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335,0016,950

election made by late
reported on business
practice. 5-2641



March 22, 1979

Tax Counsel (GJJ) - Headquarters

This is in response to your request of March 20, 1979, that we review the analysis made in the last paragraph of our memorandum to you of September 8, 1977, in regard to the referenced taxpayer.

In our memorandum of September 8, 1977, we stated as follows:

"A further question raised in the memorandum of July 13, which accompanied your memorandum of July 15, is the question of timely reporting of tax on the rental receipts basis. Information submitted in connection with the claim for refund indicates that the engine was first leased in the quarter preceding the third quarter of 1973, when the rentals were reported. The initial rental of the engine was not billed or received until 3 Q 1973. Revenue and Taxation Code Sections 6094 and 6244 provide quite unambiguously that in the appropriate circumstance the purchaser may elect to pay use tax measured by the fair rental value only 'if the election is made on or before the due date of a return for the period in which the equipment was first leased.' It would appear that taxpayer's election in the case before us was not timely made."

Upon further review of the question outlined above, we are of the opinion that an election to report use tax on a rental receipts basis should be regarded as timely within the requirements of Sections 6094 and 6244 if the lessor reports use tax on the rental receipts basis under the circumstances set forth in the quoted paragraph. When it is

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the normal business practice of a lessor to invoice its lessee for rental charges and to collect rental payments some time after the leased property is furnished to the lessee for use, it would appear appropriate in certain circumstances to recognize this business reality and to regard the lessor's election to report use tax on the fair rental basis as having been timely made. The circumstance which would warrant application of this interpretation would be the circumstance where possession of the leased property is transferred to the lessee within the last part of the lessor's quarterly reporting period.

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Memorandum

To

Date : April 24, 1987

From : David H. Levine
Tax CounselSubject :
[REDACTED]

This is in response to your memorandum dated March 10, 1987 in which you ask whether an election to report tax measured by fair rental value pursuant to Regulation 1661(e) is timely if the return is filed late.

[REDACTED] purchased an airplane on December 26, 1984 from [REDACTED] [REDACTED] has filed a claim for refund under Revenue and Taxation Code section 6366.1 based on his lease of the aircraft for use as a common carrier. He has not provided sufficient documentation for this exemption and you will be denying his claim for refund on this basis. At this time, your question and the relevant facts are as follows:

"The aircraft was purchased from what appears to be a non-dealer. The taxpayer elected not to pay tax measured by the purchase price but to report tax based on fair rental value. The monthly leaseback statements provided by claimant show that the aircraft was first placed in operational use during December, 1984. The claimant also reported the gross receipts from the aircraft rental on its fourth quarter 1984 return.

"The problem is that the return was filed February 13, 1985 as evidenced by the postmark date of the return. Since this is after the due date of the return, there is a question as to

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whether the claimant has made a timely election to report the tax measured by fair rental value pursuant to Regulation 1661(e).

"If the correct measure of tax is the purchase price, against the claimant, should a billing be made? If so, do we allow the claimant a credit for the tax paid to the State on rental receipts when no tax reimbursement was charged to the customer?"

Discussion

Initially, I note that your statement that the "aircraft was purchased from what appears to be a non-dealer" is of critical importance. Aircraft is mobile transportation equipment (MTE) under Revenue and Taxation Code section 6023. The sale of MTE by a dealer (that is, a seller required to hold a permit by reason of the number, scope, and character of its sales of aircraft) to a purchaser who intends to lease that MTE is a sale at retail and is subject to sales tax unless the purchaser issues the dealer a resale certificate. (Rev. & Tax. Code §§ 6006(g)(4), 6010(e)(4), 6051, 6092.1, 6283, Reg. 1661.) If the sale to [redacted] were by a dealer and he did not issue his vendor a resale certificate, the tax due is a sales tax on the dealer and no further tax would be due on [redacted] the sale or lease of that aircraft. (Rev. & Tax. Code §§ 6006(g)(4), 6010(e)(4), 6023, 6051, 6092.1, 6094(d), 6244(d), 6401, Reg. 1661.) This opinion is based on the vendor's not being a dealer of aircraft.

Since [redacted] purchased the aircraft from a non-dealer, his use of it is subject to use tax measured by purchase price unless his use of the aircraft:

"is limited to leasing the [aircraft] and he elected to pay his use tax measured by the fair rental value, if the election is made on or before the due date of a return for the period in which the equipment is first leased...." (Rev. & Tax. Code § 6244(d). See also Rev. & Tax. Code § 6092.1.)

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This provision sets forth when the election to pay use tax measured by fair rental value must be made. In the present case, the aircraft was first placed in rental service in December, 1984, the last quarter of 1984. The return for that period was due by January 31, 1985. (Rev. & Tax. Code § 6451.) [REDACTED] attempted to make the aforementioned election after January 31, 1985. This appears to have been late.

However, we have allowed a seemingly late election to stand because to do so was an appropriate construction of the term "period in which the equipment is first leased." In that case, the MTE was first leased in the second quarter, but the initial rental was not billed or received until the third quarter. The lessor then made the election on its third quarter return. We concluded as follows ([REDACTED] 3/22/79):

"Upon further review of the question outlined above, we are of the opinion that an election to report use tax on a rental receipts basis should be regarded as timely within the requirements of Sections 6094 and 6244 if the lessor reports use tax on the rental receipts basis under the circumstances set forth in the quoted paragraph. When it is the normal business practice of a lessor to invoice its lessee for rental charges and to collect rental payments some time after the leased property is furnished to the lessee for use, it would appear appropriate in certain circumstances to recognize this business reality and to regard the lessor's election to report use tax on the fair rental basis as having been timely made. The circumstance which would warrant application of this interpretation would be the circumstance where possession of the leased property is transferred to the lessee within the last part of the lessor's quarterly reporting period."

I assume that [REDACTED] did not invoice the lessee for rental charges until the first quarter of 1985. [REDACTED] based on this interpretation, [REDACTED] [REDACTED] within the situation discussed in Mr. Jucum's opinion

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because possession of the leased property was not transferred to the lessee under the lease until the last part of the fourth quarter of 1984. Therefore, you should regard Mr. McKewon's election to report use tax on fair rental value as having been timely made.

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A handwritten signature in cursive script, appearing to read "D.H. Lurie".