

## **Part 135 Sales Tax Exemption for Aircraft**

During the everyday conversations of aircraft dealers, brokers and prospective buyers the belief is being enforced that a Part 135 exemption exists in California. This belief is dangerous and misleading. The applicable sections of the California Sales and Use Tax Laws and Regulations are 6366 and 6366.1. They do not mention Part 135. They state in pertinent part:

“6366. Aircraft sold to common carriers, foreign governments and nonresidents. (a) There are exempted from the taxes imposed by this part the gross receipts from the sale in this state of, and the storage, use or other consumption in this state of, the following:

(1) Aircraft sold to any person under authority of the laws of this state, of the United States or of any foreign government, or sold to any foreign government for use by that government out of this state, or sold to any person who is not a resident of this state and who will not use that aircraft in this state otherwise than in the removal of the aircraft from this state. . .”

“6366.1 Aircraft leased to common carriers, foreign governments and nonresidents. (a) There are exempted from the taxes imposed by this part the gross receipts from the sale in this state of, and the storage, use or other consumption in this state of aircraft are leased or are sold to persons for the purpose of leasing, to lessees using such aircraft as common carriers of persons or property under authority of the laws of this state, of the United States or of any foreign government, or any foreign government as lessees for use by that government out of this state, or to persons as lessees who are not residents of this state and who will not use that aircraft in this state otherwise than in the removal of the aircraft from this state. . .”

Regulations 1593 and 1610 which are the boards interpretation of sections 6366 and 6366.1 never mention the term Part 135. Unfortunately as the history of aircraft and sales tax unfolded in this state, the term Part 135 became synonymous with common carrier. This has led to many taxpayers attempting to support an exemption which doesn't exist. It is true that in order for an aircraft to qualify as being used in “common carriage” it can be operating in Part 135. However, it is not true that when a Part 135 pilot is in command of an aircraft, or that a qualified Part 135 organization is in control of the aircraft that the aircraft is operating as a common carrier.

Sections 6366 and 6366.1 offer legal exemptions for common carriers. The pitfalls for an individual are that the law requires the longest test period (twelve months), the federal requirements are cumbersome and because of the mythology, taxpayers can lose their claim because they are arguing their case incorrectly.

### Examples of Cases-Annotations:

105.0010-Aircraft-Purchaser Liable for Sales Tax. A purchaser of an aircraft gave an exemption certificate to a California aircraft dealer. In the certificate he claimed that he was a nonresident of California and that he would make no use of the aircraft here, other than its removal from the state. The purchaser owned real property in California, and Oregon and spent time in Oregon, California and Arizona. The purchaser filed California

resident income tax returns, claimed a homeowners exemption on a residence located in California, and owned a vehicle licensed and registered in this state. The aircraft was flown to Oregon on the date of purchase and did not reenter California until it was put up for sale two years later.

**Since the aircraft was delivered in California, it is a sales tax transaction. The seller was relieved of the liability for the tax due to the purchaser's issuance of an exemption certificate. The purchaser is not entitled to the exemption provided by Regulation 1593 (a)(3), since he was a California resident at the time of purchase. As the result of issuing an erroneous certificate, the buyer is liable for the sales tax on the purchase price of the aircraft, pursuant to Regulation 1667 (b)(3). 5/23/93.**

105.0046 Charter to Owner-Lessor. A lessor-owner purchased an aircraft from an out-of-state seller and immediately entered into an "Aircraft Lease and Usage Agreement (100% Lessee Usage)." The agreement required the lessee (a common carrier operator) to pay the lessor-owner rent of \$505 per flight hour, and for lessor/owner to pay the lessee rent of \$461 per flight hour. In addition, the lessor/owner was required to pay an agreed amount for pilot services, miscellaneous fees and expenses, if any, for those occasions when the lessor owner rented the aircraft from the lessee.

