

M e m o r a n d u m**325.0190**

To: Mr. Jack Warner
Out-of-State District Principal Auditor

Date: September 26, 1989

From: David H. Levine
Tax Counsel

(916) 445-5550
ATSS 485-5550

Subject: ---.
Account No. ---

This is in response to your memorandum dated August 29, 1989. xx is an out-of-state company that makes sales of aircraft parts to common carrier airline companies in California. As I understand these transactions, had xx's sales been made in California, they would have been exempt from sales tax pursuant to Section 6385. However, since these sales occurred outside California and Section 6385 exempts only transactions subject to sales tax, xx was required to collect use tax from its purchasers unless the transactions were otherwise exempt from use tax.

With respect to many of these transactions, the audit has disclosed that xx accepted Certificate F under Regulation 1621. As you note, this certificate covers only an exemption from sales tax and is improper with respect to these transactions. I also note that that this certificate covers only foreign air carriers, as does subdivision (b) of Section 6385 to which the certificate refers. I assume your memorandum relates only to foreign air carrier purchasers.

You have provided us copies of memoranda and a letter from 1982 written on this subject with respect to the XXX Corporation. XXX was advised that a blanket certificate of exemption under Section 6009.1 would be acceptable. One aspect that was not covered in the memoranda or letter, and which you note, is that to qualify for the exclusion provided by Section 6009.1, the property must not be delivered out of state prior to use by the purchaser (as is the case with Section 6385 exemptions), but the property must also thereafter be used solely outside the state (as you know, we apply a six-month test to ascertain whether the exclusion applies).

xx contends that this represents unconstitutional interference with foreign commerce. xx believes that it is unconstitutional to place stricter requirements for exemption from use tax (that is, that the property be used thereafter solely outside California) than those imposed on "similar" sales transactions. We do not believe that the Section 6009.1 exclusion is similar to the exemptions provided by Section 6385. Actually, in some ways the Section 6009.1 exclusion is much broader than the exemptions provided by Section 6385, while in other ways the Section 6009.1 exclusion is more narrow. For example, Section 6385 applies only to common carrier purchasers, while Section 6009.1 applies to any purchaser. Under Section 6385, the purchaser/carrier may not use the purchased property to carry a payload or for any other

purpose prior to its delivery out of state. (See, generally, Reg. 1621 & Certs. D & E.) On the other hand, some types of "use" which would cause purchasers to lose the Section 6385 exemptions would be excluded from the definition of use under Section 6009.1. For example, the Section 6009.1 exclusion would be applicable even if a purchaser installs an engine on an aircraft, a use otherwise subject to use tax, and flies the aircraft directly out of California (without carrying passengers or property) provided the aircraft does not return to California (within six months). (Reg. 1620(b)(5).)

Regardless of the differences between Section 6009.1 and Section 6385, xx's argument is not actually based on these differences. Section 6009.1 was not intended to be complimentary to the Section 6385 sales tax exemptions, and it is not. xx's argument is actually that we are required to provide an exemption for use tax that is otherwise identical to Section 6385. We disagree.

xx wants us to conclude that the taxing provisions of Section 6201 are unconstitutional with respect to transactions subject to use tax which would have been exempt from sales tax under Section 6385 had the transactions been sales in California. Section 3.5 of Article III of the California Constitution states that an administrative agency, such as this Board, has no power to declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. Since no appellate court has made a determination that Section 6201 is unconstitutional in the manner asserted by xx, this Board has no power to declare that such is the case. (Even if Sundstrand prevails in court, the court might very well resolve the alleged unconstitutional discrimination by eliminating the Section 6385 exemptions.)

Since xx did not take timely certificates in good faith that establish an exemption from use tax, it has the burden of establishing that the property it sold into California qualifies for the exemption provided by Section 6009.1. As opposed to taking a certificate in good faith at the time of the sale, in which case we would look to the purchaser to confirm that it met the requirements of use thereafter solely outside the state, Sundstrand must now show that the property purchased and delivered into California which otherwise qualifies for the Section 6009.1 exemption was actually used entirely outside the state for at least six months after removal from this state.

In future correspondence, please ensure that you include the taxpayer's account number. Alpha had two account numbers for taxpayers with this name. I believe the account number cited above is correct; however, the central file was out so I could not confirm. Please contact my secretary, Wendy, at 324-4441 to inform her as to the correct account number so that a copy of this memorandum is filed in the correct central file.

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cc: Mr. E. L. Sorensen, Jr.