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AB 1452 Signed by Governor 9/30/08

What does this mean for the Marine, Automotive and Aviation Industry?

Last evening Governor Schwarzenegger signed Assembly Bill 1452 returning the Marine and Aviation Industry to those temporary rules that were in effect from 10/2/04 thru 6/30/07 ("the Temporary Period") commonly known as the "1 Year Test." With the exception of the absence of a sundown provision and a few grammar changes, New CA Rev. & Taxation Code § 6248¹ is similar to the preceding version that existed during the Temporary Period. The most significant difference is the fact that there is no sundown provision for this law to go away and thus it will take new legislation to return us back to the old 90 Day/6 Month Test.

Pursuant to the specific language of New 6248(d) *"The amendments made to this section by the act adding this subdivision shall not apply to any vehicle, vessel, or aircraft that is either purchased, or is the subject of a binding purchase contract that is entered into, on or before the operative date of this subdivision."*

Thus contracts entered into on 10/1/08 and thereafter will be subject to these new rules. As before, the exact rules you will be under are not apparent from the face of the statute. As you recall, when the Temporary Rules were adopted, this Firm was able to cull out of the language in §6248(a)(1) and (a)(4) a separate test which became known as the "Non-Resident 6 Month Test." That language remains in the New 6248 and it is unknown at present if the SBE will continue to honor non-CA LLC's owned by CA residents to the entitlements under the "Non-Resident 6 Month Test."

¹ AB 1452: THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS: SECTION 1. Section 6248 of the Revenue and Taxation Code is amended to read:

- 6248.(a) On and after the effective date of this section, there shall be a rebuttable presumption that any vehicle, vessel, or aircraft bought outside of this state, and which is brought into California within 12 months from the date of its purchase, was acquired for storage, use, or other consumption in this state and is subject to use tax if any of the following occurs:
- (1) The vehicle, vessel, or aircraft was purchased by a California resident as defined in Section 516 of the Vehicle Code.
 - (2) In the case of a vehicle, the vehicle was subject to registration under Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code during the first 12 months of ownership.
 - (3) In the case of a vessel or aircraft, that vessel or aircraft was subject to property tax in this state during the first 12 months of ownership.
 - (4) The vehicle, vessel, or aircraft is used or stored in this state more than one-half of the time during the first 12 months of ownership.
- (b) This presumption may be controverted by documentary evidence that the vehicle, vessel, or aircraft was purchased for use outside of this state during the first 12 months of ownership. This evidence may include, but is not limited to, evidence of registration of that vehicle, vessel, or aircraft, with the proper authority, outside of this state.
- (c) This section *shall* (old 6248 used word "does") not apply to any vehicle, vessel, or aircraft used in interstate or foreign commerce pursuant to regulations prescribed by the board.
- (d) The amendments made to this section by the act adding this subdivision *shall* (old 6248 used word "do") not apply to any vehicle, vessel, or aircraft that is either purchased, or is the subject of a binding purchase contract that is entered into, on or before the operative date of this subdivision.
- (e) (1) Notwithstanding subdivision (a), *any* (old 6248 did not include word "any") aircraft or vessel brought into this state for the purpose of repair, retrofit, or modification shall not be deemed to be acquired for storage, use, or other consumption in this state.
- (2) This subdivision *shall* (old 6248 used word "does") not apply if, during the period following the time the aircraft or vessel is brought into this state and ending when the repair, retrofit, or modification of the aircraft or vessel is complete, more than 25 hours of airtime in the case of an airplane or 25 hours of sailing time in the case of a vessel *is* (old 6248 used word "are") logged on the aircraft or vessel by the registered owner of that aircraft or vessel or by an authorized agent operating the aircraft or vessel on behalf of the registered owner of the aircraft or vessel. The calculation of airtime or sailing time logged on the aircraft or vessel *shall* (old 6248 used word "does") not include airtime or sailing time following the completion of the repair, retrofit, or modification of the aircraft or vessel that is logged for the sole purpose of returning or delivering the aircraft or vessel to a point outside of this state.
- (3) This subdivision *shall apply* (old 6248 used word "applies") to aircraft or vessels brought into this state for the purpose of repair, retrofit, or modification on or after the operative date of this subdivision.
- (f) The presumption set forth in subdivision (a) may be controverted by documentary evidence that the vehicle was brought into this state for the exclusive purpose of warranty or repair service and was used or stored in this state for that purpose for 30 days or less. The 30-day period begins when the vehicle enters this state, includes any time of travel to and from the warranty or repair facility, and ends when the vehicle is returned to a point outside the state. The documentary evidence shall include a work order stating the dates that the vehicle is in the possession of the warranty or repair facility and a statement by the owner of the vehicle specifying dates of travel to and from the warranty or repair facility.

We suspect that the SBE going forward will be looking closely at time spent in CA for repair, retrofit or modification (“RRM”). It is clear that the RRM must be significant. In another bill, which did not pass, there was a requirement that the RRM be undertaken by a business that was licensed thus precluding those that did their own repairs from qualifying for the exception. Because that language was not included in the New 6248 we have no reason to believe the RRM rules will be applied any differently than before. The SBE will be enforcing a self imposed unwritten rule that upon RRM completion the Vessel “leave California.” The SBE has stated in a prior ruling that upon completion of RRM the Vessel must leave California within a reasonable time upon RRM completion for a moment in time. It is therefore recommended that the vessel, automobile or aircraft leave very shortly after completion of the RRM and that said departure be documented by pictures similar to that which would be used to document an offshore delivery.

Recap of historical rules:

<u>Time Period</u>	<u>Applicable Test</u>	<u>Exceptions</u>
Pre 10/2/04	Old 90 Day or 6 Month Test (“Old Rules”)	
10/2/04 thru 6/30/07	Temporary Rules	If transaction closed during this time frame but was subject to a “binding contract” as of 10/1/04 the Old Rules applied.
7/1/07 thru 9/30/08	Old Rules Apply	
Post 10/1/08	New 6248 Applies	If transaction closed after this date but was subject to a “binding contract” as of 9/30/08 the Old Rules apply. The one exception to this exception being for a contract that was entered into between 10/2/04 thru 6/30/07 and closed after 9/30/08

It is truly unfortunate that the legislature has chosen once again to drive business out of our state especially during these difficult economic times. Not only will sales be lost to brokers but it is likely that repairs and equipment purchase will also be lost to other states and countries.

Sincerely,

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Cris John Wenthur, LL.M.