STATE BOARD OF EQUALIZATION

February 3, 1966

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Attention: --- ---
Tax Manager

Gentlemen:

This is in regard to the problem concerning which you expressed your views in your letter of July 14, 1965. Since receipt of your letter our staff has given a great deal of thought to the problem and have had two conferences with personnel of the Tax Section of the Attorney General's Office.

The problem is with respect to the application of use tax to parts and engines transferred from --- --- and installed on aircraft outside this state, which aircraft are subsequently used in this state in both interstate and intrastate commerce. It is our opinion that the parts and engines are subject to use tax if the parts or engines were purchased for use whenever and wherever (including California) such items would be needed, and were actually used in California in either intrastate or interstate operations, or both. It is our understanding that, contrary to the case which involved American Airlines (American Airlines v. State Board of Equalization, 216 Cal. App. 2d 180), none of the aircraft were used in California exclusively in interstate commerce for as little as 6.4% (the maximum use in California by the American aircraft) of total miles flown.

If the aircraft on which the parts and engines were installed are not used in California within 6 months from the date the parts and engines were transferred out of state, the parts and engines will be considered as exempt from use tax under § 6009.1, provided, however, the aircraft with the parts and engines installed therein are actually substantially used in revenue or company service outside this state within the 6-month period.

The mere holding of the parts and engines for standby or emergency purposes, for 6 months or more, outside the state, does not, in our opinion, exempt the initial storage or retention in California from the use tax. This is exempt by § 6009.1 only if it is for subsequent use "solely" outside the state. Because literal compliance with this section would virtually preclude any

exemption thereunder, since nonliability could definitely be determined only after such a period of time had elapsed as to make subsequent use of the property in this state a practical impossibility, e.g., by obsolescence or destruction, we have recognized a practical test of out-of-state actual use for 6 months after being transported outside this state. We do not recognize the standby or "insurance" status of these parts and engines as constituting an actual use. But, even if we were to do so, we would then regard such a status in California as an actual use also, and thus the parts and engines in such a status in California would lose the exemption under § 6009.1.

In your letter of July 14, you state, "we have been advised that installation on an aircraft is now a prerequisite in determining the 6 months time period." (Underscoring added.) We are not aware that we ever took a contrary position. Actual use during the 6-month period seems to us to be implicit in the statute which otherwise would allow an exemption in effect for property never functionally used outside this state. We do not believe such an interpretation of the statute is at all proper.

We are aware of the possibility that another state may impose its use tax with respect to the use of property in that state, the storage or retention of which in this state has already been subjected to the California tax. We are aware of no judicial decision up to the present time which would indicate that when a use tax is imposed by one jurisdiction on a storage or use in that jurisdiction, and another sate imposes the use tax on a different incident in a different jurisdiction, that one of the two taxes must necessarily be invalid under the Constitution.

The fact that the court in the American Airlines case upheld the California tax upon property that had previously been stored in another state does not, in our opinion, establish that had a tax been imposed by another state with respect to storage therein such tax would have been invalid. It was stipulated in the case that no such tax had been imposed where the storage occurred. Had it been, it is certainly within the realm of possibility that the decision in American Airlines would have been different.

Even, however, if we assume solely for purposes of discussion that one of the two taxes would be invalid, there is no indication in existing decisions that the tax first imposed would be the one held invalid, rather than the tax thereafter imposed even though the second tax might be upon a use as distinguished from storage. Our doubts in this regard are made stronger insofar as our tax is concerned, which applies to storage or retention only when that is followed by an actual use in this state, in accordance with § 6009.1, and that use with 6 months under our administrative interpretation.

But the possibility of more than one sales or use tax with respect to the same item of property is minimized by the fact that an number of states have provided for an offset or credit against their use tax of a tax previously imposed by another jurisdiction with respect to the same property. It is possible that more states will adopt similar provisions. Although California does not now provide for such an offset or credit, this board has recommended such a provision to the State Legislature.

It seems to us, however, that our statute, as it now reads, clearly provides for the application of the tax in accordance with the principles we have indicated herein. In the absence of judicial decision indicating that the imposition of the tax in this manner is unconstitutional, we feel obliged to apply the tax in this manner. We shall, accordingly, recommend that your refund claim be denied. In the event you desire to be heard before the board, we will be glad to schedule the matter for hearing.

Very truly yours,

E. H. Stetson
Tax Counsel

EHS:fb

bcc: Hon. Ernest P. Goodman
Out of State – District Administrator