

M e m o r a n d u m

To: Edward W. King, Chief
Fuel Taxes Division (MIC:33)

Date: October 12, 2006

From : Carolee D. Johnstone *cdj*
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Subject: **AIRCRAFT JET FUEL TAX EXCLUSIONS
AMENDMENT TO ANNOTATION 1180.710**

I am responding to your memorandum dated February 21, 2006, regarding so-called Motor Vehicle Fuel License Tax Annotation (Annotation) 1180.710, which pertains to the aircraft jet fuel tax. The memorandum on which this annotation is based was issued on October 24, 1969. At that time, the provisions of the aircraft jet fuel tax were included in the Motor Vehicle Fuel License Tax Law. As of January 1, 2002, the Motor Vehicle Fuel License Tax Law was repealed and replaced by the Motor Vehicle Fuel (MVF) Tax Law (Pt. 2, commencing with § 7301, of Div. 2 of the Rev. & Tax. Code), where provisions pertaining to the aircraft jet fuel tax (Ch. 2.5, commencing with § 7385) now reside. You have requested, on the assumption that the substantive content of Annotation 1180.710 is still valid, that this annotation be amended to reflect the change in the law governing the aircraft jet fuel tax.

Annotation 1180.710, entitled "Supplemental Air Carriers," states as follows:

A supplemental air carrier holding a certificate of public convenience and necessity under 49 U.S.C.A. Section 1371(d)(3) qualifies for the exemption under Section 7374(a) of the Revenue and Taxation Code.

Specifically, you have asked if a "supplemental air carrier" may obtain a certificate from the U.S. Department of Transportation (DOT) that would permit the carrier to qualify for exclusion from the definition of "aircraft jet fuel user" under Revenue and Taxation Code¹ section 7389, subdivision (a), thereby making sales to such a person exempt from the aircraft jet fuel tax. In addition, you also ask if section 1371(d)(3) of title 49 of the United States Code Annotated (49 U.S.C.A.) pertaining to "supplemental air carriers" is still valid.

¹ All future statutory references will be to the Revenue and Taxation Code unless stated otherwise.

DISCUSSION

Section 7389, subdivision (a), which is comparable to section 7374, subdivision (a), under the prior law, provides that: "A common carrier by air engaged in the business of transporting persons or property for hire or compensation under a certificate of public convenience and necessity issued pursuant to the authority of the laws of this state [or] of the United States . . ." is not considered to be an "aircraft jet fuel user." (§ 7390, subd. (a) [emphasis added].) An "aircraft jet fuel user" is defined to mean "any person who uses aircraft jet fuel for the propulsion of an aircraft in this state except" as provided. (§ 7389.) The aircraft jet fuel tax is imposed on each gallon of fuel that an aircraft jet fuel dealer sells "to an aircraft jet fuel user or use[s] . . . as an aircraft jet fuel user." (§ 7392.)

First, 49 U.S.C.A. section 1371, which apparently dealt with certification of air carriers that provide supplemental air transportation, no longer exists. Specifically, section 1371(d)(1)-(3) was replaced in 1994 by 49 U.S.C.A. section 41102(a). (See Historical and Statutory Notes, West's U.S.C.A., tit. 49 (1997 ed.) foll. § 41102, p. 148.) However, Section 41102(a) currently provides that:

The [U.S.] Secretary of Transportation may issue a certificate of public convenience and necessity to a citizen of the United States authorizing the citizen to provide . . . :

- (1) air transportation as an air carrier.
 - (2) temporary air transportation as an air carrier for a limited period.
 - (3) charter air transportation as a charter air carrier.
- (49 U.S.C.A. § 41102(a).)

As to the continued validity of the substance of Annotation 1180.710, the question is, which, if any, of the three types of air carriers eligible for certificates of public convenience and necessity under 49 U.S.C.A. section 41102 (a) is comparable to an air carrier that provided supplemental air transportation under 49 U.S.C.A. section 1371? Fortunately, several annotations to section 41102 provide clarification. Initially, the annotations confirm that 49 U.S.C.A. section 41102 is the successor of the former 49 U.S.C.A. section 1371 and that it also pertains to air carriers holding certificates for supplemental air transportation. (See annotations to 49 U.S.C.A. § 41102 citing, e.g., *World Airways, Inc. v. Civil Aeronautics Board* (D.C. Cir. 1976) 547 F.2d 695 (*World Airways*) and *Trans International Airlines, Inc. v. Civil Aeronautics Board* (D.C. Cir. 1970) 432 F.2d 607.)

Further, *World Airways* clarifies that "supplemental air transportation [is] defined to encompass charter service but not individually ticketed authority." (*Id.* at p. 697 [emphasis added].) Therefore, it may be surmised that an air carrier providing supplemental transportation under former 49 U.S.C.A. section 1371(d)(3) is the same as a charter air carrier providing charter air transportation under 49 U.S.C.A. section 41102(a)(3).

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The Civil Aeronautics Board previously issued certificates of public convenience and necessity to supplemental air carriers, and the DOT now issues certificates of public convenience and necessity to charter air carriers. The Federal Aviation Administration (FAA) still issues Air Carrier Certificates for supplemental operations, which are defined to include public charter operations. (See 14 C.F.R. §§ 119.1, 119.3, 119.5, 121.1 & 380.2.) The FAA only issues Air Carrier Certificates to direct air carriers, which must hold certificates of public of convenience and necessity or all-cargo air transportation certificates issued by the DOT in order to operate. (See 14 C.F.R. §§ 119.1 & 119.5(a) & (i).)

Accordingly, a charter air carrier (or supplemental air carrier) holding a certificate of public convenience and necessity issued by the DOT under 49 U.S.C.A. section 41102(a)(3) is among the entities excluded from the definition of "aircraft jet fuel user" under Revenue and Taxation Code section 7389, subdivision (a).

Please let me know if you have any questions regarding this information.

cc: Lou Feletto (MIC:33)
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