No. 16-1010

IN THE
Supreme Court of the United States

BOMBARDIER AEROSPACE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL AIR TRANSPORTATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LARS H. LIEBELER
Counsel of Record
LARS LIEBELER, P.C.
1828 L Street, N.W.
Suite 705
Washington, DC 20036
(202) 587-4747
LLiebeler@LHL-LawFirm.com

TIMOTHY OBITTS
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
NATIONAL AIR TRANSPORTATION ASSOCIATION
818 Connecticut Avenue, N.W.
Suite 900
Washington, DC 20006
(202) 774-7504
TObitts@nata.aero

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 11

REASON I FOR GRANTING REVIEW 11

I. The IRS's Inconsistent Application of the Federal "Ticket Tax" Under 26 U.S.C. § 4261(a) Among Various Management Companies Performing Similar Functions in the Aircraft Industry Harms Competitive Conditions in the Market and Violates the Duty of Consistency 11

A. The IRS Has Treated Aircraft Management Companies Performing the Same Functions in a Disparate Manner under 26 U.S.C. § 4261(a) 12

B. There is No Rational Basis to Support Differential Treatment Between Different Companies 15

TABLE OF CONTENTS (cont.)

C. Under the Commerce and Equal Protection Clauses, The Supreme Court Has Struck Down Discriminatory Tax Rules Burdensome to Interstate Commerce 17

REASON II FOR GRANTING REVIEW..........20

II. The IRS's Retroactive Imposition of Tax Liability Under 26 U.S.C. § 4261(a) May Subject a Large Number of Aircraft Management Companies to Back Taxes and Penalties They Cannot Recoup From Their Customers and Violates the Duty of Clarity 20

CONCLUSION..23

TABLE OF AUTHORITIES

CASES:

Camps Newfound/Owatonna v. Harrison,
520 U.S. 564 (U.S. 1997) 17

Central Illinois Public Serv. Co. v. United States,
435 U.S. 21 (U.S. 1978) 20

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (U.S. 1977) 18

Executive Jet Aviation, Inc. v. United States,
125 F.3d 1463 (Fed. Cir. 1997) 13

Hughes v. Oklahoma,
441 U.S. 322 (U.S. 1979) 18

United States v. Kaiser,
363 U.S. 299 (1960) 11

NetJets Large Aircraft, Inc. v. United States,
80 F. Supp.3d 743 (S.D. Ohio 2015) ...*passim*

STATUTES & RULES:

26 U.S.C. § 4261 .... *passim*
26 U.S.C. § 4261(a).................................... *passim*
26 U.S.C. § 4261(d).. 4
26 U.S.C. § 4261(j)... 7
Supreme Court Rule 37.2(a) 1
Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES (cont.)

OTHER MATERIALS:

U.S. CONST. art. I, § 8, cl. 3 17

U.S. CONST. amend. XIV, § 1 17

Revenue Ruling 58-215, 1958-1 C.B. 439.......... 12

IRS Technical Advice Memorandum 93-14-002, 1992 WL 465951 (Dec. 22, 1992) 12

IRS Technical Advice Memorandum 143115-03, 2004 WL 1369063 (Feb. 17, 2004) 13

Charles Adams, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 402 (Madison Books 2nd ed. 2001) 11

Adam Smith, WEALTH OF NATIONS 499 (Prometheus Books 1991) (1776)....................... 20

INTEREST OF AMICUS CURIAE[1]

The National Air Transportation Association (NATA) is a general aviation trade association serving the business, safety, and regulatory needs of its members. NATA was founded in 1940 and currently has nearly 2,300 member businesses in all 50 states. NATA member companies provide a broad range of products and services to the aviation community including: aircraft sales and acquisitions, fuel, aircraft ground support, passenger and crew services, aircraft parking and storage, on-demand air charter, aircraft rental, flight training, aircraft maintenance and overhaul facilities, parts sales, and business aircraft and fractional ownership fleet management.

NATA members range in size from large companies with an international presence to smaller, single-location operators that depend exclusively on general aviation and aviation support for their livelihood. Smaller companies account for a significant proportion of NATA's membership. Most NATA members have fewer than 40 employees and are designated as small businesses by the U.S. Small Business Administration.

