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January 4, 1994

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Executive Director

Mr. E. D. O---  
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XXXXX --- ---  
---, California XXXXX

Re: San Diego Justice Facilities  
Financing Agency (SDJF)  
Rider Refunds

Dear Mr. O---:

I am answering your letter dated November 4, 1993, regarding letter to you of October 21, 1993. You discuss certain aspects of the taxation of gasoline service stations with regard to applying for refunds of SDJF tax paid and/or tax reimbursement collected under the rule of Rider v. County of San Diego (1991) 1 Cal.App.4th 1 through the mechanisms provided by SB 263.

OPINION

You describe the pricing policies of gasoline service stations and your position that they should be permitted to apply for refunds of SDJF tax as follows:

“Pricing of fuel is posted. No increase was made in the price of the fuel at the immediate time of the enactment of the ½ of 1% increase. Adjustments to the retail price of fuel during the entire period were made on increments of 1 cent per gallon. Taxes were paid in part at the time of purchase of the fuel and when the sales tax return was made the amounts paid to the refinery for that reporting period were deducted from the total sales tax liability. The balance of the payment for sales tax was paid on the return. The delivery of fuel on which refinery collected the tax, could have been unsold on the date shown on the return as the end of the taxing period. Consequently the amounts paid for sales tax to

the refinery could have been more or less then the amounts due for sales tax on the sale of the fuel.

\* \* \*

“The use tax law has always levied a tax directly on any person purchasing property from a retailer in-state or out-of-state. The purchaser is not exempt from paying an amount of use tax unless he can prove that a sales tax has been paid. Since the retailer has assumed the obligation for all taxes levied on motor vehicle fuel, the statement that all taxes have been paid, permits the purchaser to exercise his exemption from the use tax.

“The reimbursement process is intended to permit the retailer to price his merchandise and because he is obligated to pay a retail sales tax, he may elect to add an amount for a tax reimbursement. Tax reimbursement is a matter of contract and [Civil Code Section 1656.1] allows the retailer to recover tax reimbursement on a retail sale in the event that his contract for the sale gives him that privilege.

“I should like to have you review your position on the fuel sales by Gasoline stations. The customers do not have a receipt for a purchase for motor vehicle fuel that itemizes an amount of sales tax or that makes any references to sales tax or sales tax reimbursement. The only statement is a notice on the pump that all taxes are included. It is the position of the retailer that the fuel is sold for a price determined by competition each day and any amount of tax is absorbed by the retailer.”

#### OPINION

We cannot agree with your analysis. As discussed in detail in our letter to you dated January 4, 1994, regarding the claims for refund of SDJF tax which you have submitted on behalf of several construction contractors, the sales tax and the use tax are complementary but mutually exclusive. If the sales tax applies to a transaction, the use tax does not and vice versa. (See, In re Los Angeles Lumber Products Co. (S.D. Cal., C.D., 1942) 45 F.Supp. 77, 86; Rev. & Tax. § 6401. Unless otherwise stated, all statutory citations are to the Revenue and Taxation Code.) Thus, where one buys an item in a transaction subject to the sales tax, that person cannot be held liable for use tax, but may pay sales tax reimbursement by agreement with the retailer. The mere fact that the purchaser does not get a receipt does not convert a sale subject to sales tax into one subject to use tax.

Your statement that the use tax law levies a tax on a person purchasing tangible personal property from a retailer in-state or out-of-state is simply incorrect. The sales tax applies to all in-state sales unless exempted by statute or constitution. (§ 6901.) There is no statutory exemption

Mr. E.D. O---

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January 4, 1993  
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for sales of gasoline to consumers at gas stations. Therefore, use tax does not apply to these sales.

You indicate that the gasoline sellers post a sign that sales tax is included in the price. This is inconsistent with your later statement that "any amount of tax is absorbed by the retailer." Under Civil Code Section 1656.1(b), when the retailer posts this statement, it is presumed that he has set the price of his goods high enough to recover tax reimbursement, rather than stating tax reimbursement separately, and that the purchaser is in agreement with this pricing policy. To say that a retailer "absorbs" the tax is to say that he charges the customer only the retail selling price and that he pays any tax from his own funds; there would be no need for a tax-included-price sign.

Therefore, in the situation you present we conclude that the gasoline sellers reimburse the distributor for the portion of tax that it pays and that their customers reimburse them through tax-included pricing. Thus, the persons that bear the ultimate economic burden of the tax are the customers. As they do not get receipts, they will receive effective refunds through the tax credits provided by SB 263. Therefore, the gasoline sellers may not submit claims for refund of SDJF tax under SB 263.

I am by carbon copy of this letter informing the Audit Review and Refunds Section of our conclusion on this matter.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Tax Counsel

JLW:es

cc: Mr. Robert Buntjer, Supervisor, Audit Rev. & Ref. (MIC: 39)