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Commercial Air Transport & Private Operations

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GENERAL

Overseas Territories Aviation Circulars are issued to provide advice, guidance and information on standards, practices and procedures necessary to support Overseas Territory Aviation Requirements. They are not in themselves law but may amplify a provision of the Air Navigation (Overseas Territories) Order or provide practical guidance on meeting a requirement contained in the Overseas Territories Aviation Requirements.

PURPOSE

This Overseas Territories Aviation Circular provides guidance on the type of operations that constitute Commercial Air Transport operations and those that can be classified as Private operations under the AN(OT)O.

RELATED REQUIREMENTS

This Circular relates to OTAR Parts 61, 39, 91, 119, 121, 125, 135 and 139.

CHANGE INFORMATION

Third issue, which introduces changes arising from the Air Navigation (Overseas Territories) Order 2013, including article numbers, definitions of crew, task specialist and operator, and an additional exception for the carriage of persons on aerial work flights.

ENQUIRIES

Enquiries regarding the content of this Circular should be addressed to Air Safety Support International or to the appropriate Director or Director-General of Civil Aviation.

TABLE OF CONTENTS

1	INTRODUCTION	3
2	MEANINGS OF COMMERCIAL AIR TRANSPORT AND AERIAL WORK	3
2.1	AERIAL WORK (ARTICLE 126(1)).....	3
2.2	COMMERCIAL AIR TRANSPORT (ARTICLE 195(1)).....	4
2.3	DEFINITIONS OF PERSONS CARRIED (ARTICLE 3)	4
3	HOW TO DECIDE WHETHER A FLIGHT IS COMMERCIAL AIR TRANSPORT	5
4	EXCEPTIONS	5
4.1	COSTS	5
4.2	THE 7 EXCEPTIONS.....	5
	EXCEPTION 1 – FLYING DISPLAYS (ARTICLE 196)	5
	EXCEPTION 2 – CHARITY FLIGHTS (ARTICLE 197).....	6
	EXCEPTION 3 – COST SHARING (ARTICLE 198).....	6
	EXCEPTION 4 – MOTOR MILEAGE EQUIVALENT (ARTICLE 199).....	6
	EXCEPTION 5 - GROUP OWNED AIRCRAFT (ARTICLE 200).....	6
	EXCEPTION 6 – CARRIAGE OF PERSONS ON AERIAL WORK FLIGHTS (ARTICLE 201)	7
	EXCEPTION 7 – PARACHUTING (ARTICLE 202)	7
4.3	APPLYING THE EXCEPTIONS TO HIRED AIRCRAFT OR JOINTLY OWNED AIRCRAFT	7
5	VALUABLE CONSIDERATION	8
6	WHO IS THE OPERATOR?	8
7	USE OF A NON-AOC OPERATED AIRCRAFT	9
8	EXAMPLES	9
APPENDIX	EXAMPLES AND POSSIBLE SCENARIOS	10

1 Introduction

- 1.1 This Circular is intended to increase awareness and understanding of legislation as it relates to commercial air transport.
- 1.2 There is often a general perception that if an aircraft is carrying passengers who are not making any payment this constitutes a private flight and is not subject to any of the requirements in the Air Navigation (Overseas Territories) Order 2013 (“the Order”) relating to commercial air transport. This is far from being the case, particularly if the aircraft concerned is normally operated under an Air Operator Certificate (AOC) and/or under the control of an air transport undertaking.
- 1.3 The distinction between commercial air transport and private aviation is based on expectations and the ability to accept risk. Where a person is in substance paying another to carry him as a passenger on that aircraft, he is entitled to expect the highest standards. The law provides for this by requiring the operator to have an AOC and to comply with the relevant commercial air transport requirements.
- 1.4 An individual is entitled to take risks that he can understand and appreciate. These principles are reflected in aviation law by focusing on the pilot and the operator. It is the pilot and the operator who can be taken to understand the risks associated with a flight; the passenger may not.
- 1.5 If someone, who does not hold an AOC, uses their own aircraft to take some friends for a free ride then such a flight may be considered to be private. It is possible even for those passengers to contribute to the actual costs of the flight under certain circumstances without it becoming a commercial transport flight (see 4.2 Exception 3 below). However, the situation is complex and each case merits careful consideration.
- 1.6 This Circular contains a summary of the law; it is the text of the legislation that must be relied upon and only a Court can provide an authoritative interpretation.

