No. 16-1010

In the Supreme Court of the United States

BOMBARDIER AEROSPACE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the air-transportation excise tax imposed by 26 U.S.C. 4261 applies to fees, including fixed monthly fees for aircraft management services, that petitioner collected from participants in its Flexjet program.

2. Whether the Internal Revenue Service (IRS) provided sufficient notice that petitioner was required to collect the Section 4261 tax on monthly management fees.

3. Whether the IRS subjected petitioner to less favorable tax treatment than other similarly situated taxpayers received during the tax periods at issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 831 F.3d 268. The opinion of the district court (Pet. App. 35a-96a) is reported at 94 F. Supp. 3d 816.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2016. A petition for rehearing was denied on October 18, 2016 (Pet. App. 33a-34a). On December 28, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 16, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 4261 of Title 26 of the U.S. Code imposes an excise tax on all amounts paid for the "taxa-

ble transportation of any person" by air.[1] Section 4262(a) defines "taxable transportation" as transportation by air that meets certain geographic requirements and includes layover or waiting time and movement of the aircraft in deadhead service. 26 U.S.C. 4262(a) and (d).

The person paying for taxable air transportation—*e.g.*, a passenger—is the taxpayer required to pay the Section 4261 tax. 26 U.S.C. 4261(d). The party receiving payment for taxable air transportation—*e.g.*, the airline or flight operator—must collect the excise tax from the person making the payment. 26 U.S.C. 4291. If the entity charged with collection of the tax fails to collect it, the Code permits the tax to be levied directly on the delinquent collector. 26 U.S.C. 4263(c).

Apart from fluctuations in the tax rate,[2] Section 4261 has existed in substantially the same form since 1956. See Pub. L. No. 84-796, ch. 725, 70 Stat. 644. Since 1960, the Internal Revenue Service (IRS) has applied the "possession, command, and control" test to determine whether transportation is taxable under Section 4261. See Rev. Rul. 60-311, 1960-2 C.B. 341, 1960 WL 12965; Rev. Rul. 68-256, 1968-1 C.B. 489, 1968 WL 15396; Rev. Rul. 74-123, 1974-1 C.B. 318, 1974 WL 34732; Rev. Rul. 76-394, 1976-2 C.B. 355,

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[1] Petitioner uses the industry shorthand "ticket tax" to refer to the Section 4261 excise tax. *E.g.*, Pet. 2. The Section 4261 tax is imposed on all amounts paid for the taxable transportation of persons by air and is not limited to amounts related to the issuance or processing of tickets. See 26 U.S.C. 4263(d).

[2] Initially 10%, the tax rate under Section 4261 dropped to 5% in 1959, Pub. L. No. 86-75, § 4, 73 Stat. 158; was raised to 8% in 1970, Pub. L. No. 91-258, § 203, 84 Stat. 238; and is now 7.5%, 26 U.S.C. 4261(a).

1976 WL 36862; see also *Executive Jet Aviation, Inc.* v. *United States*, No. 95-7T (Fed. Cl. 1996), slip op. 12. That test "focuses on whether the taxed entity, rather than the entity being transported, has 'possession, command, and control' of the means of transportation and charges for its services." Pet. App. 13a.

b. Before 1970, both commercial and noncommercial flights were also subject to a separate fuel-excise tax. 26 U.S.C. 4041(b) (1964 & Supp. V 1969); see *Executive Jet Aviation, Inc.* v. *United States*, 125 F.3d 1463, 1464 (Fed. Cir. 1997). In 1970, Congress added a special provision to the fuel-excise tax statute that raised the tax rate for aviation fuel and made it applicable only to noncommercial flights. 26 U.S.C. 4041(c) (1970); see Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 202, 84 Stat. 237. The Act defined "noncommercial aviation" as "any use of an aircraft, other than use in a business of transporting persons or property for compensation or hire by air." 26 U.S.C. 4041(c)(4) (1970). At that time, the term "commercial aviation" was not defined in the fuel-excise tax provisions. See 26 U.S.C. 4081-4084 (1964).

