

Memorandum

170.0001.151

To : Mr. W. Brian Manuel, Supervising Tax Auditor,
Refunds and Local Allocation Service

Date: October 31, 1996

From : Thomas J. Cooke
Tax Counsel

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Subject: R--- & D--- Corporation
Permit No. SP -- XX-XXXXXX-001

Gary Jugum has requested that I respond to your memorandum to him dated October 22, 1996 concerning the above taxpayer.

In your memorandum, you state that the Centralized Collection Section has recommended denial of a claim for refund. You ask that the Legal Section advise if a lien filed by the Board was in violation of the bankruptcy automatic stay.

On November 26, 1991, R--- D--- sold an aircraft to R--- & D--- Corporation. On June 30, 1995, the Consumer Use Tax Section mailed a tax return to the corporation. The return was never filed. On October 31, 1995, R--- I--- Corporation filed Chapter 11 bankruptcy. On November 22, 1995, the Board issued a Notice of Determination to R--- & D--- Corporation. On February 20, 1996, the Board requested that liens be recorded in San Diego County and with the FAA. On April 22, 1996, M--- A---, an attorney for R--- I--- Corporation's bankruptcy trustee advised the Board that "R---" was the true owner of the aircraft and that R--- & D--- Corporation does not exist. On May 8, 1996, the FAA recorded the Board's lien against the aircraft. On June 12, 1996, the bankruptcy court found that R--- & D--- Corporation is an unfiled dba of R--- I--- Corporation, that the aircraft although FAA-registered in the name of R--- & D--- Corporation was in fact property of R--- I--- Corporation and upon commencement of R--- I--- Corporation's bankruptcy case, the aircraft became property of the debtor's bankruptcy estate. The bankruptcy court authorized the trustee to sell the aircraft and authorized the payment of the Board's lien on the aircraft "with a full reservation of rights for refund of amounts paid." On or about June 14, 1996, the payment of the tax liability was made. The bankruptcy trustee has filed a claim for refund on two grounds: 1) R--- I--- Corporation purchased the aircraft for resale; and 2) the lien that the Board filed violated the bankruptcy automatic stay.

When the Board requested that a lien be recorded with the FAA, the automatic stay was in effect. Although the aircraft was registered with the FAA under the R--- & D--- Corporation name, the Board's lien would attach to the aircraft itself and any potential purchaser of the aircraft could not obtain clear title until the lien was paid or released. The bankruptcy court has found that at the time that R--- I--- Corporation filed bankruptcy, the aircraft became property of the bankruptcy estate. It is our opinion that the filing of the FAA lien by the Board violated the bankruptcy automatic stay even though the Board had no opportunity to discover that the true owner of the aircraft had filed for bankruptcy protection.

The bankruptcy trustee paid the tax due on the aircraft so that the lien on the aircraft would be released and the aircraft could be sold to a third party. Revenue and Taxation Code section 6901 provides that a refund be granted for any amount "illegally collected." It is our opinion that the Board should grant the refund on that basis issue a Notice of Determination to R--- I--- for the tax, interest and penalty due on its purchase of the aircraft and file a proof of claim for that amount in the bankruptcy proceeding.

TJC/cmm