12 In May 2013, the Internal Revenue Service purportedly suspended the assessment of FET on owner flights on aircraft managed by aircraft management companies. See: John B. Hoover, *IRS Suspends Federal Transportation Excise Tax Assessments for Owner Flights on Managed Aircraft*, Bloomberg/BNA Tax and Accounting Center (June 4, 2013), available at <http://www.bna.com/irs-suspends-federal-n17179874335/> [Accessed September 26, 2013]. Also, see: NBAA, *Advocacy Achieves Breakthrough on Federal Excise Tax Issue*, available at: <http://www.nbaa.org/admin/taxes/federal/fet/management-fees/> [Accessed September 26, 2013]. According to the NBAA, "[o]n May 16, 2013, the IRS informally announced that it will suspend the assessment of Federal Transportation Excise Tax on owner flights on aircraft managed by aircraft management companies."
- 13 FAA Interpretation 1993-17, 4 Fed. Av. Dec. I-42 (August 2, 1993). The IRS standards differ from, and are not dependent on, the FAA regulations on "operational control" of any aircraft. Yet for both the FAA and IRS, it is a small divide that shifts operations from Part 91 to Part 135 and related state and federal taxes.
- 14 Under 49 U.S.C. §40102(a)(15), a "citizen of the United States" means "(A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) 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% of the voting interest is owned or controlled by persons that are citizens of the United States." Definition available at <http://www.law.cornell.edu/uscode/text/49/40102> and <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=91979cc3c92c6b6a0203b970c220c32e&rgn=div5&view=text&node=14:1.0.1.3.23&idno=14#14:1.0.1.3.23.1.363.2> [Accessed Oct. 17, 2013].
- 15 The U.S. aircraft industry has used NCTs for more than 35 years, even before its codification in 1980 by an amendment to the Federal Aviation Regulations (FARs). Since 1980, users of NCTs have essentially used the original trust structure. On February 9, 2012, 144 the FAA issued a proposed "policy clarification" of NCTs and on September 16, 2013 the final policy clarification became effective. See: *Non-Citizen Trusts*, NBAA, available at <http://www.nbaa.org/admin/registration/non-citizen-trusts/> [Accessed Oct. 17, 2013].
- 16 Notice of Policy Clarification for the Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries, 78 Fed. Reg. 36,412 (June 18, 2013), available at http://www.faa.gov/about/office_org/headquarters_offices/agc/special/AircraftRegistration/ and at <http://www.gpo.gov/fdsys/pkg/FR-2013-06-18/pdf/2013-14434.pdf> [each accessed Oct. 16, 2013].
- 17 Study at 21, 24.
- 18 Study at 72-73.
- 19 One significant concern relates to "piercing the corporate veil"—cutting through the corporation structure to reach its owners personally. The claimants must establish that the SPE and its controlling stakeholders operate as a "single economic entity" where the use of the shield creates an injustice or denies fairness to the claimant. See: *Tradewinds Airlines, Inc., et. al. v. Soros, et. al.*, Nos. 08 Civ. 5901 (FK), 10 Civ. 8175 (JFK), 2012 WL 983575 (S.D.N.Y. Mar. 22, 2012), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2008cv05901/328658/96/0.pdf?1332513936> [Accessed February 4, 2013]. In *Tradewinds*, the court refused to dismiss a claim against owners individually as the company that operated aircraft where the company and its owners may have acted as "alter-egos." SPE owners should not, therefore, assume their SPEs will shield them from personal liability.