---

[1] Pursuant to Rule 37.2(a), *amicus curiae* provided all counsel of record with timely notice of its intent to file this brief and all parties consented in writing. Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party to this case authored in whole or part any portion of this brief. No counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

NATA provides safety training and other programs to further the success of general aviation service businesses. It also represents the interests of the general aviation business community before the Congress and federal, state, and local government agencies, the media, and the public.

NATA advocates for and promotes economic policy, including tax policy, that enhances and sustains economic growth and competitive conditions in the general aviation industry.

Beginning in 2012, NATA became actively involved on behalf of its members advocating before the Internal Revenue Service, the United States Treasury, and with the U.S. Congress regarding the proper application of the federal air transportation excise tax set forth in 26 U.S.C. § 4261(a). NATA has advocated for strict adherence to the plain language of the statute which applies only to actual "transportation of any person" and therefore does not apply to management fees that are paid without regard to whether actual transportation of persons occurs.

Petitioner, Bombardier Aerospace Corporation, is a member of NATA as are the other fractional ownership program managers including NetJets, FlexJet, Flight Options, Executive AirShare, The Company Jet, Sikorsky Shares and PlaneSense. In addition, there are hundreds of smaller aircraft management companies, many of which are NATA members, that provide service to single or multiple aircraft owners.

SUMMARY OF THE ARGUMENT

This case arises as a result of the IRS's inconsistent application of the federal air transportation excise tax among the industry's many private aircraft management companies. Because of the IRS's disparate application of the tax, some companies have been burdened with the 7.5% commercial excise tax on aircraft management services while other management companies providing the same services and operating in direct competition are not required to pay the tax.

Lower courts assessing taxpayer challenges to the IRS's imposition of the excise tax have come to conflicting results. Review of this issue by this Court is necessary to provide certainty to thousands of aviation businesses and customers, restore competitive conditions in the marketplace, and remedy the grave economic consequences of the IRS's inconsistent and arbitrary application of the excise tax.

Many private aircraft owners hire management companies to handle a wide variety of tasks related to the maintenance and operation of their aircraft. Management companies normally charge aircraft owners a monthly management fee for these services. Monthly Management Fees (MMFs) are paid to assist aircraft owners with administrative and support services, such as scheduling, flight planning, and weather forecasting; obtaining insurance; maintenance, storage/hangaring of aircraft; hiring, training, and provision of pilots and crew; accounting; establishing and complying with safety standards; or

such other services necessary to support flights operated by an aircraft owner. The MMF is paid regardless of whether a plane is flown in a given month.

Management companies performing services for aircraft owners are currently subject to an irreconcilable conflict regarding application of the federal excise tax ("ticket tax") set forth in 26 U.S.C. § 4261(a). The ticket tax is "imposed on the amount paid for taxable transportation of any person . . . ." *Id.* The tax is "paid by the person making the payment subject to the tax" but the tax is collected and remitted to the IRS by the entity receiving the payment, in this case the management company. 26 U.S.C. § 4261(d). The plain statutory language makes clear that § 4261 is only triggered by payments made for the movement of persons via aircraft and not payments for aircraft management or non-moving support activities.

Although the statutory language in § 4261(a), applying the excise tax to "transportation of any person," has not changed in over 50 years, the IRS's position with respect to whether the ticket tax applies to fixed cost management fees has fluctuated wildly, particularly since 2004. The IRS's application of § 4261 is now hopelessly muddled and has been applied arbitrarily and inconsistently to different management companies in the industry; and as Bombardier has demonstrated in its Petition for Certiorari, the IRS has inconsistently applied the tax to Bombardier itself in different time periods.

As it stands now, the legal landscape on this issue is a jumble:

- Bombardier applied for and received over one million dollars in IRS refunds for ticket taxes paid on MMF payments for the period 1995-97. During the years 1998-2005, Bombardier did not collect or pay the ticket tax. The IRS confirmed the correctness of this conduct at the conclusion of its audit of those years in 2007. But, the IRS then required Bombardier to pay the ticket tax on MMF charges paid by aircraft owners in 2006-07. The IRS imposed this tax despite the fact that Bombardier did not collect taxes from its customers during that time period, acting in reliance in part on the refund paid by the IRS for the same exact tax in 1995-97, and the "no further action" letter issued after the audit for 1998-2005. Bombardier is now subject to additional tax payments, interest, and penalties pending the final outcome of this case. *See* Petition for Certiorari at 8-10.

