

M e m o r a n d u m

To: Mr. Jack E. Warner
District Principal Auditor

Date: July 25, 1990

From: David H. Levine
Tax Counsel

ATSS 485-5550
(916) 445-5550

This is in response to your memorandum dated June 7, 1990 regarding the application of use tax to sales to a foreign air carrier which is wholly owned by a foreign government. In a previous memorandum, I concluded that a foreign air carrier which is owned substantially, but not wholly, by a foreign government should be treated as any other person for purposes of the application of section 6009.1. You now ask whether this conclusion applies if the carrier is wholly owned by a foreign government. My understanding is that the air carriers about which you inquire are corporations, and my opinion is made on this basis.

A person who purchases tangible personal property from a retailer and uses that property in this state is liable for use tax. (Rev. & Tax. Code § 6201, 6202.) "Person" does not include a foreign government. (Rev. & Tax. Code § 6005.) Therefore, in a use tax situation, where the purchaser is a foreign government no tax applies because no "person" purchased the property for use in this state. On the other hand, section 6005 specifically includes corporation in the definition of "person" for purposes of sales and use taxes. If this standard analysis applies, even if a corporation is wholly owned by a foreign government, that corporation is a person for purposes of use tax and should be treated as is any other person for purposes of the application of section 6009.1.

Dealing with foreign governments is often a federal concern. Since a foreign government is at least indirectly involved in your question, this might arguably implicate federal law. Nevertheless, we are not aware of any federal law that prohibits the imposition of use tax on a corporation wholly owned by a foreign government. We believe that since the purchaser chose to do business as a corporation and not as a foreign government, and since a corporation is defined as a person, we believe that person is liable for use tax in the same manner as is any other person.

Since we have concluded that a corporation is a person liable for use tax, if applicable, even if wholly owned by a foreign government, you have three additional questions. You ask whether our opinion would be different if the foreign government treats the carrier as a "nationalized" corporation. You provide an example of [---] which, according to your information, is an airline whose "holding passed to the [---] government upon nationalization in 19XX and it now has a 100% holding." From this description, it appears that [---] was an existing private corporation which was then taken over by the [---] government. We are not aware of any distinction between a nationalized corporation and any other corporation, and we believe that they should be treated in the same manner.

Your second question is whether our opinion would be different if the foreign government treats the carrier as a "state" corporation. You provide an example of [---] which, according to your information, "was formed as a state corporation in May 19XX when the Ministry [---] took over the activities of all **airlines**" This description again sounds like this carrier was a nationalized corporation and was not newly formed by the [---] government. We do not believe there should be a distinction between the application of tax to this corporation and any other corporation. Even if this corporation were newly formed by the [---] government, our opinion would probably be the same. The only way we can imagine in which a foreign government could create a corporation that, under the standard analysis discussed above, we would not regard as a person for purposes of sales and use tax, would be if that corporation were actually equivalent to a department or agency of the government. An example of this might be if our cabinet departments were actually created as corporations, such as defense corporation, transportation corporation, etc. If someone wishes to make such an argument, we will have to examine it at that time.

Your last question relates to a statement in Patricia McKinney's backup memo for Annotations 250.0140 and 570.0620. The statement is that as far as Ms. McKinney knew, there was no similar treaty [to that which was discussed in her memorandum] with any other foreign nation which grants immunity from use taxes. You ask whether there are any treaties that would have an effect on a transaction otherwise subject to use tax. We believe it is appropriate to require a taxpayer claiming a particular transaction is exempt by virtue of a treaty to carry its burden of proving the exemption. That is, a person claiming an exemption by virtue of a treaty should cite the specific treaty and provision therein that supports the claim for exemption. Otherwise, we may conclude that the transaction is not exempt by virtue of a treaty provision.

If you have further questions, feel free to write again.

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