2 Meanings of Commercial Air Transport and Aerial Work

The general rules relating to commercial air transport and aerial work are defined in article 195 and 126 of the Order. Seven exceptions to those general rules are then established in articles 196 to 202.

2.1 Aerial Work (Article 126(1))

A flight is for the purpose of aerial work if payment or valuable consideration is given or promised in respect of the flight or for the purpose of the flight, unless the flight is in fact for the purpose of commercial air transport (see 2.2 below).

Under article 126(2), if the only payment involved is the payment to the pilot, the flight is deemed to be private for airworthiness purposes, although it will still be aerial work for other purposes, e.g. flight crew licensing. This enables a private aircraft owner to pay a flying instructor for a flying lesson in his own aircraft.

2.2 Commercial air transport (Article 195(1))

Commercial air transport flights comprise one major category and two other categories.

The major category is relatively straightforward; and is when payment is made directly for the carriage of passengers or cargo in the aircraft on the flight.

The second category is when passengers or cargo are carried gratuitously, i.e. for no payment, by an air transport undertaking. An air transport undertaking is defined in article 3 as “an undertaking whose business includes the undertaking of flights for the purposes of commercial air transport of passengers or cargo”. An AOC holder is almost bound to be an air transport undertaking. Any flight operated by such an undertaking for the carriage of passengers or cargo is a commercial air transport flight, whether or not payment is made.

Note: There is an exception in this second category for carriage of employees of the undertaking and authorised persons making inspections or carrying out tests (i.e. such persons can be carried without the flight being deemed to be commercial air transport).

The third category of commercial air transport flight relates only to airworthiness. If an aircraft is hired for a flight, e.g. from a flying club, that flight is deemed to be commercial air transport for airworthiness purposes, i.e. the aircraft must have a certificate of airworthiness and be equipped and configured to commercial air transport requirements. The flight will be private for all other purposes, provided that no other payments are made in relation to the flight.

2.3 Definitions of persons carried (article 3)

Passenger means a person other than a member of the crew.

Crew means any person carried in an aircraft who is:

- (a) a member of the flight crew;
- (b) a person carried on the flight deck who is assigned by the operator of the aircraft to give or to supervise the training, experience, practice and periodical tests required for the flight crew under article 99(2) of this Order;
- (c) a member of the cabin crew; or
- (d) a task specialist who is assigned by the operator to perform specialised tasks on board or from the aircraft.

Task specialist means a person assigned by the operator or a third party, or acting as an undertaking, who:

- (a) performs tasks on the ground directly associated with a specialised task;
or
- (b) performs specialised tasks on board or from the aircraft.

From a legal point of view, task specialists are either crew members or passengers. In accordance with the definition of ‘Crew’, a task specialist who is assigned by the operator to perform specialised tasks on board or from the aircraft is a member of the crew. If not assigned by the operator to perform specialised tasks on board or from the aircraft (for example a ground worker associated with a specialised task), a task specialist is a passenger.

3 How to decide whether a flight is commercial air transport

- 3.1 To determine whether or not a flight is for the purpose of commercial air transport of passengers, the first question is **whether or not there are any passengers on board**. This is not always entirely straightforward as an occupant may claim to be a member of the crew or an employee of the aircraft operator.
- 3.2 Having determined that there is at least one passenger on board, the next question is **whether any payment has been given or promised which, if it had not been given or promised would mean that the passenger(s) would not have been carried**. If there is any payment which could fall into this category, consider what would have happened if the passenger had presented himself for carriage and announced that such a payment would not now be made. Would he still be carried?
- 3.3 If passengers are carried but there appears to be no payment for their carriage, it will be necessary to consider whether the operator is an air transport undertaking. If it is, even gratuitous carriage will be commercial air transport, subject only to the exceptions referred to in article 195(1)(b) noted in 2.2 above, i.e. for employees of the operator and authorised persons making inspections or carrying out tests.
- 3.4 Even if no passenger is carried or there is no payment for the carriage of passengers or cargo (and the operator is not an air transport undertaking) a flight may of course still be aerial work (see paragraph 2.1 above).

4 Exceptions

4.1 Costs

Articles 196 to 202 set out seven exceptions to the general rules and these are summarised below, but first there are two important definitions. Direct costs and annual costs are defined in article 3(1) of the Order but in summary:

Direct costs means those costs directly incurred in relation to a flight (e.g. fuel, en-route charges) but excludes any remuneration payable to the pilot.