- NetJets Aviation, Inc., which holds the largest share of the fractional ownership aircraft management market, has not been required to collect or pay the ticket tax on MMF charges and is not subject to back audit on that issue on the basis of the IRS's interpretation of the statute in 1993, a 1997 Federal Circuit Court of Appeals opinion and a 2015 decision from the U.S. District Court in Ohio.

- In November 2012, during litigation in the U.S. District Court in New Hampshire, the U.S. Department of Justice, Tax Division, conceded that another aircraft management firm, Alpha Flying, Inc. (d/b/a PlaneSense, Inc.), was not required to pay ticket tax on its MMF charges to customers for the period June 2004 through June 2006; this time period overlaps with the time period in this case in which the IRS claims Bombardier is responsible for tax on MMF charges. Shortly after the DOJ and PlaneSense agreed to dismiss the New Hampshire case, the IRS also agreed that the company was not required to pay excise tax on management fees during the period September 2006 through March 2012.

- In January 2015, the IRS denied a refund request by USAirports Air Charters, Inc. seeking a refund of excise taxes paid on MMF charges for the years 2009-2011. USAirports, a company based in Rochester, New York, provides aircraft management services to aircraft owners, but is not a fractional ownership program manager. USAirports filed a refund action in the Court of Federal Claims in January 2017 and that case is currently pending.

Management companies that have relied upon prior indications and authorities that the ticket tax does not apply (including Bombardier), have not collected the tax from their owner clients and could now be subject to massive unexpected back tax

liability if the Fifth Circuit's opinion below stands. Other management companies based outside the Fifth Circuit may choose to ignore the ruling below, rely on Federal Circuit precedent along with IRS concessions in other cases, and continue to conduct business in competition with companies based in the Fifth Circuit, without collecting and paying any ticket tax on the management fees they charge aircraft owners.

In 2012, Congress amended § 4261 to exclude "fractional" interest owners. Fractional owners co-own aircraft on a percentage basis, and jointly retain a management company to manage the aircraft. Bombardier provided management services to fractional owners during the tax years at issue in this case. After the 2012 amendment, fractional owners now pay an additional fuel surcharge in lieu of the transportation excise tax, but the statute contains a sunset provision that expires in September 2017. *See* 26 U.S.C. § 4261(j).

The 2012 amendment to § 4261, however, does not excuse non-fractional owners from the reach of § 4261. Those owners constitute a significant part of the aircraft market and there are over 1,000 management companies (such as USAirports), many of which are NATA members, that support these owners by providing management services. Many of these companies are small businesses without sufficient capital or reserves to survive a multi-year back tax assessment with penalties under § 4261, including the associated legal defense costs resulting from such an assessment.

The end result is economic and tax chaos in the aircraft management marketplace. The uncertainty regarding the uneven application of the ticket tax creates economic inefficiency and deters economic activity in two ways:

(1) existing participants and potential entrants into the aircraft management market cannot accurately assess whether the ticket tax will be applied to their activities. They take considerable financial risk if they do not collect the ticket tax on MMF charges, and they place themselves at a severe competitive disadvantage if they do collect the tax from their customers; and

(2) individuals and companies evaluating whether to purchase aircraft cannot accurately assess the costs and benefits of doing so because application of the ticket tax is so arbitrary and unpredictable. This tax application uncertainty has a chilling effect upon private aircraft sales activity. Additionally, an aircraft management company's ability to obtain credit necessary to operate its small business is in jeopardy by the IRS's potential imposition of liens for the failure to collect back excise taxes

In addition to the across-the-board economic turbulence caused by the inconsistent IRS application of § 4261, there is a separate reason the Petition for Certiorari should be granted. Because aircraft management companies are considered, for the purposes of collecting taxes, agents of the government, they are entitled to clear agency

guidance from the IRS, and this they have not received.

As set forth in the record in this case, and as experienced by hundreds of NATA members, aircraft management businesses are currently vulnerable to back tax assessments based on whatever collection scheme the agency chooses to use at any given moment. This is particularly burdensome to small businesses who have no ability to recoup back excise assessments from customers who paid their management fees, without the tax, in good faith long ago. The IRS's vacillating conduct with respect to § 4261 violates its obligation to make tax collection responsibilities clear, precise, and non-speculative to all those in the aircraft industry.

