

M e m o r a n d u m**105.0140**

To: Petition Unit (RNZ)

Feb. 7, 1968

From: Tax Counsel (WEB)

This memo will provide you with our recommendations for further action on the above-named taxpayer's petition for redetermination of sales and use taxes. An oral hearing was held on this matter on October 3, 1967, at which time the matter was taken under consideration with the direction that petitioner file a brief for consideration of the Board within 30 days. This time limitation was subsequently extended at the request of the petitioner.

The subject matter of the petitioner's protest involves the application of the use tax to the rental of two Hovercraft to "H". The lease in question was executed on or about February 1, 1965. Because new material has been introduced, detailed comments are in order.

Petitioner had initially contended that the leased property was watercraft and that the leasing of the Hovercraft for use by certificated or licensed carriers qualified for the exemption provided by Revenue and Taxation Code Section 6368 (watercraft exemption). In the alternative, it contended that rentals received were exempt from tax after the effective date of the enactment of Section 6368.1 of the Revenue and Taxation Code. Effective September 17, 1965, Section 6368.1 exempted from use tax the leasing of watercraft "...to lessees using such watercraft in interstate and foreign commerce involving the transportation of property or persons for hire...."

We have denied exemption under Section 6368 on the basis that petitioner's leasing of the vessel was a use separate and apart from the use made by the lessee (Union Oil Co. v. State Board of Equalization, 60 Cal. 2d 441). Exemption under Section 6368.1 was denied on the basis that the property was used by petitioner prior to the effective date of the exemption section; and, therefore, its only option was to pay use tax on the cost of the property or rental receipts. (See E. H. Stetson's letter of May 3, 1967.)

At the oral hearing, for the first time petitioner contended that the Hovercrafts were aircrafts, rather than watercrafts, and that the leasing of the Hovercrafts to the certificated carrier qualified it for the exemption provided by Section 6366.1 of the code. On February 1, 1965, Section 6366.1 provided in pertinent part as follows:

"6366.1 (a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of and the storage, use, or other consumption in this State of aircraft which are leased, or are sold to persons for the purpose of leasing, to lessees using such aircraft as certificated or licensed carriers of persons or

property in interstate or foreign commerce under authority of the laws of the United States or any foreign government, or to any foreign government as lessees for use by such government outside the State, or to persons as lessees who are not residents of this State and who will not use such aircraft in this State otherwise than in the removal of such aircraft from this State.”

Our research has not produced any particular legislative history which provides a ready answer for determining what constitutes an aircraft or watercraft for purposes of these exemptions. The Hovercraft literally meets the dictionary definition of both an aircraft and a watercraft. However, we do not believe that this alone warrants a finding that Hovercrafts should be regarded as aircraft for purposes of Section 6366.1.

The exemption was provided for persons leasing aircraft to “... lessees using such aircraft as certificated or licensed carriers of persons or property in interstate or foreign commerce....” Such carriers are regulated by the provisions of the Federal Aviation Act of 1958 (29 U.S.C.A., § 1301, et seq.). The law and the regulations implementing this act clearly contemplates that the carriers aircraft be designed for flight in navigable airspace.

Title I, section 101 (24) of the Federal Aviation Act defines navigable airspace as follows:

“(24) ‘Navigable airspace’ means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.” (49 U.S.C.A., § 1301[24].)

Pursuant to this authority, the Civil Aeronautics Board has prescribed the minimum altitudes of navigable airspace at 1,000 feet over congested areas and 500 feet over other areas (Aaron v. U.S. (1963) 311 F.2d 789). However, navigable airspace has been held to include such airspace below prescribed altitudes as is needed to insure safety in take-off and landing of aircraft (Johnson v. Airport Authority of Omaha, 115 N.W. 2d 426).

It is my understanding that the Hovercraft in question can only clear vertical objects of three to four feet and rounded obstructions of from six to eight feet in height. Therefore, it seems clear that it cannot perform transportation of persons or property in navigable airspace except in the course of taking off and landing.

The situation presented appears to be quite similar to the problem presented in classifying a seaplane. A number of cases have held that a seaplane does not constitute a vessel, even though it is capable of landing and taking off on water. The cases are collected in U.S. v. Peoples, 50 F. Supp. 462. There the court quoted with approval the following pertinent language from Noakes v. Imperial Airways, Ltd., D.C. (1939) 29 F. Supp. 412:

“The primary purpose and function of the Cavalier [seaplane] was to travel through the air. It was practically incapable of being used as a means of transportation on water, although its construction enabled it to embark on its journey from the sea and to alight on the water when it had reached its destination, but this was purely incidental to its flight through the air. It does not appear that it ever functioned as a ‘vessel’.”

Similarly, the Hovercraft can enter navigable airspace only when landing and taking-off. During the course of actual transportation between points, it is incapable of travel in navigable airspace and for all practical purposes, this limits it to performing transportation in connection with water. Its operation in the air overland, other than landing and takeoff, would not only be contrary to Civil Aeronautics Board regulations, but would also interfere with the reasonable use and enjoyment of the land of private landowners. Such intrusion would clearly be actionable (Jackson Municipal Airport Authority v. Evans, 191 So.2d 126).

Perhaps a factual distinction can be drawn because the watercraft is capable of operating without actually touching the water. However, I fail to see how it is any less a watercraft if it is incapable of performing any transportation except in connection with water. Furthermore, it can operate in the water itself, and is classified as a vessel for federal regulatory purposes.

In view of the above, it is my conclusion that the Hovercraft should not be regarded as aircraft for purposes of the exemption provided by Section 6366.1, because it is not designed for transportation of persons or property in navigable airspace.

It is my recommendation that the tax be redetermined without adjustment.

WEB:vs [1b]