

M e m o r a n d u m**105.0040****To :** Mr. Gary J. Jugum**Date:** June 29, 1992**From :** David H. Levine**Subject:** Annotation 105.0040 (5/1/57)

The above annotation is wrong, and I believe it must be deleted. It addresses the question of whether a charter can be regarded as a lease. The rule stated by the annotation is that if the customer is entitled to exclusive use or possession of the plane for a flight, then the aircraft is regarded as leased. The exception to this rule stated in the annotation is that it does not apply if the owner's charter flight operations are such that he is subject to licensing and regulation as a carrier. Under such circumstances, the flight is not regarded as a lease. This is incorrect analysis, and is not the analysis we have been applying.

Whether the owner is certificated and regulated as a carrier is relevant to whether the owner is entitled to an exemption under section 6366 or 6366.1, but it has absolutely no relevance to the question of whether the transaction is a lease. If the owner will not "lease" the aircraft without providing a pilot who will maintain control of the aircraft during flight, then the flight is a charter and not a lease. That the owner doing charters may or may not be in violation of regulatory requirements has no relevance to the question of whether a charter is involved. The answer to that question depends solely on the degree of control retained by the owner.

The applicable rule is set forth in Entremont v. Whitsell (1939) 13 Cal.2d 290. If possession and control of the property in question are not transferred to the purported lessee, then the transaction is not a lease. Rather, the purported lessor is actually using the property. We regularly apply this rule. For example, if a photographer "leases" his camera but insists upon taking the pictures himself, refusing to transfer possession and control of the camera to the "lessee," then the "lessor" is not regarded as leasing the camera, and would not be entitled to purchase that camera for resale.

Here, if the aircraft owner will not let the purported lessee gain possession and control of the aircraft, that is, if the owner insists that his pilot will fly the aircraft, then the owner is providing charter transportation service and is not leasing the aircraft. Such an owner may not elect to pay tax on fair rental value because there is no lease and no rentals are paid. The annotation should be deleted.