The Board has held that a charter of an aircraft to an owner or lessor-owner of an aircraft is not "common carriage" when the owner receives a preferential rate on some basis not available to the general public (section 2170 of the Civil Code).

The rate of \$461 plus an agreed amount for pilot service and miscellaneous fees and expenses would not result in a price significantly different than the charge made to the general public. Although a rate not significantly less than that charged to the general public may not be considered as carriage use, such a conclusion would not end the analysis. The fact that the lessor-owner paid a separate amount for the pilot raises the issue of whether such carriage was pursuant to Part 135 of Title 14 of the Code of Federal Regulations and, thus, "common carriage" or pursuant to Part 91 of the Code and not "common carriage." In a true "common carriage" agreement it is not customary for pilot services to be separately charged.

Also, Part 135 has more stringent rules (e.g., a written load manifest must be prepared prior to the flight and must be retained; certain operating equipment must be part of the aircraft, certain pre-flight briefings must be made to the passengers, and certain weather conditions cannot exist before the flight). Also federal excise tax is charged for such flights.

In this case, billings were not shown as revenue, but rather as a charge to "owner" and the term "rents" rather than "charter" was used. This implies that the lessee did not regard the flights as Part 135. Such a finding is also consistent with the agreement which required the lessor-owner to pay for pilot services. This is a strong indication that the lessor-owner had control over the aircraft. Accordingly, although the amount charged may not be a "preferential rate," the aircraft when used by the owner was not used "common carriage," as discussed in Part 135. 9/26/95.

105.0059 Common Carriage. A company purchased and accepted delivery of an aircraft out of state on or about July 3, 1989, and flew it into California that same day. On August 1, 1989, the company leased the aircraft to a certified air carrier. The lease agreement required the company to pay for the pilot and other crew members when the aircraft was used in common carriage. To avoid these charges, the company allowed its president to serve as pilot as often as possible. During this period, the president passed FAA inspections and was certified as a common carrier pilot. During these flights, the president is under the lessee's direction and control. The issue is whether, during the "operational use" test period for this aircraft with the company's president as pilot, the flights would qualify as common carriage.

The undisputed evidence shows that the purpose of the flights was to carry passengers unrelated to the company. The passengers contracted with the lessee for carriage. The lessee billed the customers and the customers paid the lessee at standard common carriage rates. Other than allowing its president to serve as pilot, the company did not participate in these transactions in any way. These flights cannot be considered private use by the company. 10/13/92.

105.0060 Common Carrier. A company operating under an "air taxi/ commercial operator" certificate issued by the Federal Aviation Administration, providing air transportation to the public in an aircraft under control of the company's pilot at a rate based on mileage plus standby and other charges, on a nonscheduled basis, is a common carrier within the meaning of Sections 6366 and 6366.1. 5/26/69.

105.0062 Common Carrier. The owner of an aircraft has an agreement with a common carrier and under the circumstances listed below the agreement was not a lease of the aircraft to a common carrier and therefore not exempt from tax under Regulation 1593(a)(1).

(1)The owner is required to pay all fixed, direct, and incidental costs incurred in operation and maintenance of the aircraft.

(2)All charter advertising was in the carrier's name, but the content of the advertisement was subject to the owner's approval, and paid for by the owner.

(3)The owner accounts to the carrier for all charter hours flown, and to submit to the carrier the completed flight logs within three days of each charter.

(4)The flight crew members, who are employed by the owner, have been directed by the owner to comply with the carrier's policies and procedures.

(5)The carrier needed advance approval from the owner to fly an actual charter for a third party customer.

The above circumstances and ensuing action effectively resulted in the aircraft and pilots being under the control of the owner and not the carrier. A common carrier qualifying under Regulation 1593, is the carrier who schedules and approves use of the aircraft, conducts the FAR Part 135 flights, controls the pilots and aircraft during those flights, prepares the Part 135 flight logs, and then accounts to the owner/lessor. In this situation,

the owner's control of the aircraft negates any contention that the carrier had the exclusive possession and control of the aircraft necessary for the carrier to have conducted Part 135 carriage operation. 12/15/93.

