STATE BOARD OF EQUALIZATION

October 5, 1965

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Gentlemen:

This is in reply to your letter of August 23, 1965, which was discussed at our conference on September 13 in this office, with a number of representatives of railroad companies and others. We shall number our answers to correspond to the numbers of the different questions asked.

1. It is our opinion that trailers or containers used in conjunction with flat cars, e.g., piggyback equipment, are not within the category of "rail freight cars", as that term is used in Section 6368.5 of the Sales and Use Tax Law. *

2. Under the provisions of Section 6006.1, it is our opinion that the granting of possession of tangible personal property by a lessor to a lessee is not limited to the initial delivery, but is a "continuing sale in this state" as respects any period of time the leased property is situated in this state "irrespective of the time or place of delivery of the property to the lessee." The last quoted words from Section 6006.1 appear to us to indicate the legislative intent that the lease is a continuing sale while the property is in this state, even though the initial grant of possession had taken place outside the state. The fact that the equipment is in use in interstate commerce when it enters the state and remains in such use while in the state does not, in our opinion, necessarily prevent the application of the use tax under the Constitution, although under Ruling 55(B) the use tax would appear to be inapplicable. But, if the use tax is considered not to apply, the sales tax would apply in view of the provisions of Section 6390 which exempts rentals from the sales tax only when such rentals are required to be included in the measure of the use tax.

3. In our opinion the application of the tax is the same as to equipment used by the lessee more than 90 days outside California before being brought into California. The so-called 90-day rule we believe to be without application to leased property.

4. Because the sales tax, rather than the use tax is, in our opinion, the applicable tax, we are not concerned with the fact that the lessee is using the property in interstate commerce, even assuming that he would be immune from the use tax under Ruling 55(B).

5. Mr. Hal Dickson, Principal Tax Auditor, who attended the conference on September 13, will consider the accounting problems involved in making an allocation and indicated at the hearing that it would be helpful for our district office personnel to review the available records to determine what basis exists for a reasonably accurate allocation. I am sure he will follow through on this to the end that some formula or plan may be devised which will be satisfactory to all concerned.

6. We agree that where the contract is for the rendition of a service as distinguished from a rental of tangible personal property, the tax would not be applicable to the amounts paid to the person providing the service. This would be true even though in performing the service, use of equipment is involved. If the use of the equipment is entirely under the control of the person furnishing the service, particularly if the furnishing of such service is authorized by appropriate governmental agencies and is subject to their regulations, apparently only a service is being performed. Where, however, the contract specifies that there will be a rental of certain property or where property passes into the possession of the other party to the contract, there is a rental. If it is optional for the customer to purchase the services of a driver or other personnel, we believe a separate charge for such additional services could be excluded from the measure of the tax.

7. Considerations similar to those mentioned under No. 6 would apply in determining whether charges for maintenance of equipment may be separated from rental payments. If maintenance is a condition of the lease, i.e., it is mandatory that the lessee purchase such maintenance, we believe the entire receipts are taxable. If the maintenance is optional with the lessee, separate charges for such optional maintenance could be excluded from the amount of rental payments subject to tax.

Very truly yours,

E. H. Stetson
Tax Counsel

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