STATE OF CALIFORNIA

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November 18, 1994

Ms. S--- W---, Manager
--- & --- LLP
XXXX --- --- Street, Suite XXX
---, TX XXXXX

Re: Taxpayer Unidentified

Dear Ms. W---:

This is in response to your letter dated September 6, 1994 regarding the application of sales and use tax to an emergency air transport business. You inquire regarding three scenarios where a helicopter will be used for emergency medical transport involving a hospital or ambulance service (for simplicity, I will refer to hospitals only). You sent a letter dated June 15, 1994 on this subject requesting a "ruling" and Senior Tax Auditor Lori J. Mayoya responded in a letter dated August 24, 1994. You indicate that you do not feel that Ms. Mayoya's letter provides the guidance you need, and you ask for a more definite answer or, in the alternative, a statement of what additional information we need to provide such a definitive response.

Initially, I note that you again indicate that you are requesting a "letter ruling." We do not issue rulings. As indicated by Ms. Mayoya, the only basis for the Board to grant relief to a taxpayer from tax otherwise due is if the taxpayer had reasonably relied on incorrect written advice from the Board in response to a written request for such advice that included all relevant facts, including the identity of the parties to the transaction. (Rev. & Tax. Code § 6596.) Since you have not identified your client, this letter does not come within the provisions of section 6596. (I note also that when you wish a letter coming within the provisions of section 6596, you should identify your client in your initial request so that we may serve you, and all others who write, most efficiently.) I will first discuss your scenarios two and three, and will then discuss your scenario one.

Scenario 2

In this scenario, your client contracts directly with the patients for transport services and bills and collects fees from them, or their insurance carriers (the actual billing and collection may be done by a third party hired by your client to do so). You state that various hospitals may make contributions to your client, but no contracts for service are written between your client and the hospitals.

The nature of the hospitals' contributions is not clear. Although they probably do not affect the conclusion herein, we cannot be certain without a detailed explanation of them. With that proviso in mind and assuming the transport services are authorized the FAA regulations governing your client's FAA common carrier certification, the common carrier exemption would apply if the other requirements of Regulation 1593 are satisfied. (Ms. Mayoya has already explained the important requirements of the regulation, and I will therefore not repeat them herein.)

Scenario 3

In this scenario, the hospital purchases a helicopter from the manufacturer or from your client, and contracts with your client to provide pilots, mechanics, parts, and other personnel and supplies necessary for the operation of the helicopter. You state that although the hospital may hold an Air Carrier Operating Certificate, your client will operate the hospital's helicopter under its own certificate for the benefit of the hospital. The hospital will contract with the patients and will be responsible for billing and collecting fees from the patients or their insurance carriers. Your client will be paid a monthly fee and an additional fee for each operating hour.

In this case, it is the hospital that owns and uses the helicopter, and it is the hospital who contracts with customers for transportation services. Assuming the transport services are authorized the FAA regulations governing the FAA common carrier certificate under which the helicopter is operated, the common carrier exemption would apply if the other requirements of Regulation 1593 are satisfied.

Scenario 1

You state that your client will purchase or lease a helicopter and then lease it to a hospital. Your client also contracts with the hospital to provide pilots, mechanics, parts, and other personnel and supplies necessary for the operation of the helicopter. This may involve two contracts (one for the lease and one for the flight services) or a single contract. The hospital contracts with the patients and is responsible for billing and collecting the applicable fees. Your client will be paid a monthly fee and an additional fee for each operating hour.

Without a review of the actual contracts involved, we cannot ascertain whether we would regard the transaction between your client and the hospital as a true lease or instead as a charter type contract. Whether a charter is involved depends on the degree of control retained by your

client. If possession and control of the helicopter is not transferred to the purported lessee, then the transaction is not a lease. Rather, the purported lessor is actually using the property to provide its customer charter services. When the "lessor" will not provide the aircraft without also providing a pilot, the "lessor" has not transferred possession and control to the purported lessee for purposes of this analysis, even if the purported lessee can direct the flight pattern flown by the aircraft. Thus, if your client will not "lease" the helicopter without also providing a pilot, then your client is providing charter services and is not regarded as leasing the helicopter. (Business Taxes Law Guide Annot. 105.0040 (6/29/92); see *Entremont v. Whitsell* (1939) 13 Cal.2d 290.)

If your client is actually leasing the helicopter to the hospital, then the hospital is the person regarded as using the helicopter and the analysis applicable to your second scenario is equally applicable here. That is, assuming the transport services are authorized the FAA regulations governing the FAA common carrier certificate under which the helicopter is operated, the common carrier exemption would apply if the other requirements of Regulation 1593 are satisfied.

If your client is instead regarded as providing charter services to the hospital rather than leasing the helicopter, then it does not appear that use of the helicopter would qualify for the common carrier exemption. That is, subdivision (a) of Regulation 1593 states: "The term 'common carrier' means 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." Thus, the person using the aircraft must be the person qualifying as a common carrier for that use, meaning that it must be that person who offers its services to "the public or to some portion of the public." With respect to the helicopter in question in this scenario, <u>your client</u> does not offer services to the public or to some portion of the public, but rather offers its services to a single person, the hospital. Thus, under these facts, the common carrier exemption would apply only if the hospital is regarded as leasing the helicopter within the meaning of the Sales and Use Tax Law, and the other requirements of Regulation 1593 are satisfied.

I hope this answers your questions.

Sincerely,

David H. Levine
Supervising Staff Counsel

DHL:cl

cc: Out-of-State District Administrator

Ms. Lori J. Mayoya