France / Mineral Oil Tax – September 2024

# Non commercial operator / Refuelling exempt from Mineral Oil Tax

## The Bobigny Judicial Court sheds light on the notion of 'end user' of an aircraft.

*Judgment delivered by the 9th chamber of the Bobigny judicial court on 5 September 2024, RG n° 22/08248*

### *Reminder of the regulatory framework*

The tax regime for jet fuel, defined by Directive 2003-96 of 27 October 2003 and codified, since 1 January 2022, in Articles L. 312-48 and L. 312-58 of the Code of Taxes on Goods and Services, exempts jet fuel used "*for the purposes of air navigation when the movement is inherent in the performance, by the user of the aircraft, of a service for consideration [ie which is remunerated] (...)*" from Mineral Oil Tax ("MOT").

To facilitate its implementation, the Order of 17 December 2015 stipulates that the exemption from MOT is open to airlines holding an AOC and to companies "*that have obtained an **identification certificate** from the customs and excise authorities*".

However, as the regulatory authority points out, the exemption is subject to "*the performance of a commercial activity characterised by the provision of a service for consideration using the aircraft. This criterion is always assessed with regard to the activity carried out by the **end user** of the aircraft, whether he is the owner, lessee or user in any other capacity*". (Article 1 of the Order).

It is precisely around the notion of "end user" of the aircraft that the dispute submitted to the Bobigny court has crystallised.

### *The legal issue: who is the « user » of the aircraft: the operator or the passenger?*

An operator who operates aircraft exclusively on behalf of its members and who does not hold an AOC applied to the customs authorities for an identification certificate so that it could refuel in

France free of MOT. Having provided all the documents required for the examination of its application, this certificate was finally refused on the main grounds that the operator's activity consisted, not in providing transport services, but in making an aircraft and a pilot available to its members.

This amounts to considering that the operator acts as a freighter and that its members act as charterers. However, in accordance with European case law (ECJ, no. C 250/10, 21 December 2011, Haltergemeinschaft LBL GbR v Hauptzollamt Düsseldorf), when the aircraft is chartered, it is the charterer who is deemed to be the "user" of the aircraft within the meaning of the Directive and it is therefore up to the charterer to demonstrate that the aircraft is being used to provide a service for consideration.

### *The Court's response*

Recalling the definitions of a charter contract and of a carriage contract set out in the Navicon case law (ECJ, C 97-06, 18 October 2007), the Court then took up one by one the various criteria set out in the French case law for classifying a service as a carriage or as a charter. In this case, it found that the operator, which leases the aircraft it operates on a dry lease basis, has all the 'attributes' of a carrier: obligation to maintain the aircraft, to insure them (body and liability), to employ the pilots and staff necessary for their commercial operation, to organise and coordinate the flights with the various service providers (handling, airport authorities, etc.), to give the operator and the crew authority over the technical and commercial operation of the aircraft (in particular the route to be taken) and to invoice the services on the basis of the distance travelled. It concludes that the "members" of the operator, who have no control over the aircraft, cannot be described as charterers and that the services they receive are indeed transport services provided by the operator, the user of the aircraft.

As a result, the judge ordered the authorities to issue an identification certificate to this operator and to reimburse the MOT paid for the refuelling of its aircraft in France.

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### *Conclusion*

To our knowledge, this is the first time that a French court has ruled on the legal classification of the services provided by an operator which, as it does not hold an AOC, cannot provide 'public transport' services. Implicitly, the judge recalls that the benefit of the MOT exemption is exclusively linked to the "onerous" nature of the services provided by means of the aircraft and cannot be called into question by the fact that the user is acting for the benefit of his associates only. In this respect, this decision is similar to the judgment delivered in September 2022 by the Austrian Higher Administrative Court (equivalent to the French *Conseil d'Etat*), which also confirmed that an airline could benefit from the MOT exemption, even when it was transporting the "owners" of the aircraft used for the flight.

However, the Judgment delivered by the Bobigny judicial court, handed down very recently, is still subject to appeal. To be continued...

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