In the current Petition for Certiorari filed by Bombardier Aerospace, the time periods 2006 and 2007 are directly at issue. But, the results of this case may have a significant effect on potential liability (backward and forward) for over one thousand other management companies in other years. Absent review by this Court, the IRS may impose back excise taxes and cite the Fifth Circuit's decision as authority; management companies will continue to rely on the Federal Circuit decision, the 2015 District Court opinion in Ohio, and the plain language of the statute itself to fight application of the tax. But, absent Supreme Court action, the battle will surely continue on many fronts.

A grant of Bombardier's Petition and an opinion by this Court will eliminate the irreconcilable positions within the various courts, and resolve the multiple

conflicting positions regarding the applicability of § 4261 taken by the IRS itself.

The Court should grant Bombardier Aerospace's Petition for Certiorari, resolve the issues related to the inconsistent interpretations of § 4261 by ruling that the ticket tax in 26 U.S.C. §4261(a) does not apply to MMFs, reaffirm the duty of consistent treatment among taxpayers to insure a level and competitive marketplace, and reaffirm the duty of the IRS to provide clarity to deputy tax collectors such as Bombardier.

The Court should grant Bombardier's Petition for Certiorari and reverse the Fifth Circuit's decision below.

ARGUMENT

REASON I FOR GRANTING REVIEW

"People want just taxes more than they want lower taxes." -Will Rogers[2]

I. The IRS's Inconsistent Application of the Federal "Ticket Tax" Under 26 U.S.C. § 4261(a) Among Various Management Companies Performing Similar Functions in the Aircraft Industry Harms Competitive Conditions in the Market and Violates the Duty of Consistency

Bombardier's Petition for Certiorari discusses the significant body of caselaw establishing the logical and reasonable position that the government should treat similarly situated taxpayers in the same manner. Petition at 34; *citing U.S. v. Kaiser,* 363 U.S. 299 (1960) (Frankfurter, J., concurring) and other cases. The reasoning of this line of authority is compelling and standing alone justifies review and correction of the Fifth Circuit's decision by this Court.

But, as demonstrated below, the effect of the IRS's arbitrary application of § 4261 harms more than Petitioner Bombardier; the unpredictable application of § 4261 acts as a *de facto* burden on interstate commerce, randomly tilting the economic playing field for and against certain market participants depending on where and who they are. Even had the IRS offered some rational basis for its decisions to

---

[2] *See* Charles Adams, For Good and Evil: The Impact of Taxes on the Course of Civilization 402 (Madison Books 2nd ed. 2001).

interpret and apply § 4261 as it has since 2004, the arbitrary imposition of the tax on some but not others in the industry would not withstand any level of judicial scrutiny. But, the IRS has offered no rational or logical explanation for its inconsistent and arbitrary application of the excise tax.

A. The IRS Has Treated Aircraft Management Companies Performing the Same Functions in a Disparate Manner under 26 U.S.C. § 4261(a)

The ticket tax in 26 U.S.C. § 4261 was enacted in 1954. In 1958, the IRS issued Revenue Ruling 58-215, 1958-1 C.B. 439, which determined that MMFs paid by aircraft owners to management companies were ***not*** subject to federal excise tax because owners were not engaged in "taxable transportation."

In 1992, however, the IRS issued Technical Advice Memorandum 93-14-002 (1992 TAM), to taxpayer Executive Jet Aviation, Inc. (EJA) ruling that EJA ***was*** required to collect the excise tax in connection with its management of aircraft owned by others in its fractional program. IRS Technical Advice Memorandum 93-14-002; 1992 WL 465951 (Dec. 22, 1992). However, the 1992 TAM did not address the applicability of excise tax to the different types of fees charged by EJA. EJA charged fractional owners separate fees for management (MMF) and for variable charges directly related to actual flights taken by aircraft owners (VRF). When Executive Jet (now NetJets) asked the IRS for clarification on this issue, the IRS took the position that MMFs were ***not*** paid for "taxable transportation" and were therefore not subject to the ticket tax. The IRS's stipulation was

informal and not made a part of a formal revenue ruling or TAM, but the IRS's position was noted and accepted by the Federal Circuit Court of Appeals in 1997, and again by a U.S. District Court in Ohio in 2015. *See Executive Jet Aviation, Inc. v. U.S.*, 125 F.3d 1463, (Fed. Cir. 1997); *NetJets Large Aircraft, Inc. v. United States*, 80 F. Supp.3d 743 (S.D. Ohio 2015).

