

Beneficial Interest Sale vs Traditional Transfer of Title, Elements to Consider Under Mexican Law.

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COELUM

Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.



Beneficial Interest Sale vs Traditional Transfer of Title, Elements to Consider Under Mexican Law.

by Viridiana Barquín.

It has become a common practice within the industry, the scheme of the Sale of the Beneficial Interest of the company that, under an aircraft lease agreement (the “Lease”), has been the Lessor (either the special purpose company or the trust constituted for that purpose; or, a banking association acting as owner trustee thereunder, as the case may be.

From a tax exposure standpoint, the transfer of the Beneficial Interest on the Lessor, would not, in principle, involve any tax implications or VAT liability in respect thereof; however, it is important to make sure that such transaction will not be exposed to Mexican VAT. First of all, considering that it is the shareholder’s structure which are being sold and not of an specific asset individually, the transaction will not be considered to have occurred in Mexico for which no VAT would be caused as result of the transfer, to the extent that, the Beneficial Interest Sale Agreement (“BISA”) includes: (i) the acknowledgment of the parties under the BISA (regardless of the acknowledgment by the lessee, which is also important), that the Aircraft was delivered to the lessee to Lessee when the Lease became effective, pursuant to the specific Delivery Date as defined in the Lease; (ii) that such right of possession has been held by lessee throughout the term of the Lease and will not be interrupted; and (iii) that no physical delivery of the aircraft will be conducted on the date on which the Beneficial Interest Sale will be effective (the “Effective Time”). In the event that the BISA contains provisions that could lead to understand that, besides of the transfer of the Beneficial Interest on the Lessor, any and all interest in the Aircraft and the rights under the Lease are subject to transfer as well; an interpretation could be made that the Aircraft is also being sold, in addition to the Beneficial Interest, and the Lease is being transferred also. From a Mexican tax standpoint, this would not raise any tax implications either, even if the Aircraft is located in Mexico on the Effective Time, given that, as there has been directed in previous deliveries of Coelum¹, no VAT would be triggered regardless of whether the Aircraft is physically located, the transfer of title thereof must be conducted while the temporary importation regime is in effect.

Under a traditional transfer of title of an Aircraft, the principal issues that arise in regards to applicable taxes are principally: (i) the tax residency of the parties involved; (ii) the location of the asset at the time of the transfer; and (iii) in respect to an aircraft that has been imported in the United Mexican States under a temporary importation regime.

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In accordance with Article 1 paragraph (I) of the VAT Law², VAT is payable only in respect to transfers of title that have occurred within the Mexican territory. When the buyer is, for example, a foreign tax resident and the seller a tax resident of Mexico, VAT also at a 16% rate would be applicable if the aircraft is located in the United

1.- See “Tax Consequences of the Transfer of Ownership of Aircraft” by Viridiana Barquin. Coelum December 2014. Year 09, No. 08.

2.- “Ley del Impuesto al Valor Agregado”, amended and updated as published at the Official Journal of the Federation (“Diario Oficial de la Federación”), on December 11, 2013. <http://www.diputados.gob.mx/LeyesBiblio/pdf/77.pdf>

Mexican States at the time of the transfer or, when the aircraft shall bear Mexican registration marks, irrespectively of whether it shall be located outside of Mexican territory at the time when the transfer takes place.

On the other hand, when the transfer of title is conducted between two foreign tax residents, in accordance with Article 9 Paragraph (IX) of the VAT Law, VAT would not be payable, bearing in mind; it is not considered that the transfer of title occurred within Mexican territory. Since 2014, changes in the VAT Law, specifically under paragraph IX of the referred Article 9, now require that in order for the premise above to apply, at the Effective Time, the asset involved should also be subject of a temporary importation regime or of a certain importation program in accordance with applicable law.

Therefore, whether the transfer of the Aircraft would be made as a traditional sale of the asset, or through the BISA, for Mexican Law purposes, there could be irrelevant whether the BISA is interpreted to be an actual sale of the Aircraft or not, provided that subject to the considerations that has been explained above, there will not be any tax concerns, and would only be important to consider, however, if this could be relevant for other purposes in other jurisdictions.

While there are not tax implications in respect to the transfer of title of an aircraft, as an asset individually, or, by means of a BISA; we should not forget the steps and actions to be taken for purposes of registration of the interests constituted thereunder. It is common for the parties involved under a BISA where the name of the Lessor will not change, to consider that for such reason, no filings and registries are necessary, notwithstanding; in most of the cases, under the terms and provisions of the BISA, besides of the transfer of the Beneficial Interest on the Lessor, the interests in the Aircraft and the rights under the Lease are also assigned, and thus, the BISA should have to be filed for registry, in order to have such assignment of the rights under the Lease and interests over the Aircraft duly registered. Furthermore, if it is intended that such assignment be documented through a Lease Assignment or a Lease Amendment, is such document, as the case may be, which in fact should be filed for registration, regardless if the Aircraft is registered at the FAA, or any other foreign registry, or, if holds Mexican Registration Marks, provided that, any amendment or assignment to the Lease of an aircraft should be registered. This registration of the relevant Lease Assignment or a Lease Amendment, should be noted, must also be conducted, in case of an actual sale of the Aircraft as an individual asset. This is important in terms of completeness of the lease that is on file at the DGAC, and notwithstanding it is an aircraft of foreign registry, considering that, in such particular case, is the lease -and consequently any subsequent assignments and/or amendments thereto- which is required to be filed only.

