

**STATE BOARD OF EQUALIZATION**

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November 2, 1989

G---y M. M---, M.D.
XXXX W. --- --- Blvd., Suite XXX
---, California XXXXX

Dear Mr. M---:

This is in response to your letter dated September 25, 1989. You will be purchasing an aircraft and you ask whether your purchase will qualify for exemption from sales tax under the "principal use" test.

A sale of tangible personal property for use in California is subject to sales or use tax unless specifically exempted by statute. (Rev. & Tax. Code §§ 6051, 6201.) Revenue and Taxation Code Section 6366.1 exempts from sales and use taxes the sale or use of an aircraft which is leased, or sold to a person for leasing, to lessees using such aircraft as common carriers of persons or property under the authority of the laws of this state or the United States. We apply a principal use test to ascertain whether the lessee is using the aircraft as a common carrier. (Reg. 1593(b)(used as common carrier over one-half of the operational use during the first 12 months commencing with the first operational use).) A copy of Regulation 1593 is enclosed for your information. I assume that this is the exemption about which you inquire.

You explain that the use of the aircraft you may purchase would involve three entities: G--- M---, as an individual; G--- M---, M.D., a medical corporation; and a charter operator chartered by the FAA under Part 135 (Code of Federal Regulations, Title 14.) You also explain:

"The airplane will be owned individually by G--- M---. It will be managed by the charter company and flown by their pilots in compliance with Part 135 rules. The medical corporation will need the plane for approximately 10 days per month, and the charter company will have it available for other clients approximately 20 days per month.

"All flights, for the medical corporation as well as other clients of the charter company will pay the same rates including applicable taxes.

“G--- M--- is a certified commercial pilot with instructor and instrument ratings. He has flown as a qualified pilot on a Part 135 certificate. For those flights for the corporation where he is to be traveling, he will be the pilot of the aircraft. He will do this as a certified employee of the charter company in compliance with all regulations.”

For purposes of the relevant exemption, a common carrier is a person who engages in the business of transporting persons or property for hire or compensation and who offers these services indiscriminately to the public or to some portion of the public. (See Reg. 1621(a)(1).) I assume that the lessee/charter company will be a common carrier within this definition and that the presumption of subdivision (b)(1)(D) of Regulation 1593 will not apply to your lease, or that you can overcome the presumption. However, even if these assumptions are correct, your purchase and use of the aircraft will be subject to sales or use tax unless the aircraft is used more than one-half of its operational use during the test period (the first 12 months commencing with the first operational use) in common carriage. (Reg. 1593(b)(1).)

There is nothing in your letter which indicates that charters of the aircraft to persons other than your medical corporation would not qualify as common carrier use of the aircraft. Therefore, I assume that your question arises because the aircraft will not be used more than one-half its operational use pursuant to contracts with persons other than the medical corporation. This means that unless use pursuant to contracts with the medical corporation constitutes common carrier use, use of the aircraft will not be exempt under Section 6366.1 and Regulation 1593. In essence, your question is whether the charter company will be regarded as using the aircraft in common carrier operations when it charters the aircraft to the aircraft owner's medical corporation and permits the aircraft owner to pilot the aircraft as the charter company's employee for those flights. The alternative is that we would regard your medical corporation or you individually as subleasing the aircraft from the charter company, and such subleasing would not qualify as common carrier use.

Initially, we note that we would regard as a lease any “charter” in which the person chartering the flight also acted as the pilot, even if as an employee of the charger company. Thus, if you, as an individual, “charter” the aircraft and act as the pilot, such use will not qualify as common carrier use of the aircraft. However, we recognize your medical corporation as a separate person. (Rev. & Tax. Code § 6005.) When your medical corporation charters the aircraft and you act as the pilot, such use may or may not be regarded as common carrier use of the aircraft, depending on the particular facts involved.

When your medical corporation “charts” the aircraft for the purpose of having only you transported, we will not recognize this as a true charter if you are the pilot. Such use does not constitute use as a common carrier. When your medical corporation charters the aircraft for the purpose of transporting several persons and you act as pilot, we will recognize this as common carrier use if you are a true employee of the lessee and if such use is common carrier use within the intent of Revenue and Taxation Code Section 6366.1.

Of course, you would have to be treated in the records of the lessee, as well as in your own records, as an employee of the lessee and you would have to be paid the same amount as paid to any other pilot with equivalent experience employed by the lessee. The parties would be required to pay all applicable employment taxes and fees (social security taxes, unemployment insurance, etc.). Your employment would have to satisfy all regulatory requirements for a pilot of an air taxi or commercial operator carrier under applicable regulations. (see, e.g., 14 CFR §§ 135.1, 135.101, 135.265.) The rates to the medical corporation can be no lower than rates available to other charterers. However, satisfying these requirements alone is not sufficient. The intent of the Legislature in adopting Section 6366.1 did not include extending an exemption to the use of an aircraft by the owner in a lease and sublease back arrangement.

We will disregard the corporate existence of the medical corporation for purposes of this exemption if the sole purpose of your employment with the lessee is to act as a pilot of your own plane when your own medical corporation "charters" the aircraft. If you are not available to act as pilot for other flights besides those chartered by your medical corporation, we will not recognize your relationship with the lessee as a true employment relationship for purposes of the common carrier exemption. Rather, we will regard such use of the aircraft as use not constituting common carrier use for purposes of calculating the principal use of the aircraft during the test period.

It is presumed that your purchase of an aircraft for use in California is subject to sales or use tax until the contrary is established. (See Reg. 1667.) If you believe you will qualify for the exemption provided by Section 6366.1, you and your lessee should retain sufficient documentation to establish the exemption. If you do not retain such documentation, the exemption will be denied. For example, If you are unable to present documentation showing that a particular flight qualifies as common carrier use, that flight will be regarded as non-common carrier use. Similarly, if you cannot present documentation showing that you were employed more than incidentally by the lessee to act as pilot for flights other than those involving your medical corporation, such flights will be regarded as non-common carrier use for purposes of the exemption.

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

Sincerely,

David H. Levine
Tax Counsel

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Enclosure

G--- M. M---, M.D.

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November 2, 1989
105.0065

bc: Mr. E. L. Sorensen, Jr.
Occasional Sales Unit
Ms. Shirley Johnson – Petition Unit.