



STATE BOARD OF EQUALIZATION

July 23, 1985

Your letter of March 7, 1985, has been referred to me for response. You request our opinion with regard to the following facts:

"We represent a shipowner's agent which assists vessels arriving in the ports of Los Angeles and Long Beach.

One of the clients which the agent represents is a foreign cooperative association of tuna fishermen which serves approximately 1,000 tunafishing vessels. The cooperative association owns and operates two 'mother' vessels which periodically call at ports in California, Panama or Hawaii to purchase fuel and supplies. The two vessels purchase fuel for their own needs and for resale to the tuna fishing vessels. In addition, the two vessels transport supplies and ship stores to the tuna fishing vessels by sailing to a prearranged rendezvous area on the high seas and making deliveries to such vessels over a 30 to 45 day period. These supplies are not purchased by the association and resold to the members but are purchased in the name of the owner of the vessels and transported as cargo to such vessels. After the mother ships have discharged their supplies and fuel, the ships then proceed to any of the above ports and repurchase fuel and stores to begin anew the cycle.

Given the unique juridical entity of a ship or- vessel, U.S. Customs and Immigration authorities in the United States and elsewhere consider the fact that a vessel making contact with another vessel on the high seas is a visit to a foreign jurisdiction. Accordingly, any vessel which sails out of the United States and does not go into a foreign country but makes contact with another vessel on the high seas, must go through customs and immigration clearances as if such vessel had visited a foreign country."

You request our confirmation of the following conclusions which we will discuss in order.

1. Fuel for Resale to Tuna Vessels

"No sales or use tax should apply with regard to the purchase of bunker fuel by the two mother ships where such fuel is intended to and is resold to

tuna fishing vessels on the high seas. In practice a resale certificate is not given by the mother vessel to the seller of fuel since the association owning the mother vessel is not doing business in, and is not registered as a retailer within, California. Notwithstanding the failure to deliver a resale certificate at the time of the sale, no sales or use tax should be owing if the seller of the fuel can carry its burden on audit by proving that the sale is not a "retail sale", for purposes of Section 6007 of the California Sales and Use Tax (the 'Law'), because the fuel is resold to another purchaser in the ordinary course of the mother vessel's business."

Applicable law, with regard to your argument that the sales you describe are sales for resale, is Regulation 1668 (enclosed) which, in interpreting Revenue and Taxation Code Sections 6007 and 6091, states in part:

"(a) EFFECT OF CERTIFICATE.

(1) The burden of proving that a sale of tangible personal property is not at retail is upon the seller unless the seller timely takes a certificate from the purchaser that the property is purchased for resale. If timely taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds a California seller's permit, the certificate relieves the seller from liability for the sales tax and the duty of collecting the use tax.

* * *

(b) FORM OF CERTIFICATE

(1) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the property described in the document if it contains all of the following essential elements:

* * *

(c) The number of the seller's permit held by the purchaser: or if the purchaser is not required to hold a permit because the purchaser sells only property of a kind the retail sale of which is not taxable; e.g. food products for human consumption or because the purchaser makes no sales in this State, an appropriate notation to that effect in lieu of a seller's permit number." (emphasis added)

The association can and should give a resale certificate to sellers of bunker fuel even if the association does not do business in, or register as a retailer in, California. Regulation 1668(b) (1) (C), as above quoted, specifically provides that a purchaser who is not required to hold a seller's permit because it "makes no sales in this State" may

include "an appropriate notation to that effect in lieu of a seller's permit number" on the resale certificate.

While we would not recommend to any seller that they make the sale you describe without receiving a resale certificate from the association, nevertheless Regulation 1668(c) does provide that a seller who does not obtain a timely resale certificate will be relieved of liability for the tax if it presents "satisfactory evidence" that the specific property, in this case bunker fuel, was resold, is being held for resale, or that the purchaser has paid the use tax. The burden of presenting "satisfactory evidence" during a future audit should not be lightly undertaken by any seller, but if the burden is successfully met, the seller of bunker fuel would be relieved from liability for sales or use tax.

