

M e m o r a n d u m**105.0090**

To: Mr. J. W. Cornelius
Supervisor, Petition Section

Date: August 1, 1978

From: David H. Levine
Senior Tax Counsel

Subject: Common Carrier Exemption

This is in response to your memorandum dated February 28, 1991 regarding the application of the common carrier exemptions provided by sections 6366 and 6366.1 and Regulation 1593.

The subject exemptions as relevant to this inquiry are for aircraft used as common carriers of persons or property under the authority of the laws of California or the United States. It has been the policy of the Petition Section to grant or deny assertions that aircraft are used as common carriers by reference to the guidelines established pursuant to Part 135 of the Federal Aviation Regulations (14 CFR § 135). You believe that all property for hire must receive certification from the Federal Aviation Administration pursuant to Part 135. You note that Part 135.1 specifically excludes the subject rotocraft flights from its purview as well as excluding some other flights.

As you note, Regulation 1593 defines "common carrier" to include "any person who engages in the business of transporting persons or property for hire or compensation and who offers his services indiscriminately to the public or to some portion of the public." You also note that under this definition many of the flights excluded under Part 135.1 could qualify as common carrier flights but you also note that to qualify for the exemption the person must use the aircraft as a common carrier under the authority of the laws of this state or the United States. Specifically, you ask whether firefighting flights and external-load operations would qualify as common carrier flights under the Sales and Use Tax Law. These flights are under authority of FAR Part 133, rotocraft external-load operations. (14 CFR § 133.) The response below is in the context of an aircraft whose use is authorized pursuant to federal authority.

The two basic conditions which must be met to qualify for exemption are that: the aircraft must be used as a common carrier; and that use must be under the authority of this state or under the authority of the United States. That common carrier use must be defined as common carrier

use under Regulation 1593. It need not be defined as common carrier use under federal law but rather must be specifically authorized by federal law. The short answer to your question is that aircraft will qualify for the exemption as long as the aircraft is used to transport persons or property for hire or compensation, the transportation is provided indiscriminately to the public or to some portion of the public, and that operation is authorized by federal law.

In this case, the aircraft will qualify for the exemption if its use comes within the definition of common carrier use regardless of whether that use is authorized under Part 133, Part 135, or any other part of the Federal Aviation Regulations. On the other hand, if aircraft is used in a manner qualifying as common carrier use under the definition set forth in Regulation 1593 but that use is not authorized by the Federal Aviation Regulations under which that person is certificated, then that use does not qualify as common carrier use for purposes of the exemption even if the person is otherwise authorized to operate pursuant to federal law (that is, use of aircraft in violation of a person's certificate does not count as common carrier use when calculating whether the aircraft qualifies for the exemption).

The problem appears to have arisen because of the incorrect belief that all common carriers must be certificated under Part 135. I note that the provision in Part 135 that concerns you does not exclude from the definition of common carrier the subject activities but rather excludes those activities from coverage under Part 135. As far as I can tell, Part 135 does not actually define common carrier activities but rather authorizes certain air taxi operations. Other parts of the FAR also authorize operations that clearly qualify as common carrier operations. (See 14 CFR §§ 121, 125, 127, 129.) These parts do not define common carrier operations but rather define those operations which each part authorizes.

In response to your specific question, firefighting flights and external-load operations qualify as common carrier use for calculation of whether the exemption applies provided: the flight will transport persons or property for compensation; those services are offered indiscriminately to the public or to some portion of the public; and the flights are authorized by the person's FAA certificate.

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M e m o r a n d u m**105.0090**

To: Mr. J. W. Cornelius
Supervisor, Petition Section

May 14, 1991

From: David H. Levine
Senior Tax Counsel

Subject: Common Carrier Exemption

In a memorandum dated April 26, 1991, I responded to your inquiry regarding the application of the common carrier exemptions provided by sections 6366 and 6366.1 and Regulation 1593. It has now come to my attention that the subject of your inquiry was also the subject of much wrangling a number of years ago, and I believe that some further discussion in the context of my April 26 memorandum is appropriate.

In your inquiry, you noted that, with the exception of ferry flights made in connection with an otherwise qualifying common carriage flight, it had been the policy of the Petition Section to grant or deny claims for common carrier exemption using the guidelines established pursuant to FAR Part 135.1. In my memorandum, I concluded that operating pursuant to Part 135 was not a requirement for the exemption from California Sales or Use Tax. Rather, I concluded that: the aircraft must be used as a common carrier; and that use must be under the authority of this state or under the authority of the United States. This was the main focus of my memorandum and remains the applicable rule.

Your inquiry was specifically in the context of firefighting flights and external load operations. Since the main focus of my memorandum was to clarify that an aircraft operated pursuant to some Part other than 135 could still qualify for the common carrier exemption, my reference to firefighting flights was conclusionary. I stated that the firefighting flights and external load operations will qualify as common carrier use provided: the flight transports persons or property for compensation; are offered indiscriminately to the public or to some portion of the public; and the flights are authorized by the person's FAA certificate. Again, these conclusions remain applicable, but a bit more discussion would have been helpful.

When a person provides carriage for firefighters from Point A to Point B, that flight qualifies as a common carrier flight if meeting the other requirements. Similarly, if that person provides carriage of firefighting supplies picked up at Point A and delivered to Point B, that flight also qualifies as common carrier flight if meeting the other requirements. On the other hand, if that same person carries water in its aircraft from Point A and drops the water on a fire at Point B, we would not regard that flight as qualifying as a common carrier flight. That is, we do not regard such a flight as for the purpose of transporting persons or property for compensation but rather as a flight to provide the service of firefighting. The same analysis would apply, for example, to cropdusting. Even though the aircraft carries the dusting material from one point to the location of the fields, we do not regard such a flight as for the purpose of transporting property for compensation. Rather, we regard that flight as for the agricultural service of cropdusting. Such a flight does not qualify as a common carrier flight.

If you have further questions on this subject, feel free to contact me.

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bc: Mr. Donald J. Hennessy