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July 27, 1992

Mr. [F]
[S]
Attorneys at Law
XXXXX --- ---, Suite XXXX
--- ---, California XXXXX

Re: Unidentified Taxpayer

Dear Mr. [F]:

This is in response to your letter dated June 17, 1992 regarding the application of tax to your unidentified client's purchase of an aircraft. You state:

"Our client (hereinafter the 'Taxpayer') purchased, from an unrelated party, an aircraft. The intent of the Taxpayer in purchasing the aircraft was to utilize the aircraft in the chartering business. To accomplish this, the Taxpayer intended, after inspection and refurbishing of the aircraft, to transfer the aircraft to a newly formed corporation in exchange for all of that corporation's shares. Thereafter, the shares of the newly formed corporation would be distributed to the Taxpayer's shareholders. The Taxpayer is the holder of a valid resale certificate. The business purpose for transferring the aircraft to the newly formed corporation is to limit the Taxpayer's potential liability with respect to operation of the aircraft in the air charter business."

You do not state whether your client purchased the aircraft from a dealer or instead from a person who was not required to hold a seller's permit by virtue of its sales of aircraft. I assume that the aircraft was purchased from a person who was not required to hold a seller's permit by virtue of its sales of aircraft.

You state that your client holds a valid "resale certificate" (I assume you mean that it holds a seller's permit - a person who holds a seller's permit may issue a resale certificate showing that persons's seller's permit number if that person is purchasing property for resale in the regular course of business). However, you do not state whether your client was required to hold a permit by virtue of its sales of aircraft. I assume that your client makes sales of tangible personal property other than aircraft and is not required to hold a seller's permit by virtue of its

sales of aircraft.

You believe that your client's purchase of the aircraft was not at retail since it intended to resell it. You believe that the transfer to the new corporation is exempt from tax under Revenue and Taxation Code section 6366 to the extent the new corporation is a common carrier under applicable law.

Discussion

Initially, I note that it is unclear what you mean when you state your conclusion that the transfer to the new corporation is exempt "to the extent the new corporation is a common carrier under applicable law." The exemption provided by section 6366 is not based on merely whether the purchaser is a common carrier. The aircraft must be used more than 50 percent of its operational use in actual common carriage to qualify for exemption. This is explained in Regulation 1593.

The exemption is not prorated based on percentage of use as a common carrier. If the aircraft is used in a manner qualifying for the exemption, the sale to, and use by, the common carrier is entirely exempt from sales and use tax. If a common carrier purchases an aircraft and uses it in a manner not qualifying for the exemption, the sale or use of the aircraft is subject to sales or use tax measured by the full purchase price.

You state that your client will transfer the aircraft to the new corporation in exchange for the stock of that corporation. I assume that the new corporation gives no other consideration for the transfer. Thus, the transfer of the aircraft to the new corporation solely in exchange for first issue stock of that commencing corporation is not a sale subject to sales or use tax. (Reg. 1595.)

You state that your client purchased the aircraft for use in a chartering business. We disagree. The person who will use the aircraft in the chartering business is not your client but rather is the new corporation. Your client did not purchase the aircraft for resale but rather for the purpose of transferring it to a commencing corporation in a nontaxable transaction. This is a use subject to use tax.

If your client were to itself use the aircraft as a common carrier in a manner qualifying for the section 6366 exemption, then of course that use would be exempt from tax. Similarly, if your client leases the aircraft to the new corporation and the new corporation uses the aircraft as a common carrier more than 50 percent of its operational use during the first twelve months after its first operational use, then the use by your client would again be exempt from use tax under the provisions of Revenue and Taxation Code section 6366.1. (The lease of an aircraft is never a sale but rather is a consumption by the lessor. The use by the lessee is attributable to the lessor, and section 6366.1 was adopted as a corollary to section 6366.)

The parties to a transaction often have many ways to structure their transaction to accomplish their goals. The parties must accept the burdens along with the benefits of their chosen method of reaching their goals. (*Simplicity Pattern Co. Inc. v. State Board of*

Equalization (1980) 27 Cal.3d 900.) If your client chooses to transfer title to the aircraft to the new corporation, then the section 6366 exemption is not available to your client since it would not be using the aircraft in an exempt manner. If, instead, your client leases the aircraft to the new corporation, it would be the consumer and the use of the aircraft by the new corporation would be attributable to your clients. If that use meets the requirements of the section 6366.1 exemption, no use tax will be applicable to that exempt use.

If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Senior Tax Counsel

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