

Memorandum

7651.1 REVIEW REQUIRED	
REFERENCE:	<u>7401(a)(5)</u>
APPROVED:	<u>SPG</u>

To : Mr. Ed King, Chief
Fuel Taxes Division (MIC: 33)

Date: October 29, 2003

From : M. Judith Nelson *M. Judith Nelson*
Senior Tax Counsel

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Subject: Taxability of Aero Club

This is in response to your memorandum to Ms. Janice Thurston dated July 1, 2003, requesting a legal opinion on whether aviation gasoline purchased by an aero club located on a federal military base is exempt from motor vehicle fuel tax under Revenue and Taxation Code section 7401. Your memorandum also requests a review of Motor Vehicle Fuel License Tax Annotation 1135.460.

The facts upon which the opinion will be rendered can be summarized as follows:

- The purchaser of aviation gasoline is an aero club located on a military base in California¹ and governed by AFI 34-217 and AFMAN 34-232²
- The aero club's fuel purchase requests are made on United States government purchase orders from the Services Flight Contracting Office
- Payments for the fuel are from a United States government military account

Conclusions. Based upon the plain meaning of the statute, the aviation gasoline sold to the United States government for use by an aero club, located on a military base in California and governed by AFI 34-217 and AFMAN 34-232, is exempt from motor vehicle fuel tax pursuant to Revenue and Taxation Code section 7401, subdivision (a)(5). Annotation 1135.460 is obsolete and should not be relied upon.

¹ Members must qualify as active military services, military retirees, active reserves, Department of Defense civilian employees or dependants, Civil Air Patrol and Federal Aviation Administration employees.

² Formerly Air Force Regulation 215-12.

The Annotation. Motor Vehicle Fuel License Tax Annotation 1135.460, dated May 5, 1967, interprets the exemption very narrowly, providing:

“Military flying clubs are not entitled to purchase gasoline exempt from tax...as such clubs are not regarded as the ‘armed forces’, nor is the fuel sold for use in aircraft operated by the armed forces for a military purpose.

“This is consistent with IRS Revenue Ruling 67-120.”

Since the backup to the annotation contained no analysis of California law, it appears that the primary basis for the position set forth in the annotation was IRS Revenue Ruling 67-120 (Revenue Ruling).

The Revenue Ruling interpreted *federal* law that exempted from *federal* tax gasoline sold to the United States as “supplies for vessels or aircraft.” The Revenue Ruling held that military flying clubs may not purchase gasoline on a tax-free basis, because the aircraft were not within the scope of the term “vessels of war of the United States.”³

First, it should be noted that the Revenue Ruling has been found to be obsolete by the Internal Revenue Service and is no longer determinative.⁴ Second, the Revenue Ruling pertained to federal law that was very different from the language of the California exemption at Revenue and Taxation Code section 7401. Finally, the annotation was not a legal opinion and contained no analysis; therefore, it should be deleted.

The Statute. Revenue and Taxation Code section 7401, subdivision (a)(5) exempts from tax:

“Motor vehicle fuel sold to the United States armed forces for use in ships or aircraft, or for use outside this state.”

The essential requirements of the exemption for purposes of this opinion request are that (i) the fuel must be sold to the United States armed forces and (ii) the fuel must be for use in aircraft.

³ The Revenue Ruling provided in pertinent part as follows:

“...Section 4221(a)(3) of the Code provides that no tax shall be imposed on the sale by the manufacturer of an article for use by the purchaser as supplies for vessels or aircraft. Section 4221(d)(3) of the Code provides, in part, that the term ‘supplies for vessels or aircraft’ means fuel supplies, ships’ stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation. Furthermore, the term ‘vessels of war of the United States or of any foreign nation’ includes aircraft owned by the United States or by any foreign nation and constituting a part of the Armed Forces thereof.

“Since military aircraft on loan to flying clubs do not come within the definition of ‘vessels of war of the United States,’ they are not part of the Armed Forces’ within the meaning of section 4221(d)(3) of the Code. Accordingly, it is held that sales of gasoline to flying clubs are subject to the manufacturers excise tax imposed by section 4081 of the Code. ...”

⁴ See IRS Revenue Ruling 94-35.

The facts which you describe in your memorandum are that the fuel supplier receives a purchase order from the United States Air Force Flight Services Contracting Office for aviation gasoline to be delivered to an aero club at a federal military base in California. Payment is received from a United States military account. The Aero Club is established pursuant to and governed by AFI 34-217 and AFMAN 34-232⁵.

Based on the facts presented, the aviation gasoline sold is exempt from motor vehicle fuel tax because it meets the requirements of the exemption at Revenue and Taxation Code section 7401, subdivision (a)(5)—that is the fuel is sold to the United States armed forces for use in aircraft.⁶

MJN:bb

cc: Mr. Robert Frank (MIC: 33)
Mr. Doug Shepherd (MIC: 65)
Mr. Arlo Gilbert (MIC: 33)
Ms. Janice Thurston (MIC: 82)
Ms. Sharon Jarvis (MIC: 82)

⁵ AFMAN 34-232 *Aero Club Operations* was formerly AFR 215-12.

⁶ This conclusion is consistent with the treatment of aero clubs for purposes of exemption from sales and use taxes. See Sales and Use Tax Annotation 505.0020 (5/27/60).