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**STATE BOARD OF EQUALIZATION**

(916) 324-8208

February 13, 1991

Dear,

By letter dated December 11, 1990, you referred to the new law enacted by Congress in the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) which imposes an excise tax at the rate of 2.5 cents per gallon on fuel sold for use in diesel-powered trains. You sent this letter after speaking with Peter Horton in the Audit, Evaluation, and Planning Unit. Mr. Borton gave you the general rules relating to the measure of sales tax on transactions subject to federal excise taxes but instructed you to write to us for specific advice concerning this new excise tax. From your letter and our discussions with Mr. Horton, we assume that you are inquiring whether this excise tax is included in the gross receipts of retail sales of diesel fuel used in diesel-powered trains and therefore subject to the sales tax.

Section 4091 of the Internal Revenue Code (26 U.S.C.) imposes various excise taxes on the sale of any taxable fuel by the producer or the importer thereof or by any producer of a taxable fuel. Taxable fuel includes diesel fuel. 26 U.S.C. § 4092(a)(1)(A). There are two taxes on diesel fuel. The first, imposed at the rate of 17.5 cents per gallon, is known as the Highway Trust Fund financing rate. The second, enacted by OBRA '90, imposes an additional 2.5 cents per gallon tax (known as the diesel fuel deficit reduction rate) on diesel fuel. 26 U.S.C. § 4091(b)(1)(A)(i) and 4091(b)(4).

Section 4093 of the Internal Revenue Code exempts certain sales of fuels that would otherwise be taxable under 26 U.S.C. § 4091. Subsection 4093(c)(2)(B), however, specifically provides that the exemption shall not apply to the diesel fuel deficit reduction rate on diesel fuel sold by a producer or importer for use in diesel-powered trains even though purchased for a nontaxable use under 26 U.S.C. § 6427(1)(2) or a use described in 26 U.S.C. § 6427(b)(1).

26 U.S.C. § 6427 allows the ultimate purchaser of certain fuels subject to excise tax to obtain a refund or credit of the excise tax if the purchaser uses the fuel in one of the manners described in this section. For example, a purchaser of taxable fuel who uses the fuel in an automobile bus for transporting students may receive a refund of the excise taxes imposed by section 4091. 26 U.S.C. § 6427(b)(1). None of the refund allowances in section 6427 apply to the 2.5 cents per gallon tax imposed on the sale of diesel fuel which is used in a diesel-powered train.

The sales tax imposed by Revenue and Taxation Code section 6051 is measured by gross receipts from retail sales. Gross receipts include the manufacturers' and importers' excise tax imposed pursuant to section 4091 of the Internal Revenue Code unless the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for the federal excise tax paid. Rev. & Tax. Code § 6012(c)(4). Since it appears that the 2.5 cent per gallon deficit reduction tax is never refundable to a purchaser who uses the diesel fuel, in a diesel-powered train, it is our opinion that this excise tax will always be included in the gross receipts of these types of retail sales and therefore will be taxable.

If you have any further questions, please feel free to write to us again.

Sincerely,

Elizabeth Abreu  
Tax Counsel

EA:cs/0135E

bc: Long Beach District Administrator  
Mr. Peter Horton - Audit, Evaluation & Planning Unit  
Mr. Donald Hennessy