Against this backdrop, Petitioner Bombardier, which had been collecting and remitting to the IRS the ticket tax on its MMF charges in 1995-97, filed a refund request. By 2006, the IRS had granted that refund request, and concluded with a "no action" letter, an audit for the years 1998-05. Petition at 8-10. In doing so, the IRS simply disregarded the contents of a 2004 TAM it had issued to Bombardier which stated that the excise tax in § 4261 should be applied to management fees. TAM 143115-03, 2004 WL 1369063 (Feb. 17, 2004).

Notwithstanding the refund of excise tax for the period 1995-97, and the "no action" letter for 1998-2005, the IRS initiated a third audit of Bombardier and reversed its position again; the IRS determined that the ticket tax should apply to MMF payments for the time period 2006-07. Petition at 10. The totality of the IRS's actions resulted in a very strange outcome: Bombardier was not required to collect tax on MMF for any period prior to December 31, 2005, but, with no change in law or facts, and with no advance notice from the IRS, Bombardier should have begun to collect and remit excise tax on MMF the very next day, January 1, 2006.

Bombardier challenged the IRS's audit determination in the United States District Court for the Southern District of Texas. The District Court upheld the IRS on March 20, 2015. Petition at 35a-96a. The Fifth Circuit below affirmed on July 25, 2016. Petition at 1a-32a. In determining that the excise tax did apply to MMF charges paid by Bombardier customers, the Fifth Circuit determined that Bombardier was bound by the 2004 TAM and could not rely on the two later IRS audits or the *EJA* case to justify its decision not to collect and remit excise tax for the period 2006-07.

During the same time period that the IRS assessed excise tax against Bombardier, NetJets continued to operate in the same management marketplace without paying the excise tax on the MMF payments made by its customers. In June 2015, the U.S. District Court for the Southern District of Ohio confirmed that NetJets was not required to pay the ticket tax on MMF because the IRS had, shortly after the issuance of the 1992 TAM, come to an agreement with NetJets predecessor, EJA, exempting it from the ticket tax on MMF payments. *See NetJets Large Aircraft, Inc. v. United States*, 80 F. Supp.3d 743,756-59 (S.D. Ohio 2015).

Then, in another court case, the IRS again took the position that a management company was not required to pay the ticket tax on MMFs. *PlaneSense, Inc. f/k/a Alpha Flying, Inc. v. United States*, Docket No. 1:11-cv-00136-PB (Distr. N.H. filed March 22, 2011).

Still another management company, USAirports, was required to pay the excise tax and in January 2017 initiated a refund action in the U.S. Court of Federal Claims. *USAirports Air Charters, Inc. v. United States*, Case No. 1:17-cv-00015-CFL.

In sum, on the one hand, cases from the Federal Circuit Court of Appeals, the Southern District of Ohio, and other IRS audit positions and interpretations indicate that the ticket tax is ***not*** applicable to fees paid by aircraft owners for the fixed cost management of their aircraft. On the other hand, the Fifth Circuit below and other IRS audit positions and interpretations indicate that the ticket tax ***does*** in fact apply to management fees charged to owners irrespective of whether any actual transportation of persons occurred in connection with the payment.[3]

B. There is No Rational Basis to Support Differential Treatment Between Different Companies

The language of 26 U.S.C. § 4261(a) is simple and straightforward: "There is hereby imposed on the amount paid for taxable transportation of any person a tax equal to 7.5 percent of the amount so paid." It is simply on its face an excise tax specifically directed at amounts paid to transport persons by aircraft. In

[3] In 2013, the IRS temporarily suspended assessments related to § 4261. In addition, the IRS initiated a fourth audit of Bombardier for the time period 2008-2012, which is currently suspended within the IRS administrative agency pending the outcome of this case.

order to apply, there must be movement ("transportation") and there must be passengers ("person[s]").[4]

The plain text of the statute makes no distinction between types of companies, types of air transportation, geography within the United States, or any other factor. Consequently, there is nothing in the statute itself that would explain the IRS's decision to assess the tax in some circumstances, and not in other factually identical management situations. And the IRS has not made any attempt to explain its differential treatment of separate management companies, nor its differential treatment of Bombardier in the two different time periods identified above (1995-2005 & 2006-2007). There is simply no rhyme or reason to the positions taken by the IRS. There is a randomness that is only explained by institutional failures of procedures within the IRS.