c. The special provision for noncommercial aviation was removed from Section 4041(c) in 2004. See American Jobs Creation Act of 2004 (2004 Act), Pub. L. No. 108-357, § 853(d)(2)(A), 118 Stat. 1612. Today, both commercial and noncommercial flights are subject to the Section 4081 fuel-excise tax, although at different tax rates. 26 U.S.C. 4081. The noncommercial fuel-excise tax rate is now approximately five times as high as the commercial rate. 26 U.S.C. 4081(a)(2)(C)(i)-(ii). In the 2004 Act, Congress defined "commercial aviation," "for purposes of this subpart" (*i.e.*, the fuel-excise tax provisions), as "any use of an

aircraft in a business of transporting persons or property for compensation or hire by air." 26 U.S.C. 4083(b). In situations where the lower commercial fuel-tax rate applies, the relevant air transportation will also be subject to the Section 4261 excise tax, as the commercial nature of the operation ensures that there has been an "amount paid" for taxable air transportation under Section 4261.

2. a. During the tax periods at issue here, petitioner operated a fractional-aircraft-ownership program known as Flexjet. Pet. App. 2a, 36a-37a. Participants in the Flexjet program would lease or acquire a partial interest in an airplane in the program fleet and thereby gain the right to nearly on-demand use of the entire fleet. *Id.* at 2a.

The Flexjet program provided access to aircraft, pilots, crews, other in-flight and on-the-ground services, and aircraft maintenance and management. Pet. App. 2a, 89a-90a. To obtain this access, participants paid three types of fees: (1) a fixed monthly management fee, which is incurred regardless of whether the program participant takes any flight; (2) an hourly fee for the use of program jets in flight; and (3) a variable hourly surcharge that depends on the price of jet fuel at the time of the flight. *Id.* at 2a, 37a.

For the 2006 and 2007 tax periods at issue here, petitioner collected and remitted the Section 4261 excise tax on both types of hourly fees paid by Flexjet program participants. Pet. App. 3a, 37a. Petitioner did not collect the tax, however, on the monthly management fees paid by those same participants for the same service. *Ibid.* The IRS made additional assessments against petitioner based on the monthly man-

agement fees paid by program participants. *Id.* at 3a, 37a-38a.

Petitioner paid a portion of that assessment and commenced this lawsuit. Pet. App. 3a. Petitioner contended that it owed no Section 4261 tax on the hourly fees it had collected from its program participants, and petitioner sought a refund of taxes paid on those fees. *Ibid.* The government counterclaimed to recover unpaid Section 4261 tax for 2006 and 2007 plus interest, penalties, and statutory additions. *Id.* at 3a, 38a-39a.

b. Petitioner contended that it was not required to collect Section 4261 tax on any of the fees paid by Flexjet program participants because it was not engaged in "commercial aviation." Pet. App. 8a-9a, 91a. Alternatively, petitioner contended that even if its hourly fees and fuel surcharges were subject to the Section 4261 tax, its monthly management fees were not. *Id.* at 18a.

Petitioner's argument with respect to the monthly management fees was based, in part, on the IRS's decision not to apply the Section 4261 tax to petitioner's monthly management fees in earlier tax periods, or to the monthly management fees that had been collected by Executive Jet Aviation, Inc. (Executive Jet), one of petitioner's competitors. Pet. App. 3a, 18a-19a, 37a-38a. In 1992, the IRS had issued to Executive Jet a Technical Advice Memorandum (1992 TAM), which concluded that the Section 4261 tax applied to fees paid by participants in a fractional aircraft ownership program. IRS Tech. Adv. Mem. 93-14-002, 1992 WL 465951 (Dec. 22, 1992). After subsequent discussions with Executive Jet, however, the IRS declined to apply the 1992 TAM to monthly

management fees. See *NetJets Large Aircraft, Inc.* v. *United States*, 80 F. Supp. 3d 743, 749-750 (S.D. Ohio 2015). Notwithstanding that concession, Executive Jet took the position that none of its fees were subject to the Section 4261 tax, and it sued for a refund of the tax that it had collected on hourly fees paid by participants in its NetJets program. *Id.* at 750.