You next argue that:

"As an independent ground of exemption, the bunker fuel purchased for resale outside the state should qualify for the exemption from sales or use tax under Section 6396 of the Law if the contract of sale requires that the fuel be shipped to a point outside the state by the seller by means of carrier. It seems clear that for diesel fuel which will be delivered to the tuna vessels, the fuel constitutes cargo and would not be used by the mother vessels to power their own engines or for their other needs. Provided that the proper certificate under Section 6396 is given to the seller, we believe the exemption would be applicable to the sale and delivery of such fuel in California."

Under the stated facts, the association will purchase the bunker fuel for resale outside California. It follows then that the association will not be "transporting for compensation" bunker fuel "owned by other persons" (as required by Section 6396) but will be transporting fuel owned by the association and to be resold by the association. Therefore, the association's mother vessels are not "carriers" as to bunker fuel purchased for resale, and the and the exemption of Section 6396 will not apply to the sale of bunker fuel to the association for resale.

2. Fuel Sold to Carrier for its Own Use.

"With respect to the fuel which is sold to the mother vessels for their own use, we believe that the exemption under Section 6385 should apply. The statute requires that the property be shipped by the seller under a bill of lading to a "point outside the state". The mother vessels rendezvous with the tuna fishing vessels on the high seas and may stay in a designated area for periods of 30 to 45 days while servicing the various vessels. It is only after this time period that the vessels go to another port. In some cases a vessel will return to the port from which it came."

Regulation 1621 (enclosed), in interpreting Section 6385, states in pertinent part:

(a) DEFINITIONS

(1) Common Carrier. As used herein the term "common carrier" means any person who engages in the business of transporting persons or property for hire or compensation and who offers his services indiscriminately to the public or to some portion of the public. With respect to water transportation the term includes any vessel engaged, for compensation, in transporting persons or property in interstate or foreign commerce. This includes those vessels commonly called "ocean tramps," "trampers," "tramp vessels."

* * *

(c) PARTICULAR APPLICATION--FUEL, LUBRICATING OIL, AND OTHER PROPERTY PLACED IN USE PRIOR TO REACHING DESTINATION. The sales tax applies with respect to sales of fuel which will be consumed in a voyage, flight or trip from the California point where the fuel is taken on, to the first destination outside of California. The sales tax applies with respect to sales of tangible personal property placed in use prior to arrival at the first destination outside of California, such as lubricating oils placed in crankcases or gear cases.

In our opinion, the exemption in Section 6385 will not apply to fuel sold to the association for use in the mother vessels. While agreeing arguendo that a prearranged rendezvous point, if specifically shown on the bill of lading and supporting exemption certificate, would constitute a "point outside this state" within Section 6385(a), nevertheless, the mother vessels are not engaged "... in transporting persons or property in interstate or foreign commerce", as required by Section 6365(a) I within any authority of which we are aware. Any requirement that a vessel that makes contact with another vessel on the high seas must go through customs and immigration clearances as if such vessel had visited a foreign country is simply a practice recognizing that contraband and aliens can be transferred from one vessel to another on the high seas before illegally entering the United States. Such practice does not result in the activity of mother vessels in supplying deep sea fishing vessels being classified as interstate or foreign commerce.

This conclusion is mindful of the enactment in 1970 of Section 6396 (eff. 9/19/70) which specifically I exempts sales requiring shipment to " ... a point outside this state..." Sales and Use Tax Regulation 1620(a) (3) (3) (2), which implements Section 6396, states that, "This subsection is effective on and after September 19, 1970, with respect to deliveries in California to carriers, etc., hired by the purchasers for shipment to points outside this state that are not in another state or foreign country, e.g., to points in the Pacific Ocean." One of the principal reasons for the enactment of Section 6396 was to exempt sales for delivery to offshore oil drilling platforms, i.e., points outside California, but not in another state or foreign country. Prior to Section 6396, sales for delivery to points in the Pacific Ocean outside California were not considered sales in interstate and foreign commerce, and sales tax was applied to such sales. A like conclusion is called for

here, i.e., the mother vessels delivering supplies and ships stores from points in California to points outside California, but not in another state or country, i.e., rendezvous points in the Pacific Ocean, are not engaged in transporting property in interstate or foreign commerce.

