STATE BOARD OF EQUALIZATION

May 26, 1969

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Attention: Mr. G--- R. K---, Jr.

Gentlemen:

This is in reply to your letter of may 13, 1969, requesting an opinion as to whether a certain company acquiring aircraft would qualify as a common carrier within the meaning of the sales and use tax exemptions provided by sections 6366 and 6366.1 of the Revenue and Taxation Code.

We understand that the company in question will use the aircraft in providing transportation services. It will hold its services available to the public at a standard rate based on mileage, plus standby and other charges, on a nonscheduled basis. The aircraft will be under the control of the company's pilot and not that of the customer. The company will have a certificate from the Federal Aviation Agency pursuant to federal regulations (14 C.F.R. 135). We assume that this certificate will be an "air taxi/commercial operator" (ATCO) certificate.

Sections 6366 and 6366.1 of the Revenue and Taxation Code exempt from sales and use taxes the gross receipts from the sale of and the use of aircraft sold or leased to persons "using such aircraft as common carriers of persons or property under authority of the laws of … the United States…."

Upon the facts described above, it is our opinion that for the reasons hereafter stated, the company would be using the aircraft as a common carrier under authority of the laws of the United States within the meaning of sections 6366 and 6366.1 and that the exemptions provided by those sections would apply.

Part 298 of the regulations issued by the Civil Aeronautics Board exempt air taxi operators from certain regulations generally applicable to all air carriers subject to the jurisdiction of the C.A.B. (14 C.F.R. 298) Section 298.3 provides that:

> (a) There is hereby established a classification of air carriers, designated "air taxi operators" which engage in the direct air transportation of passengers and/or property and/or in the transportation within the 48 contiguous states or Hawaii of mail by aircraft and which:

> "(1) Do not, directly or indirectly, utilize in air transportation large aircraft (other than turbojet aircraft authorized for use by air taxi operators pursuant to section 298.21) and
>
> "(2) Do not hold a certificate of public convenience and necessity or other economic authority issued by the board (14 C.F.R. 298.3, 33 Fed. Reg. 18236)."

Section 298.21 provides that the exemption authority provided to air taxi operators by part 298 extends to the direct air transportation of persons, property and mail "in plane-load charter flights in turbojet aircraft having a maximum certificated takeoff weight of over 12,500 pounds and under 27,000 pounds and a maximum passenger capacity of not more than twelve (12) persons" 14 C.F.R. 298.3(a).

For the purposes of section 298.21, "'charter flight' means air transportation performed by an air taxi operator on a time, mileage or trip basis where the entire capacity of one or more aircraft has been engaged for the movement of persons and property by a person for his own use; or by a person … for the transportation of a group of persons and/or their property, as agent or representative of such group." 14 C.F.R. 298.3(a). In other words, those who operate turbojet aircraft in the 12,500 to 27,000 pound class on an individually ticketed (as opposed to chartered) basis cannot qualify as "air taxi operators.

Under regulations promulgated by the Federal Aviation Administration, air taxi operators conducting operations under the C.A.B. regulations cited above are required to hold air taxi/commercial operator (ATCO) certificates (14 C.F.R. 135). Holders of ATCO certificates are required to observe the operating and safety rules prescribed in subpart C of part 135 of title 14.

It appears that air carriers qualifying for the exemptions from economic regulation provided by 14 C.F.R. 298 are carriers operating under the authority of the laws of the United States as described in sections 6366 and 6366.1. Although air taxi operators are exempted from numerous of the regulations administered by the C.A.B., they remain subject to certain regulations, including the requirements of Title IV of the Federal Aviation Act of 1968: "That air tax operators shall provide safe service, equipment, and facilities in connection with air transportation."

Generally, whether a particular carrier qualifies as a common carrier is a question of fact. In Alaska Air Transport v. Alaska Airplane Charter Co. (1947) 72 F.Supp. 609, defendant was found to be a common carrier, within the meaning of the Civil Aeronautics Act of 1938, even though defendant furnished its aircraft on a nonscheduled charter basis only.

Defendant carried persons and property at hourly, daily, weekly, and monthly rates, indiscriminately to the limit of its facilities. The court said that, "It is significant … that the term 'charter' is not used … in strictly legal sense to indicate instances where control of the plane is surrendered by the owner to the charterer or lessee. Rather the term is used to describe those cases in which the exclusive use of the plane is contracted for usually at an hourly rate … but it does not

necessarily follow that such operations have the effect of removing one from the status of a common carrier in the absence of a change in the control of the plane." (See also, Arrow Aviation v Moore, 266 F.2d 488; 73 ALR 2d 346.)

In summary, it is our conclusion that on the facts described herein, the company in question will qualify as a common carrier of persons or property under authority of the laws of the United States within the meaning of sections 6366 and 6366.1 of the Revenue and Taxation Code.

Very truly yours,

T. P. Putnam
Tax Counsel

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