STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001
TELEPHONE (916) 445-6450

October 9, 1967

T---, R---, B--- & S---
XXXX --- Boulevard
--- ---, CA XXXXX

Attention: Mr. J--- J. B---

SP -- XX-XXXXXX
C--- S--- Corporation

Gentlemen:

This is with reference to your letters of July 11, 1967, and September 28, 1967, regarding use tax on your client's aircraft, number XXXX--.

You contend that the aircraft in question is used in interstate commerce and is therefore exempt under ruling 55.

In Western Pacific R.R. Co. v. State Board of Equalization, 213 Cal. App.2d 20, the court said in referring to ruling 55:

> "We regard this administrative rule as merely stating that interstate commerce will not be taxed when it cannot be taxed. The rule is not a limitation on Section 6202 of the Revenue and Taxation Code, which imposes the use tax. Therefore, the administrative rule adds nothing to the claim, heretofore considered, of invalidity of the levy on interstate grounds."

Use tax is not employed to grant special privileges to local business, but to remove special privileges from interstate commerce. American airlines, Inc. v. State Board of Equalization, 216 Cal.App. 2d 180. In that case, the court also said:

> "While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection that he may draw from a state to the upkeep of which he may be asked to bear his fair share."

In Flying Tiger Line v. State Board of Equalization, 157Cal.App.2d 95, the court in its opinion quoted from Southern Pacific v. Gallagher, 306 U.S. 167, and said:

> "all purchases may be said to be dedicated to consumption in the interstate transportation business of appellant…[U]se and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce."

In Atchison, Topeka and Santa Fe Ry. Co. v. State Board of Equalization, 139 Cal.App.2d 411, the court upheld the use tax as applied to switch engines which had been bought in Iowa and used in Iowa and other states than California for an average period of 43 days, and then hauled into California where they remained permanently, engaged chiefly in interstate commerce, although a small proportion of their work was *exclusively intrastat*e commerce.

In Western Pacific R.R. Co. v. State Board of Equalization, supra, it was argued that in Santa Fe the switch engines were permanently assigned to and permanently used in California, while in Western Pacific the equipment was not so assigned or used. The court said, in effect, this is a distinction without a difference.

The board has an administrative test of whether or not during the first six months following entry of the property in this state, it was stored or used more than one-half of the time here. This test is solely to ascertain intent. The tax, if applicable, applies to the taxable moment following entry of the plane into this state. It does not apply to any subsequent true interstate use. Interstate use in California may, however, be considered in determining whether the plane was purchased for use in California.

The board's administrative test received judicial approval in the Western Pacific case.

The United States Supreme Court in Southern Pacific v. Gallagher upheld use tax upon the basis of a "taxable moment," i.e., an interval however brief between the end of the initial journey into the state and the beginning of continuous use in interstate or foreign commerce. The taxable moment need not be functional use of the property. It has been described, among other things, as "keeping and retaining," "retention and installation," etc.

It is our understanding that your client engages in intrastate as well as interstate activities, and it cannot be said that it is exclusively interstate commerce. It appears that the plane in question is an item of equipment used, to some degree, to further interstate sales of computer equipment much the same as the cranes in Western Pacific, supra, were used to further the company's interstate business. In Western Pacific the court said:

> "By their very nature and functions the cranes, although technically "rolling stock," do not haul trains nor assemble trains as switch engines do, but are auxiliary to interstate and intrastate operations inextricably. If it is fair that interstate commerce "must pay its way" it is fair that these instruments of both kinds of commerce should do so. If they did not, unfairness to intrastate sales transactions would result."

Summarily, it is our opinion that the plane was purchased with the intent that it at least be stored in California and that your client, C--- S--- Corporation, by reason of its intrastate as well as interstate activities was not exclusively engaged in interstate commerce and the use of the planes to fly company executives on business was not an exclusive interstate commerce activity.

Very truly yours,

Robert H. Anderson
Tax Counsel

RHA:dce

cc: L.A. District – District Administrator
Inglewood – Subdistrict Administrator
Headquarters – Occasional Sales