The Court of Federal Claims held that the Section 4261 tax applied to those fees and suggested that monthly management fees could also be subject to the tax. See *Executive Jet*, slip. op. 5. The Federal Circuit affirmed and upheld Executive Jet's liability for the Section 4261 tax on hourly fees, but it did not address whether the tax applied to monthly management fees or fuel surcharges. *Executive Jet*, 125 F.3d at 1469. With no authority to the contrary, Executive Jet continued to collect the tax on hourly fees only, and its competitors in the fractional industry followed suit.

c. Petitioner had previously collected the Section 4261 tax on all Flexjet fees. Pet. 8. In 1997, after the Federal Circuit's decision in *Executive Jet*, petitioner stopped collecting the tax on monthly management fees and claimed a refund of the tax it had collected on those fees from 1995 through 1997. Pet. App. 23a. Petitioner's refund claim was initially denied, prompting an examination of the ensuing tax periods (1998 through 2005) in which it had failed to collect the tax. *Ibid.*

In 2004, in response to issues that had arisen during the examination, the IRS issued to petitioner Technical Advice Memorandum 2004-42-5048, 2004 WL 1369063 (June 18, 2004) (2004 TAM). The 2004 TAM concluded that the monthly management fees

and hourly fees received by petitioner from Flexjet program participants were uniformly subject to the Section 4261 tax. *Ibid.*; see Pet. App. 23a.

Petitioner took an administrative appeal of this determination. An IRS appeals officer concluded that, notwithstanding the unambiguous directive of the 2004 TAM, it would be unfair to apply the Section 4261 tax to the Flexjet monthly fees when the taxpayer in *Executive Jet* had apparently escaped imposition of the tax on its own monthly program fees. Pet. App. 75a. The officer stated that "the underlying issue is very strong for the government," but that the IRS would concede the tax for the tax periods at issue based solely on the "unfair competitive disadvantage principle." *Ibid.* The IRS Appeals Office conceded the tax both with respect to the tax periods at issue in petitioner's refund claim (1995 to 1997) and with respect to the subsequent periods under examination (1998 to 2005). Gov't C.A. Br. 13. Shortly thereafter, guided by the 2004 TAM, the IRS began to impose the Section 4261 tax uniformly on all three categories of program fees collected by petitioner and its competitors. *Ibid.*

3. This suit involves eight tax periods (for successive quarters) in 2006 and 2007—tax periods subsequent to the years in which the IRS had conceded the tax on the monthly management fees. Pet. App. 2a, 37a. The district court entered summary judgment for the United States. *Id.* at 35a-96a.

The district court concluded that petitioner lacked standing to seek a refund of the Section 4261 tax on hourly fees and fuel surcharges that it had collected from its program participants and paid to the IRS. Pet. App. 46a-51a. The court explained that petitioner

did not bear the economic burden of that tax because it had neither refunded those taxes to its program participants nor obtained their "consent * * * to the allowance of such credit or refund." Pet. App. 46a (quoting 26 U.S.C. 6415(a)).

The district court then addressed the government's counterclaim for unpaid taxes on petitioner's monthly management fees. The court rejected petitioner's arguments that a "commercial aviation" test, as that term is defined in the fuel-excise tax statute (26 U.S.C. 4083(b)), should govern the applicability of the Section 4261 tax. Pet. App. 53a-60a. The court instead adopted the IRS's longstanding possession, command, and control test. *Id.* at 86a. The court concluded that petitioner (rather than the program participants) had possession, command, and control of the program aircraft; that petitioner therefore was providing taxable air transportation; and that all program fees paid by Flexjet participants were subject to the Section 4261 tax. *Id.* at 88a-89a.

The district court rejected petitioner's argument that a duty of clarity precluded the IRS from imposing the Section 4261 tax on monthly management fees. The court held that, to the extent required by this Court's opinion in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21, 21-22 (1978), the 2004 TAM had provided petitioner "notice of a precise and clear duty" to collect the Section 4261 tax on monthly fees for the tax periods at issue in this case. Pet. App. 72a. The court concluded that the agreement reached with the IRS Appeals Office for earlier tax years did not compromise the clear directive of the 2004 TAM because the officer who had conceded the Section 4261 tax on monthly management fees for tax years 1995

through 2005 had done so only because of the principle of unfair competitive disadvantage. *Id.* at 74a-75a. The court further held that petitioner could not have been confused by the IRS's arguably inconsistent position in the 1992 TAM after petitioner's concerns were specifically addressed in the 2004 TAM. *Id.* at 77a-78a. The court found no unfairness, and no competitive disadvantage, in requiring petitioner to collect in 2006 and 2007 a tax that its competitors were also required to collect for those periods. *Id.* at 81a-82a.