Annual cost means the cost of keeping, maintaining and operating the aircraft over a period of a year (e.g. hangarage and maintenance).

There must be no element of profit in either direct or annual costs.

4.2 The 7 Exceptions

Exception 1 – Flying displays (article 196)

The exception under this article concerns an aircraft taking part in an aircraft race, contest or flying display or on a positioning flight to enable it carry out such a flight or returning from such a flight. The owner or operator may recover from the organiser of the race, contest or display his direct costs and an appropriate contribution to his annual costs of operating the aircraft. The flight shall be deemed to be a private flight for flight crew licensing purposes.

In addition to any payment to the owner or operator of the aircraft, as above, the pilot is entitled to receive prizes. This means that an aircraft can be flown by a PPL holder since the prizes will be deemed not to be remuneration and the payment of permitted

costs will not mean that the flight is for the purpose of aerial work for flight crew licensing purposes.

This exception only affects the appropriate flight crew licence. It does not affect any other requirement of the Order (e.g. airworthiness).

Exception 2 – Charity flights (article 197)

A flight will be deemed to be a private flight for all purposes if the only payment is to a registered charity that is not the operator of the aircraft and the flight is made with the permission of the Governor.

Exception 3 – Cost sharing (article 198)

A flight will be deemed to be a private flight for all purposes if the only payment is a contribution to the direct costs of the flight (not annual costs) otherwise payable by the pilot in command. This is provided that (a) no more than four persons (including the pilot) are carried; (b) the pilot pays at least his proportionate share (e.g. if four persons are carried the pilot must pay at least 25% of the direct costs); and (c) the flight has not been publicised in any way except within the premises of a flying club (in which case all the persons being carried must be members of that club).

There is a further proviso that a pilot cannot take advantage of this exception if he is employed as a pilot by the operator of the aircraft. This is intended to deter flying instructors from abusing the exception by offering quasi-commercial transport flights in aircraft of the flying club for which they work.

Exception 4 – Motor mileage equivalent (article 199)

In the past PPL holders have queried whether they are entitled to recover from their employers the costs of running their own aircraft or hiring an aircraft to fly themselves on business. The argument put is that they would be entitled to travel by train or car and recover their expenses of so travelling and they wish instead to recover some or all of the costs of flying. As the employer has an interest in the employee travelling to a particular location at a particular time, then any payment made by the employer in relation to the flight would be in respect of the flight or the purpose of the flight. Therefore, the flight would be for the purpose of aerial work and outside the privileges of a PPL. Consequentially, an exception has been established permitting a PPL holder to recover the direct costs (but not the annual costs) in such a situation, the flight being deemed private for all purposes.

The article contains a proviso ensuring that on such a flight no one is carried who is under any legal or contractual obligation to be carried, e.g. the boss cannot order members of his staff to travel with a PPL holder but must permit the option of alternative means of transport.

Exception 5 - Group owned aircraft (article 200)

Many aircraft are owned by groups of people. The usual and most sensible way of operating such a group owned aircraft is for all the members of the group to pay into a central fund a contribution related to the number of hours they fly, so as to ensure that the central fund has sufficient money to pay the costs of operating the aircraft over a period of time. Such a contribution is however, in law, equivalent to the payment made by a person hiring an aircraft, e.g. from a flying club, and therefore making a flight commercial air transport for airworthiness purposes, so that the continued airworthiness requirements for commercial air transport aircraft ought to be applied to the group owned aircraft.

An exception has therefore been established so that the aircraft will be exempt from the need to meet the airworthiness requirements for commercial air transport use. This is provided that: (a) payments are made by members of the group to a central fund which amount to no more than direct and annual costs of operating; and (b) the group comprises no more than 20 persons, each with at least a 5% share, whose names have been notified to the Governor. The exception applies whether the aircraft is jointly owned directly by no more than 20 persons or by a company that is owned by no more than 20 shareholders, who must be individuals and not companies.

It should be noted that this exception can only be relied upon if the only payments are those made within the group relating to the direct and annual costs of operating. No other payments can be made, so that, for instance, a group member cannot pay an instructor to train him in a group owned aircraft.

