

## Aviation Group Backs Bombardier In \$32M Tax Appeal

By Kurt Orzeck

*Law360, Los Angeles (September 16, 2016, 3:08 PM EDT)* -- The National Business Aviation Association backed Bombardier Aerospace Corp. on Wednesday in the company's efforts to persuade the Fifth Circuit to overturn a panel's decision that it was on the hook for \$32 million in aviation excise taxes.

The NBAA, which advocates for companies that rely on general aviation aircraft, argued in an amicus brief supporting Bombardier's bid for an en banc rehearing that the Internal Revenue Service broke its own rules of consistency and clarity by requiring Bombardier to collect aviation excise tax it allegedly didn't require similarly situated companies to collect.

"The IRS has a duty to treat similarly situated taxpayers consistently," the brief said. "Where the IRS fails to act in accordance with that duty, the imposition of tax must be rejected. ... It is unfair to force BAC to collect millions of dollars from its past customers (or pay such amount itself in the event it is unable to collect from its customers), while competitors in the same industry were not required to do so. This may well be a disadvantage for all of BAC's operations, including its sales of newly manufactured aircraft."

The association said the court never acknowledged recent IRS decisions that claimants aren't required to have consent from parties from whom taxes are withheld before filing a refund claim.

"The panel's holding in this case will disrupt the fractional aircraft ownership management industry, as it encourages disparate treatment among its members and allows the Internal Revenue Service to require collection of federal excise tax for years in which there was no authoritative guidance with respect to such requirement," the amicus brief said. "The panel's decision results in significant business challenges and an uneven playing field for the NBAA's members."

Bombardier claims the IRS had given conflicting guidance on whether companies providing aircraft management owe commercial aviation taxes.

The IRS' flip-flopping on whether management fees paid by aircraft owners to companies like Bombardier are subject to the federal excise tax violates the agency's "duty of clarity," the company wrote earlier this month in a petition for en banc review of a three-judge panel's earlier decision.

The NBAA argued Wednesday that because "the IRS violated its duties of consistency and clarity, the panel erred in affirming the district court's holding."

NBAA said managers of aircraft ownership companies haven't collected federal transportation excise

taxes on monthly management fees for decades. The group said the Fifth Circuit wrongly affirmed the district court's decision because the IRS has repeatedly said monthly management fees aren't subject to federal law.

The American Payroll Association — a nonprofit group advocating for payroll issues — submitted its own amicus brief Wednesday supporting Bombardier, arguing the courts didn't acknowledge IRS decisions saying consents aren't needed before filing a refund claim.

APA's brief also noted the IRS has added a 25 percent penalty to the amount at issue, which undermines the longstanding procedure by which a tax collector, in this case Bombardier, "may pay a portion of a tax in order to establish standing to bring a refund suit. By allowing a penalty on the amount in controversy, the effect will be to deter use of the 'divisible tax' procedure."

The APA said that the Fifth Circuit didn't address the penalty and that it should be considered in an en banc review.

A district judge had held that the IRS could collect \$14.5 million in unpaid taxes on Bombardier's monthly aircraft management fees and that the company was not entitled to a refund of \$17.6 million in taxes paid on variable rate fees and fuel fees combined.

In July, a Fifth Circuit panel affirmed that decision. The ruling rejected the company's arguments that since it's not in the commercial aviation business, it should not be subject to Section 4261 excise tax on any fees it collects from participants of its Flexjet program under the "commercial aviation" test.

Under the Flexjet program, participants purchase a fractional interest in a plane and then can lease the aircraft on demand while Bombardier provides services including maintenance and crew.

Counsel for the parties could not be reached Thursday for comment.

NBAA is represented by Stephen D. Gardner, John B. Hoover and Adriana Lofaro Wirtz of Cooley LLP.

American Payroll Association is represented by Steven P. Johnson of Morgan Lewis & Bockius LLP and its own attorney Michael P. O'Toole.

Bombardier is represented by Nicholas D. Mosser of Mosser Law PLLC, Robert J. Stientjes of Stientjes & Tolu LLC and Anthony Scott Gasaway.

The U.S. is represented by Julie C. Avetta and Robert William Metzler of the U.S. Department of Justice, Tax Division.

The case is Bombardier Aerospace Corp. v. U.S., case number 15-10468, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Jimmy Hoover and Suevon Lee. Editing by Patricia K. Cole.