All this approach concerning taxes exposure is always subject to interpretation, so there might exist different opinions in respect thereto, it is the standpoint of the author that, even though there is no income, transfer, VAT, turnover, stamp, registration or similar documentary taxes or duties payable in respect of the execution or delivery of the BISA and the relevant documents, as a condition to the legality or validity thereof, and while it may seem that a BISA does not generate major consequences that should be filed and therefore, there would not be necessary that the documents that such transaction involves be registered; it is very important a comprehensive analysis of the terms and conditions of each of the relevant documents and agreements, in order to verify and confirm the constituted or assigned interest that must be recorded, to the extent that in most of the cases, it could potentially change the identity of one of the parties to the Lease and therefore amend the lease accordingly. In respect to foreign registered aircraft, Mexican law requires the filing of the lease only -and consequently- of any amendments or assignments thereof that could have an actual or potential impact in the integrity of the lease.

Airbus rolls out A320neo.

The aircraft, MSN6101, which carries the test registration F-WNEO, is the first assembled example of the re-engined variant. Airbus has been expecting to fly the aircraft for the first time in September. It will deliver the A320neo in the fourth quarter of 2015. The aircraft has a reinforced wing, now the build standard on all A320s, and features the fuel-saving sharklet wing-tip. Airbus has secured over 2,700 firm orders for the re-engined jet which also has the CFM International Leap-1A as a powerplant option. www.flightglobal.com February 19, 2016.

This is the Industry's Newest Airplane: Frigate Ecojet.

We'd be willing to bet that nearly every single commercial flight you've ever been on (if not all of them) was aboard either an Airbus or Boeing plane, but a savvy Russian upstart, Frigate Ecojet, wants in. So what will Frigate Ecojet provide that Airbus and Boeing aren't? Basically, commercial airplane can be split into 2 groups: wide body and narrow body planes. Frigate Ecojet's new design can swiftly fly around 350 passengers over 4,000-nautical miles, and features a unique curved fuselage that brings the standard look of an airplane to the future, while keeping weight far below aircrafts of similar capacities. Balls in your court, Airbus and Boeing. www.frigate-ecojet.ru February 19, 2016.

GE Assembles First 777X Engine.

General Electric is gearing up for test runs of the first GE9X turbofan as components of the initial engine come together at its Evendale, Ohio, facility. The engine is in development for Boeing's 777X series and will be the largest turbofan ever produced in terms of physical dimensions. www.aviationweek.com February 23, 2016.

Airbus Group Reports Strong Results for 2015.

Airbus Group reported Wednesday that 2015 revenues increased by 6 percent, to €60.5 billion (\$66 billion), of which €11.5 billion (\$12.6 billion) came from the defense business. The group posted a net income of €2.7 billion (\$3 billion) and an order intake of €1.006 trillion (\$1.1 trillion), up 17 percent, of which €38.4 billion (\$42.2 billion) involved defense (down 9 percent). Revenues for Airbus commercial aircraft activities increased by 8 percent, to €45.9 billion (\$50.5 billion), and earnings before interest and tax (EBIT) and one-offs increased 10 percent, to €2.8 billion (\$3.1 billion). Order intake totaled just over €139 billion (\$153 billion), down 7 percent, though year-end backlog increased by 19 percent, to €952.5 billion (\$1.047 trillion). www.ainonline.com February 24, 2016.

Plane crashed in Nepal with eleven passengers.

On November 26 a plane crashed in Nepal, 11 people came aboard, only killed the two-crew members who were the pilot and copilot. The incident occurred as the plane landed. The plane arrived from Nelpanguj to the town of Jumla, when the control toward reported a technical problem which had to go to the town of Chilkhaya where the accident occurred. The plane crashed between two hills in the Himalayan mountains. This is the second plane crash reported this week in the community of Nepal. Currently the European Union banned Nepalese airlines landing at European airports. www.eluniversal.com.mx February 29, 2016.

ATR72-600 completely electric.

Because the program established in Europe called Clean Sky, the company Avions of Regional Transport (ATR) has set ATR72-600 flight to prototype to be modified to electric. This is being done to test a new management system of electric power; also, it has an electric air conditioning system. Clean Sky is a program created by the European Union to reduce pollution caused by aircraft. This aircraft will help because you will not need fuel and therefore not contaminated. www.fly-news.es February 29, 2016.

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