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October 24, 1969

Attention:

Gentlemen:

This is in reply to your inquiry of June 20, 1969, and your supplementary letter of September 29, 1969, in which you raise a question as to the application of section 6366.1 of the Revenue and Taxation Code. Please excuse our delay in responding to your initial inquiry; however, it appears that that inquiry was misplaced by us.

We understand that: represent a scheduled common carrier California corporation. a scheduled common carrier operating pursuant to the provisions of Part 135 of the regulations of the Federal Aviation Administration of the United States. The company presently is the holder of operating certificate Air Taxi/Commercial. Insofar as its multistate operations are concerned, operates pursuant to the provisions of Part 298 of the Economic Regulations of the Civil Aeronautics Board.

The company has recently entered into a contract to purchase four aircraft from a aircraft manufacturer. On receipt of the aircraft, will lease the planes to for a period of eight years. Plans to use the aircraft for the interstate and intrastate shipment of freight and also to carry passengers within the State of California on a charter basis. The aircraft in question will be based at Los Angeles International Airport.

The lessor has required your client to provide written evidence that the above-described transaction falls within the tax exemption provided by Revenue and Taxation Code section 6366.1(a).

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Section 6366.1(a) exempts from the tax the gross receipts from the sale of and the use in this state of aircraft:

"...which are leased, or are sold to persons for the purpose of leasing, to lessees using such aircraft as common carriers of persons or property under authority of the laws...of the United States."

It has been our opinion in the past that aircraft operated pursuant to Part 298 of the Economic Regulations of the Civil Aeronautics Board by holders of air tax/commercial operating certificates qualify for the exemption provided for by the statute, provided that the persons operating such aircraft use them in the common carriage of persons or property.

Generally, whether a particular carrier qualifies as a common carrier is a question of fact. In Alaska Air Transport v. Alaska Airplane Charter Company (1947) 72 F.Sup. 609, defendant was found to be a common carrier, within the meaning of the Civil Aeronautics Act of 1938, even though defendant furnished its aircraft on a nonscheduled, charter basis only.

Defendant carried persons and property at hourly, daily, weekly, and monthly rates, indiscriminately to the limit of its facilities. The court said that, "It is significant... that the term 'charter' is not used...in a strictly legal sense to indicate instances where control of the plane is surrendered by the owner to the charterer or lessee. Rather the term is used to describe those cases in which the exclusive use of the plane is contracted for usually at an hourly rate... but it does not necessarily follow that such operations have the effect of removing one from the status of a common carrier in the absence of a change in the control of the plane." (See also, Arrow Aviation v. Moore, 266 F.2d 488; 73 ALR 2d 346.)

In interpreting section 6366.1(a), we have recognized the distinction outlined above. We have said that a company providing air transportation to the public in an aircraft under control of the company's pilot at a rate based on mileage plus standby and other charges, on a nonscheduled basis, is a "common carrier" within the meaning of that term as used in section 6366.1(a).

Applying our past interpretations to the facts described by you, it is our opinion that the lease to and the use by of aircraft in question will be exempt from the tax, provided that — operates the aircraft on a common carriage basis.

Very truly yours,

Gary J. Jugum
Assistant Tax Counsel

GJJ/vs