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September 23, 1999

Mr. C--- L. N---
C--- L. N---, C.P.A.
P.O. Box XX-XX
--- ---, California XXXXX-XXXX

Re: M--- I--- Enterprises

Dear Mr. N---:

This is in response to your letter dated September 16, 1999 regarding the interpretation of Sales and Use Tax Regulations 1593 and 1620.

Your client, M--- I--- Enterprises, purchased a Gulfstream II in late August 199X. It has now purchased a Gulfstream IV better suited to its needs, and is planning to sell the first aircraft (which I will refer to as "the aircraft").

Your client initially intended that the use of the aircraft would qualify for the common carrier exemption because it would be leased to a Part 135 air taxi operator who would use it more than fifty percent of its operational use in common carriage. Additionally, since the air tax operator is located in Connecticut and the aircraft was first functionally used in Oregon, your client believed that, alternatively, the aircraft would not be regarded as purchased for use in California because it would be used principally outside California during the six-month period immediately following its first entry in California.

Now that your client's circumstances are such that it wishes to dispose of the aircraft prior to the end of the relevant test period, you have two questions regarding Regulations 1593 and 1620. First, you note that while Regulation 1593 contains a provision which explains that, if the purchaser of the aircraft owns it for less than the twelve-month test period for determining common carrier use, the test period will be based on the period of time commencing with the first operational use that the purchaser owns the aircraft. You ask whether we have a similar interpretation for the six-month test in Regulation 1620 for determining whether the aircraft is purchased for use in this state. We do.

If the purchaser sells the aircraft prior to the end of the six-month period specified in subdivision (b)(3) of Regulation 1620, then the purchaser's period of ownership after the aircraft's first entry into California is the test period. For example, if the aircraft first entered California on September 1, 1999 and your client sells it on January 1, 2000, the test period will be the three months of ownership after first entry into California. If the aircraft is used or stored

outside of California one-half or more of the time during that three-month period, your client will not be regarded as having purchased the aircraft in California. (This, of course, is based on the assumption that the transfer of the aircraft will be an arms-length sale, and not a transfer designed to avoid tax on the use of an aircraft actually purchased for use in California.)

Your second question relates to the presumption set forth in subdivision (c)(1)(E) of Regulation 1593. That provision applies subdivision (b) of Revenue and Taxation Code section 6366 which establishes a presumption that an aircraft was not purchased for use in common carriage if the aircraft owner does not receive in annual gross receipts from the lease of the aircraft at least twenty percent of the purchase cost of the aircraft to him or her, or fifty thousand dollars (\$50,000). Although not explicit in the statute or the regulation, we interpret this to be a one-time test. The period of this test is contemporaneous with the twelve-month test period used to determine whether the use of the aircraft qualifies for the common carrier exemption. That is, the period of the presumption also commences with the first operational use. Your question is whether the figures in this presumption (i.e., twenty percent of purchase price or \$50,000) are adjusted if the test period is less than twelve months because the aircraft is sold prior to that time. Yes, we prorate those figures.

As noted above, the period for determining the application of this presumption commences upon first operational use of the aircraft and ends after twelve months unless the aircraft is sold prior to that time, in which case the presumption test terminates on the date of the transfer. (Similar to above, our conclusion here is based on the assumption that the aircraft is transferred in an arms-length transaction, not designed to avoid tax on the use of an aircraft when that use is properly subject to tax.) Since the figures of the presumption are based on a one-year test period, we do not think it would be consistent with the intent of the Legislature when adopting this presumption to fail to make adjustments to these figures if the applicable test period is less than one year. Thus, for example, if your client sells the aircraft six months after the aircraft's first operational use by your client, the presumption of section 6366(b) will arise if your client has not received at least ten percent of the purchase price of the aircraft or \$25,000 in gross receipts, whichever is less.

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

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: --- --- District Administrator (--)