105.0065 Common Carrier. An aircraft owner leases his aircraft to a charter company operating under the authority of the Federal Aviation Administration. The charter company charters the aircraft to the aircraft owner's medical corporation and permits the aircraft owner to pilot the aircraft as the charter company's employee on these flights.

When the aircraft owner's medical corporation "charters" the aircraft for the purpose of having only the aircraft owner transported, this would not be recognized as a true charter if the aircraft owner is the pilot. Such use does not constitute use as a common carrier for purposes of calculating the principal use of the aircraft during the test period specified under Regulation 1593(b). When the aircraft owner's medical corporation charters the aircraft for the purpose of transporting several persons and the aircraft owner acts as the pilot, the charter will be recognized as common carrier use if the aircraft owner is a true employee of the lessee and if such use is common carrier use within the intent of Revenue and Taxation Code section 6366. 1.

The intent of the Legislature in adopting section 6366.1, did not include extending an exemption to the use of an aircraft by the owner in a lease and sublease back arrangement. The Board will not regard the transaction as common carriage for the medical corporation for purposes of the exemption explained in Regulation 1593 if the sole purpose of the aircraft owner's employment with the lessee is to act as pilot of his aircraft when the aircraft owner's medical corporation charters the aircraft.

Among the indications of a bona fide charter relationship are the following:

- (1) If the aircraft owner is not available to act as a pilot on flights other than those chartered by the aircraft owner's medical corporation, the relationship with the lessee (charter company) will not be regarded as a true employment relationship.
- (2) The aircraft owner must be treated as an employee of the lessee in the lessee's records as well as in his own records.
- (3) The aircraft owner must be paid the same amount as any other pilot of equivalent experience.
- (4) All applicable employment taxes and fees must be paid.
- (5) The aircraft owner must satisfy all regulatory requirements of an air taxi or commercial operator carrier under applicable regulations.
- (6) The rates to the medical corporation can be no lower than rates available to other charters. 11/2/89.

105.0066 Common Carrier Operational Use. Where an aircraft is purchased for lease to a lessee who will use the aircraft as a common carrier in charter operations and will also use the aircraft for non common carrier flights, the lessee's "operational use" of the

aircraft during the test period (Regulation 1593) determines whether the sale of the aircraft to the lessor is exempt from tax. If the lessee merely rents out the aircraft without a pilot or uses the aircraft for flight instruction, such use would be operational use that is not common carrier use. 3/27/84.

105.0066.300 Common Carrier Operations. Common carrier provisions for "air taxi" operations are found in Part 135 of Title 14 of the Code of Federal Regulations. Part 135 sets forth certain rules which must be followed by the operator when operating as a common carrier under Part 135. These rules are more stringent than those required under Part 91 (14 CFR 135). Part 91 governs general flights such as non common carriage operations.

In determining common carriage use, flights made under part 91 do not qualify as common carriage.

The Federal Excise Tax is applicable to Part 135 operations. The lack of any charge for such tax is evidence that the flight was not pursuant to Part 135. Evidence of a Part 135 flight is the preparation of a written load manifest prior to the flight, the existence of required operating equipment, required pre-flight briefings to passengers, and pre-flight arrangements for crew members in case of an emergency. 5/27/93.

**ASSOCIATED  
SALES TAX  
CONSULTANTS  
INCORPORATED**



9700 BUSINESS PARK DRIVE, SUITE 300  
SACRAMENTO, CA 95827  
916.369.1200 T  
[WWW.AIRCRAFTEXEMPTION.COM](http://WWW.AIRCRAFTEXEMPTION.COM)  
[INFO@AIRCRAFTEXEMPTION.COM](mailto:INFO@AIRCRAFTEXEMPTION.COM)