

M e m o r a n d u m**105.0122**

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

April 26, 1991

From: David H. Levine
Senior Tax Counsel

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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 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 aircraft operators that engage in common carriage of persons or 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 rotorcraft 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, rotorcraft 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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