There is further support for our conclusion that the association's mother vessels are not engaged in interstate or foreign commerce in the 1984 amendments to Sections 6368 and 6368.1 regarding the sale or use of watercraft. Prior to the 1984 amendments, the sale or use of watercraft for use in interstate or foreign commerce involving the transportation of property or persons for hire was exempt. The 1984 amendments added subsections expanding the exemptions to reach watercraft used 80 percent or more of the time in transporting for hire property or persons to vessels or offshore drilling platforms located outside the territorial waters of this state. We believe basic statutory construction calls for a like conclusion herein.

You next argue that:

"A second and independent ground for the exemption of bunker fuel purchased by the mother vessels for their own use is offered I under Section 6368.2 which was enacted in 1984, effective October 1, 1984. This new section exempts from sales and use tax any diesel fuel used in operating watercraft 'in commercial deep sea fishing operations*** outside the territorial waters of this state'. The mother vessels are an integral part of the commercial fishing operations of the fleet. The mother vessels are owned by the association, the members of which are the owners of the tuna fishing vessels. In effect, the association and the commonly owned vessels are an extension of the fleet since their sole activity is to service and support the tuna fleet and all its activities. We believe, therefore, the purchase of diesel fuel by the mother vessels for such purposes-constitutes and qualifies for an exemption under Section 6368.2."

Section 6368.2 provides, in pertinent part:

(a) There are exempted from the taxes imposed by this part the gross receipts from the sale of, and the storage, use, or other consumption in this state of, diesel fuel used in operating watercraft in commercial deep sea fishing operations or commercial passenger fishing boat operations by persons who are regularly engaged in the business of commercial deep sea fishing or commercial passenger fishing boat operations outside the territorial waters of this state.

(b) For purposes of this section, it shall be rebuttably presumed that a person is not regularly engaged in the business or commercial deep sea fishing or the operation of a commercial passenger fishing boat if the

person has gross receipts from these operations of less than five thousand dollars (\$5,000) a year.

We do not consider the carriage of ship stores and bunker fuel to be a fishing operation even when, as here, the carriage of supplies and fuel is exclusively in support of commercial deep sea fishing boats. In support of this conclusion, we note that Section 6368.2(b) creates a rebuttable presumption that "a person is not regularly engaged in... commercial deep sea fishing... if the person has gross receipts from these operations of less than \$5,000 a year." From your description of their operations; it our understanding that the mother vessels' income is from fees charged for the service of transporting cargo and from selling fuel. There are no gross receipts from commercial fishing. Since the mother vessels are not engaged in commercial deep sea fishing, the exemption of Section 6368.2 does not apply.

3. Delivery of Ship Stores and Supplies

"The ship stores and supplies purchased by the owners of the tuna vessels and shipped via the mother vessels should qualify for an exemption pursuant to Section 6396 if, pursuant to the contract of sale, such property is required to be shipped to a "point outside this state" by the seller by means of a carrier. In this case, the mother vessels are transporting such property to the foreign vessels and discharging such property on the high seas at the point of rendezvous with the tuna fishing vessels. Our understanding is that the tuna vessels receiving the cargo pay not only the purchase price for the cargo but, in addition, a fee to the mother vessel for such service. The mother vessel acts as a carrier in the delivery and carriage of such property for the various tuna vessels and does not purchase the property on its own account for resale to such vessels. Under these circumstances, we believe that the exemption accorded by Section 6396 of the Law should apply and that no sales or use tax should be owed with respect to such purchases in California."

Regulation 1620 (enclosed) in interpreting Section 6396 provides, in pertinent part:

"(a)(3)(B)

Shipments Outside the State--When Sales Tax Does not Apply. Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

1. Facilities operated by the retailer or
2. Delivery by the retailer to a carrier customs broker or forwarding agent, whether hires by the purchaser or not, for shipment to such out-of-state

point. As used herein the term “carrier” means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons and includes both common and contract carriers.

We are of the opinion that the mother vessels qualify as “carriers” for purpose or section - -- and Regulation 1620 when they carry, for a fee, ship stores and supplies owned by the various vessel owners and not by the association. Sales tax will not apply to the sale of ship stores and supplies transported, pursuant to the contract of sale from California sellers to purchasers in the tuna fleet outside the territorial waters of California.

If we may be of further assistance, please write this office.

Sincerely,

Donald J. Hennessy
Tax Counsel

JAD:ct

Bc: Mr. Glenn Bystrom
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