

**M e m o r a n d u m**

To : Edward W. King, Chief  
Fuel Taxes Division, MIC: 33

Date: August 21, 2006

From : Carolee D. Johnstone  
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Subject: , Inc./Exempt Bus Operator Application

In a memorandum dated March 8, 2006, you asked that my prior memorandum regarding the above-referenced taxpayer and the application of the Diesel Fuel Tax Law be reissued to reaffirm the analysis therein and to, additionally, analyze the application of the Use Fuel Tax Law. My prior memorandum, dated June 3, 2005, specifically addressed the question of whether the County of (County) is a "transit authority" for purposes of subdivision (a)(1) of section 60039 of the Revenue and Taxation Code<sup>1</sup> and, if so, whether Inc. (Taxpayer) qualifies as an Exempt Bus Operator.

The legal opinion expressed in the June 3, 2005, memorandum is still applicable: Taxpayer does qualify as an Exempt Bus Operator, but it qualifies under subdivision (a)(2), not subdivision (a)(1), of section 60039 of the Diesel Fuel Tax Law. In addition, Taxpayer also qualifies for exemption under subdivision (b)(2) of section 8655 of the Use Fuel Tax Law.

Diesel Fuel Tax Law

Section 60039 provides, in relevant part, as follows:

- (a) "Exempt bus operation" consists of the following:
- (1) Any transit district, transit authority, or city owning and operating a local transit system itself or through a wholly owned nonprofit corporation.
  - (2) Any private entity providing transportation services for the transportation of people under contract or agreement, . . . with a public agency authorized to provide public transportation services, [but] only for diesel fuel consumed while providing services under those contracts or agreements . . . ." (Emphasis added.)

<sup>1</sup> All further statutory references are to the Revenue and Taxation Code unless stated otherwise.

First, since Taxpayer, a nonprofit corporation,<sup>2</sup> is the entity that is applying for the exemption, and not the County, subdivision (a)(1) does not appear to be applicable here. Therefore, we need not determine whether the County is a "transit authority" with respect to whether Taxpayer qualifies as an Exempt Bus Operator.

However, subdivision (a)(2) does appear to apply to Taxpayer, as a "private entity providing transportation services for the transportation of people under contract or agreement," if the County is a "public agency" and if it is "authorized to provide public transportation services."

Whether the County is "public agency" for purposes of section 60039 is not specifically addressed in the codes. However, where "public agency" is defined,<sup>3</sup> with respect to other public utility matters, the definition includes "a county." Therefore, it is reasonable to conclude that the County is a "public agency" for purposes of section 60039.

Further, the County is "authorized to provide public transportation services." Public Utilities Code section 180050 states that, relevant to the creation of a local transportation authority: "A county board of supervisors . . . may designate a transportation planning agency designated pursuant to Section 29532 of the Government Code . . . to serve as an authority." Government Code section 29532 provides that: "From funds appropriated pursuant to Section 29531 [regarding continuous appropriation], the county auditor shall pay to public transportation entities the amounts allocated by the transportation planning agencies . . . as follows: (a) For a county included within the jurisdiction of a statutorily created regional transportation planning agency, that agency." The County Transportation Planning Agency, which is the regional transportation planning agency for the County, is a statutorily created regional transportation planning agency. (See Gov. Code, §§ 29532.1, subd. (d), & 67920.)

#### Use Fuel Tax Law

Under the Use Fuel Tax Law, "[no] tax shall be imposed upon fuel used by: . . . (2) Any private entity providing transportation services for the transportation of people under contract or agreement . . . with a public agency authorized to provide public transportation services, [but] only for fuels consumed while providing services under such contracts or agreements . . . ." (Rev. & Tax. Code, § 8655, subd. (b)(2).) This language is essentially verbatim the same as the language in subdivision (a)(2) of section 60039 discussed above. Therefore, it is reasonable to conclude that the analysis provided with regard to subdivision (a)(2) of section 60039 also applies to subdivision (b)(2) of section 8655.

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<sup>2</sup> Although Taxpayer is described as "a local non-profit agency" in the introductory paragraph of the contract between it and the County, Taxpayer describes itself as a "non-profit corporation" in its application for exemption, to which is attached a copy of its Articles of Incorporation.

<sup>3</sup> For example, Gov. Code, § 54999.1, subd. (c), and Pub. Util. Code, § 16871.

Therefore, where Taxpayer, a private entity, has contracted with the County, a public agency authorized to provide public transportation services, to provide transportation services for the transportation of people, Taxpayer qualifies as an Exempt Bus Operation under subdivision (a)(2) of section 60039 of the Diesel Fuel Tax Law. Taxpayer also qualifies for exemption under subdivision (b)(2) of section 8655 of the Use Fuel Tax Law. However, please note that the exemption is applicable only to the diesel fuel and fuels "consumed while providing services under" such a contract. (Rev. & Tax. Code, §§ 8655, subd. (b)(2), & 60039, subd. (a)(2).)

If you have any questions regarding any of the above information, please call me.

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