Exception 6 – carriage of persons on aerial work flights (article 201)

An exception is provided in relation to the persons who may be carried in the aircraft on an aerial work flight and on positioning flights immediately before and after the aerial work activity. In addition to members of the crew, no more than 6 persons indispensable to the aerial work activity may be carried in the aircraft¹. Where valuable consideration is involved and persons other than those indispensable to the aerial work activity are to be carried, then the exception is not applicable, the rules applicable to commercial air transport apply and an air operator's certificate is required.

Additional restrictions are applied regarding who may be carried during the conduct of specialised operations, for example when an article, person or animal is suspended from a helicopter. Helicopter hoist operations (HHO) where any person on the hoist is not a crew member must comply with the requirements applicable to commercial air transport operations.

Exception 7 – parachuting (article 202)

Where a person pays to be carried in an aircraft for the purpose of parachuting out of that aircraft then the flight is clearly for the purpose of commercial transport of passengers, regardless of the fact that the passengers will not be expected to be on board the aircraft when it lands. An exception is therefore established so that provided the flight is carried out in accordance with article 131 of the Order (which provides the conditions under which parachuting may be permitted), or the flight is positioning for such a flight or returning from such a flight, then the carriage of the parachutists (and other authorised persons, e.g. a jump master) will not mean the flight is considered to be commercial air transport. The flight will be deemed to be aerial work and must comply with the requirements relating to such operations.

4.3 Applying the exceptions to hired aircraft or jointly owned aircraft

- 4.3.1 The four exceptions relating to flying displays etc, charity flights, cost sharing and recovery of direct costs (motor mileage) are so defined that they are still available to an aircraft which has been hired, or to a group owned aircraft operated in accordance with the group aircraft exception of Article 200.

¹ This limitation on the number of persons to be carried is not applicable to aerial work parachuting flights.

- 4.3.2 The four exceptions provide that flights coming within them will be deemed to be private flights for the purposes of one or more parts of the Order if the only payment in respect of the flight falls within the specified category of payment, e.g. in the case of flying displays the costs of the flight and prize money. However, if an aircraft has been hired then there will be another form of payment in respect of the flight, i.e. the payment for the hire of the aircraft. Similarly, if the aircraft is group owned, there may well be some payment by the group member to the group for the use of the aircraft. Thus two types of payment (group and hire) are discounted when applying the four exceptions (although if the aircraft is hired it will still need to be maintained as a commercial air transport aircraft).

5 Valuable consideration

In this Circular, the question of whether a flight is commercial air transport or aerial work is discussed in terms of whether “payment” has been given or promised in respect of the flight. In the Order itself, instead of “payment”, the term “valuable consideration” is used. This term is defined at article 3(1) to include “*any right, interest, profit or benefit, forbearance, detriment, loss or responsibility accruing, given, suffered or undertaken under an agreement, which is of more than a nominal nature*”. In this context, “forbearance” means giving up something that you have a right to or to receive, so that, for example, if you are owed money and agree to write it off in return for a flight in the debtor’s aircraft that would constitute valuable consideration in that the aircraft operator has received a benefit that he would otherwise not have received.

6 Who is the operator?

- 6.1 The term 'operator' is defined in article 3(4) for the purposes of the Order. That article provides as follows:

For the purposes of the application of any provision of this Order in relation to any particular aircraft, “Operator” means:

- (a) Subject to paragraph (b), the person who at the relevant time has the management of that aircraft;
- (b) for the purposes of Part 3², when a person other than an air transport undertaking or an aerial work undertaking has chartered, hired, leased or borrowed the aircraft for a period not exceeding 14 days that person is not considered to be the operator.

- 6.2 The operator of an aircraft must be the organisation or person who exercises operational control of the aircraft. Operational control means the exercise by the operator, in the interest of safety, of responsibility for the initiation, continuation, termination or diversion of a flight. It should be noted that this is a matter of substance, i.e. the operator is the person who actually undertakes such matters.

- 6.3 The operator’s management of an aircraft will typically involve some or all of the following activities:

- maintenance management;
- employment of flight crew;
- preparation and maintenance of operations manual;
- responsibility for entering into contracts for particular operations;

² Part 3 of the Order, Airworthiness and Equipment of Aircraft.

- flight planning, fuelling and repairing the aircraft;
- keeping the required aircraft etc log books;
- briefing the flight crew;
- control of the operation in the sense of deciding when the aircraft will take off, where it will go, and what it will carry;
- the ability to abort the operation.

