

Memorandum

325.0490

To : AB - - - Audit

Date: August 14, 1992

From : David H. Levine
Senior Tax Counsel

ATSS 485-5550
(916) 445-5550

Subject: ---

This is in response to your memorandum dated June 30, 1992. --- repairs helicopters, some of which are owned by out-of-state customers. When performing repairs for such customers, --- seeks to arrange the transactions so that the transfers of the parts furnished and installed during the repairs are regarded as exempt sales in interstate commerce. You inquire about two types of transactions presented by ---.

The first is set forth as case 2 in ---'s letter to the A district office dated March 30, 1992:

"--- signs a contract with a pilot, whereby the pilot agrees to fly a specified route and deliver the aircraft to the owner outside the State of California. The pilot is neither an employee of --- nor the owner of the aircraft. The pilot does agree to be the agent of --- for purposes of delivering the aircraft outside California. However the owner agrees to be liable for any damages which may occur while transporting the aircraft. --- would pay for all the expenses of the pilot and then charge the owner accordingly for delivery charges."

As you describe the second type of transaction, an overhauled aircraft is flown out of state by a third party pilot who is not paid or reimbursed for expenses by ---. You state that expense reimbursement is usually made directly by the aircraft owner to the pilot. --- has provided you several documents which it asserts show that the pilot is its agent. The contract includes a statement that states:

"Aircraft not subject to California sales tax shall either be shipped outside of California by facilities operated by --- or by common carrier. If shipment by --- is selected, owner may supply pilot, subject to ---'s approval. However, any pilot, whether supplied by owner or ---, shall remain under the direction and control of --- at all times until aircraft leaves California."

We have also been provided a declaration from a pilot stating that he contracted with --- to deliver the aircraft out of California and flew the aircraft pursuant to ---'s instructions and at all times during the flight remained under the direction and control of ---.

You ask whether these items satisfy the requirements of Regulation 1620 and, if not, how --- can prove that the pilot is its agent rather than the agent of the owner. As set forth in Revenue and Taxation Code section 6396, to qualify as an exempt sale in interstate commerce, the contract of sale must require delivery outside California, and the property must, in fact, be delivered outside California by means of facilities of the retailer or by delivery by the retailer to a carrier, customs broker, or forwarding agent, whether hired by the purchaser or not, for delivery outside California. Thus, although the question of agency may be relevant in ascertaining whether the shipment qualifies as by facilities of the retailer, it is not relevant if a qualified carrier, customs broker, or forwarding agent transports the property outside California.

If the pilot in question is a carrier within the meaning of section 6396, then the transaction in question would qualify for the exemption if the contract of sale requires such delivery outside California. As explained in subdivision (a)(3)(B)2 of Regulation 1620, the term "carrier" means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. If the pilot does not qualify as a carrier under this definition, the sale is not an exempt sale in interstate commerce unless the shipment out of California qualifies as by facilities of ---. The remainder of this opinion is based on the assumption that the pilot in question does not qualify as a carrier under Regulation 1620.

In the first type of transaction, case two from ---'s letter, quoted above, the pilot contracts with ---. --- controls the manner of delivery and makes the payment to the pilot. The pilot is neither the owner of the aircraft nor an employee of ---. Additionally, I assume that the pilot is not an employee of the aircraft owner. We believe that under these facts, such delivery should be regarded as delivery by facilities of the retailer within the meaning of Regulation 1620. If the contract requires delivery out of state in this manner, we conclude that the sale would be an exempt sale in interstate commerce.

The second type of transaction is when the pilot is furnished by the aircraft owner, as permitted by the terms of the contract, and is paid by that owner. We believe that the critical factor is the answer to the question, who hired the pilot? In this scenario, the pilot is hired by

the aircraft owner. Thus, we conclude that the delivery is not by facilities of --- and that the sale would not be an exempt sale in interstate commerce.

In future memoranda to us, please provide the printed name of the memorandum author and his or her telephone number so that we can contact the author if necessary. If you have further questions, feel free to write again.

DHL:cl

cc: A District Administrator