4. The court of appeals affirmed. Pet. App. 1a-32a. The court agreed with the district court that petitioner could not seek a refund of the hourly taxes it had collected from Flexjet participants because petitioner had not repaid the tax to those participants or obtained their consent to seek a refund. *Id.* at 4a-8a.

The court of appeals rejected petitioner's argument that it was not required to collect the Section 4261 tax from Flexjet participants because petitioner is not engaged in "commercial aviation." Pet. App. 8a-18a. Petitioner's commercial-aviation test was based on the 1970 provision that had imposed a higher rate of tax on noncommercial flights under the fuel-excise tax statute. 26 U.S.C. 4041(c) (1970). The court explained that the definition of "commercial aviation" in Section 4083(b)—the current version of former Section 4041(c)—is explicitly limited to the provisions of the Code subpart that governs the fuel-excise tax. Pet. App. 14a.

The court of appeals found a "consistent theme" in IRS Revenue Rulings that, "where an entity is responsible for nearly every service and precondition necessary to transport persons in an aircraft, and it charges for those services, it is providing taxable

transportation—even if the *bona fide* owner of the aircraft itself is the person traveling." Pet. App. 16a-17a. The court concluded that, under the proper legal test, petitioner "is in possession, command, and control of the means of transportation" and thus is "required to submit Section 4261 tax on fees collected from Flexjet participants." *Id.* at 18a.

The court of appeals rejected petitioner's argument that monthly management fees are not "amount[s] paid for taxable transportation" under Section 4261 because they are fixed costs unrelated to actual air transportation. Pet. App. 18a-20a (brackets in original). The court explained that the monthly management fees are subject to the Section 4261 tax because they "must be paid in order for Flexjet participants to receive air transportation." *Id.* at 19a. The court noted it was "unclear" why the IRS had not sought to collect the tax on monthly management fees in *Executive Jet*, but it gave no weight to that 20-year-old concession in light of contrary authority. *Id.* at 19a-20a.

The court of appeals also rejected petitioner's argument that a duty of clarity precluded the IRS from taxing the monthly management fees and the fuel fees collected during the periods in issue. Pet. App. 20a-28a. The court explained that "the 2004 TAM sufficiently apprised [petitioner] of what the IRS thought the law was and therefore what actions [petitioner] was required to take." *Id.* at 24a (citation and internal quotation marks omitted). The court acknowledged that, "[a]fter the 2004 TAM clarified [petitioner's] tax responsibility, the Appeals Office exercised its discretion to settle the dispute over tax owed from 1995 to 2005 as if the advice had never been given." *Id.* at 26a. But the court held that "[a] settlement agree-

ment brokered with the IRS Appeals Office reducing a taxpayer's liability as to certain tax periods is not enough to revoke a TAM." *Ibid.*

Finally, the court of appeals rejected petitioner's invocation of an "unfair competitive disadvantage principle," for which petitioner cited *International Business Machines Corp.* v. *United States*, 343 F.2d 914, 919 (Ct. Cl. 1965) (*IBM*), cert. denied, 382 U.S. 1028 (1966). Pet. App. 29a-32a. In *IBM*, a taxpayer was able to avoid a statutory tax liability based on a showing that the IRS had failed to collect the same tax from another similarly situated taxpayer. 343 F.2d at 925. The court of appeals explained that *IBM* requires only "consistency by the IRS" in its private letter rulings. Pet. App. 30a-31a. The court concluded that, because petitioner had failed to establish that the IRS had treated any similarly situated taxpayer more favorably during the tax periods at issue in this case, *id.* at 31a-32a, "the unfair competitive disadvantage principle has no application here," *id.* at 32a.

ARGUMENT

Petitioner contends (Pet. 15-25) that the court of appeals should have applied a "commercial aviation" test to determine whether monthly management fees paid by Flexjet program participants are subject to the Section 4261 excise tax. Petitioner argues that those fees are not taxable under Section 4261 because petitioner is not engaged in commercial aviation.[3]

[3] Petitioner's arguments would logically imply that petitioner did not owe Section 4261 tax on any of the fees it charged Flexjet program participants. But petitioner does not challenge the court of appeals' holding that petitioner lacks standing to challenge the Section 4261 tax on hourly fees, see Pet. App. 4a-8a, and petitioner limits the questions presented to monthly management fees. Pet. i.

