

**M e m o r a n d u m****295.0300**

To: Headquarters – Return Review (ODP)

Date: October 22, 1969

From: Tax Counsel (GJJ) - Headquarters

Subject:

This is in reply to your memorandum of October 7, 1969, in which you inquire as to the treatment to be accorded certain payments (FAP – assistance program) received by --- service station dealers from the company.

We understand that the --- has embarked on an aggressive program to enlarge the number of dealers selling their product. Since theirs is not a well known brand, they have found that they must provide more than normal incentive to get service station operators. Apparently the company guarantees a profit each month to a new operator. The amount of this guaranteed profit will vary vary according to the size and type of the station being operated. At the end of each month an accounting firm prepares a profit-and-loss statement and sends copies to the company. If this profit-and-loss statement shows a profit less than that guaranteed by the company, the difference is paid to the service station operator.

You ask, “should this income from the --- be considered as additional sales and taxable to the same degree as regular sales? That is, should the same percentage of the revenue from the oil company be considered taxable as is self-declared on regular sale by the station operator?”

In our opinion the payments in question are not includable in the station’s gross receipts. “‘Gross receipts’ means the total amount of the sale... price... of the retail sales of retailers...” [Rev. & Tax. Code, §6014.] While the gross receipts from the sale to a particular individual of an item of tangible personal property may include a payment made to the retailer by a third party, this rule applies where the payment is, in effect, a part of the “sale price” of the property, i.e., when the payment is a part of the amount which must be paid before the retailer will transfer title to the goods. Here the payments made by the company to the dealer have no direct relationship to the sale of any individual item of tangible personal property.

We have also said that, “Payments to retailers in the nature of subsidy payments for the operation of a business constitute additional gross receipts from the sale of tangible personal property and are subject to tax.” [CTS Anno. 1474.60]

In my opinion the case at hand is distinguishable from the case annotated even though these payments could possibly be described as being “in the nature of subsidy payments.” In the prior case, taxpayer was the operator of a hotel and restaurant at a crew-changing point on a railroad line. There was not enough business there to warrant a 24-hour a day operation. In order to have eating and sleeping facilities for its employees, the railroad agreed to reimburse taxpayer for his losses and to guarantee to him a fixed profit. In return the taxpayer agreed to keep the restaurant and hotel open for the 24-hour period. The distinction which we find between this case and the case under consideration is that in the former situation the person making the subsidy payments was in a real sense the purchaser of the tangible personal property; while in the latter situation the person making the payment has no connection with any of the persons who ultimately consume the tangible personal property. Since the company making the payments is the principal vendor of the retailer, it would seem more appropriate to characterize the payments as being in the nature of rebate payments. [See CTS Anno. 1478.35.] It is for this reason that we think that the company’s dealers may exclude from their gross receipts payments received by them under the company’s (FAP) assistance program.

GJJ:ab