

M e m o r a n d u m**325.0016**

To: Mr. R. M. Gilbertson,
San Jose – District Principal Auditor

Date: October 19, 1987

From: John Abbott, Tax Counsel

Subject: --- Aircraft Purchased out of state – use in interstate commerce

In your August 6, 1987 memo to Legal, you raise the question of whether tax applies to purchases of two aircraft by ---. One aircraft is a North American Rockwell Sabreliner, purchased in Oregon on January 13, 1983 from --- California partnership. The second aircraft is a Falcon 50 Jet, purchased from --- and delivered on August 3, 1983 to a --- vice-president at the Wilmington, Delaware airport.

You attached to your memo various documents concerned with the purchases of these two aircraft. You also sent me a memo dated October 2, 1987, with additional facts concerning the Sabreliner. These two memos and attachments are summarized below.

With respect to the Sabreliner, --- had previously leased the aircraft to ---, with the lease expiring on the date of purchase. On that date, --- pilots flew the plane with some --- employees as passengers to Corvallis, Oregon, where the lease terminated and the purchase occurred. The plane returned to California with other --- employees as passengers. I assume that for six months thereafter the plane was used for interstate flights only.

With respect to the Falcon 50 Jet, when --- delivered the plane at Wilmington, Delaware, --- vice-president, accepted delivery and returned to California on the plane together with two non-employee passengers. For the next six months, all flights were from California to out-of-state locations, except four flights. Three flights were for type rating pilots, crew training, and pilot flight check, and one flight was from San Jose to Oakland to Fort Collins, Colorado, and return to San Jose. This flight carried passengers from Oakland to Fort Collins.

You raise the following questions, which we will quote and answer below:

Question

“1. Do these aircraft qualify as exempt under Reg. 1620 (b) (2) (b) as claimed by the taxpayer?”

Answer. Our opinion is that the Sabreliner qualifies as exempt from use tax under Regulation 1620 (b) (2) (B), because this aircraft was purchased out of state, flown into California in an interstate commerce activity, and thereafter used continuously in interstate commerce for the next six months. Although the aircraft was flown from San Jose to Corvallis, Oregon, by --- pilots on the purchase date, the taxpayer now asserts and you agree that the aircraft was previously leased by --- to --- until the date it was purchased by ---. Therefore, contrary to my May 23, 1984 memo to Mr. A. L. Cade, Occasional Sales Unit, related to this same aircraft, we can no longer assert use tax due on the grounds that --- took delivery in San Jose, not Corvallis, Oregon.

With respect to the Falcon 50 Jet, our opinion is that --- purchase also qualifies as exempt under Regulation 1620 (b) (2) (B) since the delivery of the aircraft occurred in Wilmington, Delaware, the aircraft was accepted by a --- vice-president in Delaware, and the first functional use of the aircraft occurred out of state when the aircraft was used to fly that employee back to California. The exemption is not lost because other passengers not apparently connected to --- also flew on the airplane at the same time.

The four flights you refer to in your memo do not cause the exemption to be lost because, while the flights occurred in California, they all qualify as incidental to --- continuous use of the aircraft in interstate commerce. Specifically, three of the flights were for training or testing purposes, and one portion of one flight, the January 30, 1984 flight from San Jose to Oakland, appears to be part of a continuous interstate journey where the flight was for the purpose of picking up passengers in Oakland and flying them to Colorado. However, we note that if on that flight --- had flown an employee from San Jose to Oakland, and dropped that employee off in Oakland, then we should conclude the plane was used for an in-state flight, not continuously in interstate commerce, even though the flight continued on to Colorado, and the use tax would apply. (See BTLG Annotation 570.0430, para. 4, 3/23/84).

Although not directly applicable here, Regulation 1593 provides an analogy with respect to the training and testing flights. Subdivisions (c) and (e) of that regulation allow aircraft common carriers to not count as operational flights, flights which are for the purpose of training crews or testing the aircraft. These uses are considered incidental to the use of the aircraft as a common carrier.

Question

“2. How does Reg. 1620 (b) (3) apply to these aircraft?”

Answer. Regulation 1620 (b) (3) (out-of-state purchases for use in state) would only apply to these aircraft purchases if the planes had not been used continuously in interstate commerce. However, since the purchases are exempt from use tax under subdivision (b) (2) (B), for the reasons stated above, it therefore makes no difference whether they would independently qualify under subdivision (b) (3).

*note: technically 1620 (b) (3) applies first! If not purchased for use in Cal, analysis over-no tax. If purchased for use, taxable unless exempt continues interstate commerce. Practically speaking if one or the other basis for no tax is clear, it may not be necessary to discuss other as here. DHL

Question

“3. Does storage time based in California count toward the 50% usage for the first six months?”

Answer. If subdivision (b) (3) applied, storage time in California would count as in-state use in determining whether or not an aircraft was principally used in California in the six months following its entry into California. However, as noted above, we consider that subdivision (b)(3) does not apply to these aircraft.

Question

“4. Does the presence of the Corporate Vice President on the Initial flight qualify as being engaged in its (taxpayer) interstate business? --- does not have a location in Delaware.”

Answer. Yes. According to the documentation you enclosed, the vice-president, --- was authorized to take delivery of the aircraft in Wilmington on behalf of ---. Therefore, his presence on the flight from Delaware to California constituted a functional use of the aircraft by --- in interstate commerce following the out-of-state delivery. It is immaterial that --- has no company location in Delaware.