Petitioner further contends (Pet. 25-36) that the IRS was precluded from requiring petitioner to collect Section 4261 tax on monthly management fees because the agency did not provide clear notice that petitioner was required to collect the tax on monthly management fees and because similarly situated taxpayers were not required to collect the tax during the same period. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. The questions presented are of uncertain prospective importance, moreover, because legislation enacted by Congress in 2012 prospectively exempted aircraft in fractional programs from the Section 4261 tax. Further review is not warranted.

1. a. The air-transportation excise tax imposed by Section 4261 applies to all amounts paid for the "taxable transportation of any person" by air. 26 U.S.C. 4261(a). The court of appeals correctly held that the IRS's longstanding possession, command, and control test governs whether transportation is taxable under Section 4261. Pet. App. 13a-14a, 17a-18a. Under that test, which the IRS has applied since 1960, the Section 4261 tax applies if an entity other than the entity being transported has possession, command, and control of the means of transportation; provides operating personnel; and charges for its use. See Rev. Rul. 60-311, 1960-2 C.B. 341, 1960 WL 12965; Rev. Rul. 68-256, 1968-1 C.B. 489, 1968 WL 15396; Rev. Rul. 74-123, 1974-1 C.B. 318, 1974 WL 34732; Rev. Rul. 76-394, 1976-2 C.B. 355, 1976 WL 36862. The court of appeals correctly held that petitioner is in possession, command, and control of the means of transportation in the Flexjet program and therefore is

required to collect and submit Section 4261 tax on fees paid by Flexjet participants. Pet. App. 17a-18a.

Petitioner does not dispute that it provides taxable air transportation under the possession, command, and control test. Instead, petitioner contends that the court of appeals should have applied a "commercial aviation" test to determine whether the Section 4261 tax applies. The term "commercial aviation" is defined in Section 4083(b), the fuel-excise tax provision, but that definition applies only "[f]or purposes of this subpart," *i.e.*, the separate fuel-excise tax provision set forth in Sections 4081 to 4084. 26 U.S.C. 4083(b). And neither Section 4261 itself (which imposes a tax "on the amount paid for taxable transportation of any person," 26 U.S.C. 4261(a)) nor Section 4262 (which defines the term "taxable transportation") uses the term "commercial aviation." There is consequently no textual basis for concluding that Section 4083(b)'s definition of "commercial aviation" governs the Section 4261 inquiry.

b. Petitioner contends (Pet. 15-22) that this Court's review is warranted because the Federal Circuit in *Executive Jet Aviation, Inc.* v. *United States*, 125 F.3d 1463, 1464 (1997), applied a commercial-aviation test to determine whether Section 4261 tax was due. Petitioner's reliance on that decision is misplaced.

i. In *Executive Jet*, the Court of Federal Claims held that the applicability of the Section 4261 tax turns not on the ownership of an aircraft, or on the governing fuel-excise tax provision, but rather on who has possession, command, and control of the aircraft—*i.e.*, the right to determine when, and by whom, a particular airplane can be used. *Executive Jet Aviation* v. *United States*, No. 95-7T (Fed. Cl. 1996), slip

op. 12. Because the program operator in that case had possession, command, and control" of the program aircraft, the court concluded that the Section 4261 tax applied to the fees at issue in the refund suit. *Id.* at 22.