In the event that any supporting functions are contracted out the operator still retains overall responsibility: operational control cannot be contracted out.

- 6.4 In summary therefore, where an aircraft is under the management of an AOC holder any flights operated with it that carry passengers (unless they fall within the exception noted in 2.2 above for employees of the operator or authorised persons) or cargo are commercial air transport flights.

7 Use of a non-AOC operated aircraft

- 7.1 Unfortunately, there is a temptation on the part of private operators to seek to make use of slack time in the aircraft's operations by making the aircraft available for operation for hire and reward and thereby accepting payment, in cash or in kind, for the carriage of passengers and/or cargo. Such operations, if they involve the operator receiving payment (or other valuable consideration or benefit) other than in the circumstances outlined above, are illegal. Not only does the operator run the risk of prosecution, which could lead to a substantial fine and/or imprisonment for up to 2 years, but also the insurance on the aircraft is likely to be rendered invalid in the event of an accident.
- 7.2 A private (general aviation) aircraft, even if it has the benefit of an approval under article 134 of the Order, may not therefore be operated for commercial air transport purposes unless the operator holds an AOC.

8 Examples

The following Appendix contains practical illustrations using various scenarios.

Appendix Examples and possible scenarios

Q. An employee of an AOC holder borrows one of the company's aircraft to fly himself to his home. Is the flight a commercial air transport flight?

A. The aircraft is operated by an air transport undertaking (AOC holder) and must therefore meet all of the requirements of the Order associated with an aircraft used for the purposes of commercial air transport; for example in relation to maintenance and equipment. However, if the only person on board the aircraft is the pilot then there are no passengers and consequently the flight itself is not a commercial air transport flight.

Q. Taking the above case but this time the pilot offers to take a few of his friends with him on the flight. Is the flight a commercial air transport flight?

A. Unlike in the previous case, this time there are passengers on board the aircraft. Consequently, the flight will be deemed to be a commercial air transport flight regardless of whether or not the passengers have paid for the privilege of being carried. That is because the aircraft is operated by an air transport undertaking and under article 195(1)(b) gratuitous carriage by such an undertaking is deemed to be commercial air transport. The only exception would be if the passengers were themselves employees of the company or authorised persons carrying out an inspection or test.

Q. The owner of an aircraft makes it available for operation from Monday to Friday by an AOC holder and then takes it back for the weekend for his own private use. Does the private use constitute commercial air transport?

A. The answer in this case is likely to be the same as in the two previous examples: for the purposes of the Order, the aircraft is operated by an air transport undertaking, as the AOC holder is responsible for meeting the requirements of the Order associated with a commercial air transport aircraft.

In all three of these examples, the user of the aircraft on the flights in question does not become the "operator" by virtue of the definition of operator contained in article 3(4)(b) referred to in 5 above, namely that "*when a person other than an air transport undertaking has chartered, hired, leased or borrowed the aircraft for a period not exceeding 14 days he shall not be considered to be the operator*".

Q. The owner/operator of a private aircraft offers to take a number of friends on his aircraft for a flight to another island. The friends make no payment nor offer any valuable consideration of any kind. Is the flight a commercial air transport flight?

A. So long as no valuable consideration is given or promised then the flight will be a private flight.

Q. In a similar situation to the last one, the owner agrees to carry three friends on his private aircraft provided that each of them pays one quarter of the direct cost of the flight. Is the flight a commercial air transport flight?

A. Under the terms of article 198 the flight will be deemed to be a private flight. However, if the passengers pay a third of the direct cost each, and the pilot pays nothing, then the flight would not fall within the exception in article 198. Equally if there were more than 3 passengers then article 198 would not apply; nor would it apply if the contributions made by the passengers were not related to the direct cost of the flight, i.e. they were just arbitrary amounts. In each of the last three cases the flight would be deemed to be a commercial air transport flight.

Q. The owner/operator of a private aircraft agrees to make the aircraft available to a group of friends to enable them to fly to the Monaco Grand Prix: the aircraft is to be flown by paid pilots. No valuable consideration of any kind is to be given by the passengers for the privilege of being carried. Is the flight a commercial air transport flight?