The Fifth Circuit below also failed to address the substance of the differential treatment, only noting that the different outcomes were caused not by the IRS's conflicting positions but were instead caused by the district court's ruling in "NetJet's favor." Petition at Appendix 31a. But, this is not quite right; the district court ruled in NetJets favor in the U.S. District Court in Ohio in 2015 because the IRS had informed NetJets / EJA long ago (1993) that the excise tax would not be assessed on its management fees. *NetJets Large Aircraft, Inc. v. United States*, 80 F.

---

[4] Under the IRS's interpretation of § 4261 in this case, the ticket tax is imposed on MMFs paid when a plane is stored in a hangar for several months while being overhauled.

Supp. 3d 743, 759 (S.D. Ohio 2015). The district court ruled in favor of NetJets because the IRS had never formally changed its position (outside that litigation) that NetJets was ***not*** responsible for the excise tax. But, even in that case the IRS never explained why it took a different position than it did in 1993 when it told EJA that the tax did not apply; in the intervening years neither the facts nor the law had changed.

C. Under the Commerce and Equal Protection Clauses, The Supreme Court Has Struck Down Discriminatory Tax Rules As Burdens on Interstate Commerce

Petitioner has recounted the caselaw regarding equal tax treatment for those similarly situated and it provides a compelling justification to grant the Petition and reverse the Fifth Circuit's decision below. Petition at 34.

From a policy perspective, however, there is a helpful body of analogous caselaw demonstrating the Supreme Court's adherence to the principle of equality in tax treatment among similarly situated market participants. And, that is the situation where individual states attempt to impose taxes that treat their home state businesses more favorably than out-of-state businesses. The Court has long analyzed such differential tax treatment under the Commerce Clause and the Equal Protection Clause. Time and time again, the Court has struck down state taxes with little or no compelling justification, that impose burdens on interstate commerce. *See e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Camps*

Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (U.S. 1997).

The compelling policy reasons to strike down laws that burden interstate commerce have long been self-evident. Even when there has been some rational justification for differential treatment, this Court has struck down taxing regimes that favored certain market competitors over other market competitors in a way that impairs interstate commerce. The Court in *Hughes v. Oklahoma,* 441 U.S. 322, 325 (U.S. 1979) explained this rationale:

> The few simple words of the Commerce Clause – 'The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .' -- reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

In order to pass Constitutional muster, a state taxation regime affecting interstate commerce must pass a rigorous multi-part test described by the Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (U.S. 1977). Such taxes are only upheld:

> when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Most state taxes that discriminate against interstate commerce fail – indeed to such an extent that the Court has written that there is nearly a *per se* rule barring such taxes. *Brown-Forman Distillers*, 476 U.S. at 579. There should not be a ***lower*** threshold governing a federal tax imposed by the federal government.

Because the IRS's uneven and arbitrary application of § 4261 has no justification, it is impossible to actually subject the IRS's imposition of § 4261 to testing under the *Complete Auto* factors or any similar test. It is clear, however, that under the current state of affairs there is a "Balkanization" caused by the IRS's random application of § 4261 in conjunction with the various lower courts disparate results in upholding, and in some circumstances rejecting, the IRS's interpretation of the excise tax.

On a geographic basis at this point does the tax only to apply within the Fifth Circuit (at least to Bombardier)? Does it not apply to any flight activity that NetJets conducts within the Fifth Circuit? Is Bombardier free to ignore the tax for customers or operations in Ohio? The current patchwork quilt of application is simply unfair and unmanageable to any participant in the marketplace, and clearly is a burden on interstate commerce.