The Federal Circuit affirmed without applying the possession, command, and control test. Instead, the court relied on what it described as the "critical statutory provision"—the definition of "noncommercial aviation" in the fuel-excise tax provision, 26 U.S.C. 4041(c) (1970). *Executive Jet*, 125 F.3d at 1468. That provision defined "noncommercial aviation" as "any use of an aircraft, other than use in a business of transporting persons or property for hire by air." *Id.* at 1465 (quoting 26 U.S.C. 4041(c)(4) (1970)). Based on that definition of "noncommercial aviation," and on the court's understanding that Sections 4041(c) and 4261 were "mutually exclusive," *id.* at 1464; see *id.* at 1464-1465, the court held that the "central question" under Section 4261 was whether the program operator "was in the 'business of transporting persons or property for hire by air.'" *Id.* at 1469. The court concluded that the program operator "was in the 'business of transporting persons or property for hire by air,'" and that "the transportation tax was properly imposed" under Section 4261. *Ibid.*

The statutory scheme has been significantly amended, however, since the Federal Circuit's ruling in *Executive Jet*. By the time petitioner's case was decided, Congress had made both commercial and noncommercial aviation subject to the Section 4081 fuel-excise tax (at different rates); had enacted a statutory definition of the term "commercial aviation"; and had clarified that the definition applied only with-

in the fuel-excise tax provisions. 26 U.S.C. 4083(b) (2004). Petitioner cites no judicial decision or IRS ruling that has applied a commercial-aviation test since the 2004 enactment of Section 4083(b).

ii. In any event, the difference in reasoning between the Federal Circuit's decision in *Executive Jet* and the Fifth Circuit's decision in this case did not lead to divergent outcomes. The Federal Circuit in *Executive Jet* concluded that the fractional program at issue there did not qualify as noncommercial aviation and that fees paid by program participants were therefore subject to the Section 4261 tax. 125 F.3d at 1468-1469. As the court of appeals observed in this case, "the outcome in *Executive Jet* actually weakens [petitioner's] position in that the Federal Circuit determined that an aircraft management program with services very similar to those provided by [petitioner] was a commercial operation providing 'taxable transportation' within the meaning of Section 4261." Pet. App. 16a (citation omitted).

Petitioner's relies in part (Pet. 23-24) on regulations issued by the Federal Aviation Administration (FAA) that deem fractional-ownership programs to be noncommercial aviation for purposes of FAA safety regulations. As the court of appeals correctly explained, the FAA's classification of such programs as "noncommercial" for safety purposes is not controlling in a tax dispute. Pet. App. 12a; see *id.* at 53a-60a; *NetJets Large Aircraft, Inc.* v. *United States*, 80 F. Supp. 3d 743, 755 (S.D. Ohio 2015). The IRS and FAA have recognized that same principle. An IRS Revenue Ruling explains that the "commercial" and "noncommercial" definitions in FAA regulations are "not consistent with" tax statutes and that "the status of [an]

operator under the FAA regulations is not determinative in applying the aviation fuel taxes and transportation taxes imposed by [S]ection[] 4261." Rev. Rul. 78-75, 1978-1 C.B. 340, 1978 WL 42060. Similarly, the FAA final rule on fractional-ownership programs provides that "[t]ax law does not govern safety rules." 68 Fed. Reg. 54,523 (Sept. 17, 2003). No court has accepted petitioner's argument that FAA regulations should dictate whether petitioner is required to collect Section 4261 tax.

2. Petitioner contends (Pet. 25-34) that it was not obligated to collect the Section 4261 tax on monthly management fees paid by Flexjet program participants because the IRS had not clearly instructed petitioner to do so. The court of appeals correctly rejected that argument. Pet. App. 20a-28a. As the court explained, the 2004 TAM informed petitioner of the IRS's view that monthly management fees paid by Flexjet program participants were taxable under Section 4261 and that petitioner was therefore required to collect the tax on those fees. *Id.* at 24a.

Petitioner contends (Pet. 28-30) that the IRS did not give sufficiently clear notice that petitioner was required to collect Section 4261 tax on monthly management fees because the IRS had excused petitioner from paying those taxes from 1995 to 2005. But petitioner was well aware that the IRS Appeals Office had conceded the tax for those tax years based solely on the economic-disadvantage theory. Pet. App. 25a, 75a-76a. The 2004 TAM was specifically requested to clarify petitioner's obligations to collect Section 4261 tax on monthly management fees, and that document "provided [petitioner] notice of its responsibility" going forward. *Id.* at 28a. The court of appeals cor-

rectly held that the settlements of petitioner's past tax debt neither revoked the 2004 TAM nor gave rise to any defense to petitioner's statutory liability for tax periods not covered by the agreement. *Id.* at 24a-28a.

