

M e m o r a n d u m**330.1860**

To: Mr. Robert Nunes
Deputy Director (Ret.)
Annotation Project

Date: May 13, 1994

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| "The information contained in this memo supercedes and replaces the original material that became annotation 330.1860 dated 12/8/65." SPJarvis 4/6/04. |
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From: David H. Levine
Supervising Staff Counsel

Subject: Lease Annotations

You added a note on an annotation transmittal control sheet regarding an annotation of a letter written by staff counsel Elizabeth Abreu. The letter essentially stated that a person who purportedly leases tangible personal property but does so with a mandatory operator is not regarded as leasing the property for purposes of sales and use tax. Your note indicates that you agree with the opinion but that it appears to conflict with annotations 330.1860 (12/8/65) and 330.3480. You also cite Regulation 1660(a)(1). [Date added for clarity.]

The rule stated in Ms. Abreu's letter is the correct rule, and the one we have been applying for some time. I explain it in more detail in a memorandum dated January 13, 1993, a copy of which is attached. I assume that my January 13, 1993 memorandum will be annotated. If there is any doubt about it, I specifically request that it be annotated. I think annotating Ms. Abreu's would also be worthwhile.

Rather than being inconsistent with Ms. Abreu's letter, I believe that subdivision (a)(1) of Regulation 1660 is consistent with it. The provision you mention states that a lease "includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on his premises, is operated by, or under the direction and control of, the person or his employees." I understand your point to be that the definition includes property that is merely under the direction and control of the lessee and, implicitly, operated by the lessor. We have interpreted this to mean that, if there is an optional operator, the lessee has direction and control because possession and control has been constructively transferred to the lessee. (This is discussed in my January 13, 1993 letter.)

I note that I have previously requested that annotations that are inconsistent with this rule be removed. For example, attached is a memorandum dated June 29, 1992 requesting that annotation 105.0040 be deleted because it implied that an airplane provided with a mandatory pilot could be a lease. (A copy is attached.) Rather than being deleted, the annotation was corrected to state the correct rule, as stated in Ms. Abreu's letter.

In my January 13, 1993 memorandum, I suggested that it would be appropriate for someone to cull through the annotations to select for deletion or correction inaccurate or

misleading annotations on this subject. One I cited was annotation 330.3160, which has apparently been deleted.

Annotation 330.1860 is a close question. It states that student flight instruction is ordinarily considered to be a use of the aircraft by the owner, but it indicates that the owner could elect to consider the use of the aircraft to be a lease. During the flight, the student does, in effect, have control over the aircraft. On the other hand, it could also be argued that true possession and control has not transferred to the student. My view is that, if a qualified pilot could lease the aircraft and the student is charged a rental fee in the same amount as that charged to any other lessee, with a separate charge for instruction, we should regard the transaction as a lease of the aircraft plus instruction. If, however, the aircraft is never leased to a qualified pilot, and is used only for instructional purposes, we should regard the student as obtaining the service of in-air instruction and not regard the transaction as a lease. I believe that the annotation should be clarified based on this analysis, or deleted.

Annotation 330.3480 has no redeeming qualities. It is one of the offending ones that I asked to be removed in my sweeping request for removal of inconsistent annotations. In any event, based on the analysis in my previous correspondence on this subject as well as that of Ms. Abreu and Senior Staff Counsel Ronald Dick (and, I am sure, others), please remove annotation 330.3480.