A. Provided that no valuable consideration is given or promised by the passengers for the purpose of being carried, then the flight would be a private flight, even though the owner/operator was not being carried on that flight. However, if the passengers would not in fact be carried unless they made payment of an agreed amount then the flight would become a commercial air transport flight.

Q. The owner/operator of a private aircraft agrees to make it available to a friend in return for that friend agreeing to let him use his yacht in Monte Carlo. No money changes hands. Is the flight a commercial air transport flight?

A. This scenario is much more complex. It can be argued that if the arrangements agreed are purely informal and not intended to create any legal obligation on either side then the flight should be considered as private as no valuable consideration has been given or promised. This is likely to be the case, for example, if the arrangement is a one-off arrangement.

However, if the arrangement is an on-going one such that the parties consider it to be of a business nature or to have a commercial value then it can reasonably be inferred that the use of the yacht constitutes valuable consideration and the flight becomes a commercial air transport flight.

Q. The owner/operator of a private aircraft (who may also be a resort operator) sets up a “Members or Residents Club” to which the members pay a fixed subscription in return for which they become entitled to the use of the owner’s aircraft. The owner argues that the sums paid by the members do not constitute valuable consideration given or promised for the carriage of passengers or cargo in the aircraft on that flight under article 195(1)(a) but are subscriptions paid to become members of a club. Are any flights, undertaken for the carriage of such members, commercial air transport flights?

A. This again is a complex situation. The argument by the owner is to the effect that the valuable consideration has not been given directly by the member for carriage on that aircraft on that flight and therefore does not fall within the scope of article 195(1)(a). The argument put by the owner is in essence that the article must be interpreted restrictively; that it must be demonstrated that the payment made is directly referable to carriage of passengers or cargo on that flight.

The argument advanced above can be countered by reference to the whole of article 195(1). It should be noted that article 195(1) defines (or deems) “commercial air transport” with reference to an aircraft “in flight” and references to “on that flight” in sub-paragraph (a) must be interpreted in that light.

Article 195(1) does not say that the valuable consideration given or promised must be “directly” or “solely” for the carriage of passengers or cargo. There is nothing in the ordinary and natural reading of article 195(1) that requires such a restriction to be read into it. What is required is that the carriage of passengers or cargo is pursuant to the valuable consideration having been given or promised. The question to be asked is, “would the member be carried on the aircraft if he had not paid his subscription?” The answer is likely to be, “No”.

It is considered that, therefore, such flights that are undertaken in the circumstances outlined are for the purposes of commercial air transport and the operator should be in possession of an AOC.

Q. A resort owner operates a private aircraft that he uses to ferry paying guests to and from his resort. He does not charge the guests directly for the flights. He also uses the aircraft to conduct sightseeing flights for his guests at no additional charge. Are these flights commercial air transport flights?

A. It is likely that such flights would be deemed commercial air transport flights. In paying to stay at the resort the guest is entitled to conclude that the flights are part of the “package” and that, therefore, part of the price paid is in consideration of the right to be carried, whether on the ferry flights or on sightseeing flights.

Whilst the point has not been tested in the courts in the UK in relation to aircraft flights, it has been tested in relation to public service road vehicles. The case of *Rout v Swallow Hotels Ltd* [1993] RTR 80 concerned a prosecution for contravention of the Public Passenger and Vehicles Act 1981.

The facts were that a hotel proprietor operated a coach and a minibus to convey persons using the hotel and their friends. No one had the right to travel on the vehicles and no direct payment was made for their use. The hotel manager had complete discretion as to whether the vehicles ran and as to their destinations. The hotel did not hold a certificate for the vehicles as was required under the applicable law. The issue before the Divisional Court was whether the vehicles were being used “for carrying passengers for hire and reward”. The Court held that they were.

In that case the Judge held that there does not have to be a clear connection between the payments made and the carriage of the passenger for the vehicle to be “used for carrying passengers for hire and reward”. It is sufficient that the operator provided the vehicle in the course of his business; persons were carried on it and the operator was remunerated for doing so out of the payments made by its guests.

Q. A resort developer operates its own private category aircraft for the carriage of its employees and for the purpose of bringing to the resort potential purchasers of property. Are the flights conducted for the carriage of potential purchasers commercial air transport flights?

A. Provided that no payment has been given or promised in connection with the visits or in respect of the flights (other than payment for the services of the pilot) such flights would probably not be considered to be commercial air transport.