Petitioner points to the apparent inconsistency of the IRS's decision to concede petitioner's Section 4261 liabilities for certain periods subsequent to the 2004 TAM. Pet. 29-30. With respect to the post-TAM periods, the IRS Appeals officer declined to impose the tax on petitioner where it had not yet been imposed on petitioner's competitors. Pet. App. 27a. The appeals officer's memorandum made clear that it was this perception of economic disadvantage, and not any question as to the applicability of the tax, that motivated his decision. *Ibid.* And regardless of its reasons, an IRS settlement that grants a taxpayer a limited reprieve from obligations enumerated in a TAM does not negate the TAM's effect. *Id.* at 26a.

Petitioner further contends (Pet. 31-34) that the ability of the IRS Appeals Office to settle a liability in a taxpayer's favor effectively deprives an unfavorable TAM of any force. That contention is misguided. The settlement or compromise of liabilities for reasons unrelated to a statutory obligation does not affect that obligation in other tax periods. Nor could the ability of the IRS Appeals Office to provide a discretionary reprieve from an unfavorable TAM vitiate the notice of a taxpayer's obligations that such a TAM provides. Pet. App. 24a-28a. This Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), requires only that the government provide notice that is "precise and not speculative." *Id.* at 31. The specific guidance provided in the 2004 TAM—regardless of any discretionary exceptions to en-

forcement for tax periods before the 2006 and 2007 tax years at issue here—meets that standard.

3. Contrary to petitioner's contention (Pet. 34-36), the decision below does not conflict with any precedent of this Court requiring the uniform tax treatment of similarly situated taxpayers. The equitable principle invoked by petitioner "requires consistency by the IRS." Pet. App. 31a. That administrative consistency is present here. Petitioner's unequal-treatment argument (Pet. 34-36) is based on a district court's conclusion that petitioner's competitor NetJets was not required to collect Section 4261 tax on monthly management fees during the tax periods at issue in this case. See *NetJets*, 80 F. Supp. 3d at 756-759. But the IRS took the position in that case that the taxpayer was required to collect Section 4261 tax on monthly management fees. *Id.* at 751. The outcome in *NetJets*, which has not been reviewed by a court of appeals, reflects the decision of a district court, not administrative action taken by the IRS. See Pet. App. 31a.

Nor does the outcome in petitioner's case run afoul of any "unfair competitive disadvantage principle" under *International Business Machines Corp.* v. *United States*, 343 F.2d 914, 919 (Ct. Cl. 1965), cert. denied, 382 U.S. 1028 (1966). *IBM*'s equitable rule has been limited to its facts, *i.e.*, where similarly situated taxpayers are given inconsistent private-letter rulings. See *Florida Power & Light Co.* v. *United States*, 375 F.3d 1119, 1124 (Fed. Cir. 2004). In this case, "[u]nlike in *IBM*," the lower courts were "not faced with dueling IRS rulings issued to competitors at the same time based on identical facts." Pet. App. 30a.

4. Finally, any uncertainty regarding the taxation of fractional programs like the one at issue here is of uncertain prospective importance. In 2012, Congress enacted a provision that specifically exempts aircraft in fractional programs from the Section 4261 tax. See FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 1103(c), 126 Stat. 149; see also 26 U.S.C. 4261(j).[4] Section 4261(j) currently provides that "this subsection shall not apply after September 30, 2017." 26 U.S.C. 4261(j). But the sunset provision—which was originally set to take effect on September 30, 2015, see § 1103(d), 126 Stat. 151—has been subject to regular extensions since its enactment. See Airport and Airway Extension Act of 2015, Pub. L. No. 114-55, Tit. II, § 202(c)(2), 129 Stat. 525; Airport and Airway Extension Act of 2016, Pub. L. No. 114-141, Tit. II, § 202(c)(2), 130 Stat. 324-325; FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, Tit. I, § 1202(c)(2), 130 Stat. 619. The uncertainty concerning whether and when fractional aircraft programs will again become subject to Section 4261 provides an additional reason for this Court to deny review.

[4] A conference report on that amendment stated that "[n]o inference is intended" that beyond the statutory reprieve, fractional-aircraft-ownership programs are not providing taxable transportation within the meaning of Section 4261. H.R. Rep. No. 381, 112th Cong., 2d Sess. 280 n.32 (2012).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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