If the IRS's arbitrary and discriminatory application of § 4261 is not reviewed by this Court, it will evade ***any*** sort of substantive scrutiny. Under any test postulated under existing authorities, the

arbitrary application of the statute by the IRS should not stand.

REASON II FOR GRANTING REVIEW

"The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person . . . ."

-Adam Smith[5]

II. The IRS's Retroactive Imposition of Tax Liability Under 26 U.S.C. § 4261(a) May Subject a Large Number of Aircraft Management Companies to Back Taxes and Penalties They Cannot Recoup From Their Customers and Violates the Duty of Clarity

Bombardier's Petition sets forth caselaw in support of the proposition that the IRS must give "precise and not speculative" direction to organizations that act as deputy tax collectors. Petition at 26-34. The reasoning set forth in *Central Illinois Public Serv. Co. v. United States,* 435 U.S. 21 (U.S. 1978) is powerful:

> Because the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that, absent further specific congressional action, the employer's obligation to withhold be precise and not speculative.

---

[5] Adam Smith, WEALTH OF NATIONS 499 (Prometheus Books 1991) (1776).

Bombardier's Petition also presents a persuasive chronology of events showing that the totality of the indicia during the period 2004 to the present weighed in favor of a conclusion that the excise tax did not apply to Bombardier's MMF fees; at a minimum, there was no clearly "precise and not speculative" direction that the tax did apply. Petition at 28-30.

The fact that the Fifth Circuit below rejected Bombardier's duty of clarity argument based on *Central Illinois* creates the following scenario for over 1,000 aircraft management firms in the United States who are attempting to determine whether to collect and remit § 4261 excise taxes on the management fees they charge their clients, or establish reserves if they have not collected excise taxes in the past.

First, the text of § 4261 applies the excise tax to amounts paid for the "transportation of any person," therefore the plain language should not apply to management payments that are made without regard to whether an aircraft is in motion transporting persons or not;

Second, the 1992 TAM issued to EJA simply parroted the statute, but an informal IRS agreement with EJA in 1993 excluded MMF payments from the scope of the excise tax. Even though the IRS tried to back out of its own interpretation at a later time (2007), the U.S. District Court in Ohio ruled that the IRS was bound by its 1993 informal construction of the 1992 TAM. *See NetJets Large Aircraft, Inc. v. United States*, 80 F. Supp. 3d 743, 756-59 (S.D. Ohio 2015). Although the *NetJets* court did not explicitly

refer to the duty of clarity, the concept underlies the analysis in that case. The IRS was not permitted to assess back taxes when it had informed the taxpayer in prior years that the taxes were not owed.

(3) ***Third,*** the Fifth Circuit below rejected Bombardier's argument that it should not be assessed excise tax on MMF payments because Bombardier should have known that the 2004 TAM (stating the tax did apply) took precedence over a 2006 IRS ***refund*** of excise tax on MMF payments and a 2007 written "no action" letter at the conclusion of a second audit.

Given the three points of analysis identified above, it is impossible for any management company to come to a reliable conclusion about whether the IRS and / or a reviewing court would require the company to collect and pay the § 4261 excise tax on management fees, or assess back taxes if they had not collected them in the past. Given this utter lack of clarity, the Court should grant Bombardier's Petition and resolve the question of § 4261's coverage in conformance with the statute's plain language.

The lack of clarity with respect to § 4261 has tangible consequences for hundreds of NATA members. Management firms in this market are secondary tax collectors. It is simply not possible for these management companies to go back at a later point in time to collect the excise tax from aircraft owners who have paid their monthly management fees in good faith in accordance with the contractual relationship they entered into. Therefore, management companies that have not collected the ticket tax, in reliance on the overall actions and

statements of the IRS and the courts, will be responsible with an enormous bill they may not be able to pay.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Air Transportation Association respectfully urges the Court to grant Bombardier Aerospace Corporation's Petition for Certiorari.

Dated: March 20, 2017

Respectfully Submitted,

Lars H. Liebeler
(Counsel of Record)
Lars Liebeler PC
1828 L Street, N.W.
Suite 705
Washington, D.C. 20036
(202) 587-4747

Timothy Obitts
Executive VP and
General Counsel
National Air
Transportation
Association
818 Conn. Ave, N.W.
Suite 900
Washington, DC 20006
(202) 774-1504