

**STATE BOARD OF EQUALIZATION**

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July 3, 1989

Mr. G--- A. H---
Law Offices of
---, --- & ---
XXX --- Street
--- ---, CA XXXXX

Dear Mr. H---n:

This is in reply to your February 8, 1989 letter regarding the application of sales tax and fuel excise taxes to transactions involving the sale of fuel through the California fueling network. You provided the following factual background.

“--- --- --- (‘Z’) is a network of independent oil jobbers (‘Participants’) who sell gasoline, diesel fuel, and other petroleum products at unattended cardlock fueling stations. Z has been established to provide a network of locations where the customers of Participants may purchase fuel. Customers of Participants are principally operators of commercial vehicles or fleet operators, such as trucking companies and car rental companies. Once a Participant joins the Z network, its customers may purchase fuel at sites operated by any Participant.

“Z acts as a clearing house for tracking and reporting to Participants fuel purchased by a Participant’s customers at cardlock fueling locations operated by other Participants. Each Participant at whose site fuel is purchased (‘Host Participant’) through Z bills the other Participant (‘Foreign Participant’) for fuel purchased at the host site. The price for such fuel is determined by a formula based on wholesale fuel prices in the locality of the host site. Z charges the Foreign Participant a transaction fee for each fuel purchase transaction by the Foreign Participant’s customers at sites operated by other Participants. A copy of the form of agreement between Z and each Participant is enclosed.

“The prices to be charged by each Participant to its customers are negotiated solely between the Participant and each customer. Z believes that for most, if not all, Participants, there is no written contract but simply an oral understanding concerning the prices at which various fuels will be sold by the Participant to the customer. The prices for products differ from customer to customer depending

upon the quantity of fuel purchased and other factors such as credit quality. For example, O--- O--- Company, one of the Participants, typically has as many as nineteen different price levels for each product. At any time, the price range from the lowest to the highest level for a product may be 15-20 cents per gallon. In addition, O--- O--- may quote prices that differ from these price levels for particular customers, which quoted prices may be fixed dollar amounts or 'cost-plus' price quotes.

“When a customer of a Foreign Participant purchases fuel at a site operated by a Host Participant, neither the Host Participant nor Z will know the price charged by the Foreign Participant to its customer for such fuel. Generally, there are no posted pump prices at sites operated by Participants. As described above, the per gallon price charged by each Participant to its customers for each product is separately negotiated between each Participant and each of the Participant’s customers. Thus, there may be scores of different retail prices charged for fuel pumped at a site at any particular time.”

Given this background, you provided the following three situations and requests for opinion as to the application of sales tax:

“A. Fuel purchased at California site; Foreign Participant is not operating in California except for Z network transactions.”

You requested our opinion that, if fuel is purchased at a California site by a customer of a Participant not operating in California except for Z network transactions, the sale from the Host Participant to the Foreign Participant constitutes a sale for resale, and the retail sale is the sale from the Foreign Participant to its customer.

We agree with your conclusion. The Foreign Participant has contracted to sell fuel to its customer, and the customer merely accepts delivery of the fuel in California from the Host Participant. As you know, in a November 2, 1988 letter to Mr. J--- M. P---, we reached a contrary conclusion; that is, we concluded that, under similar facts, the retail sale was made by the Host Participant. Our conclusion was predicated on an assumption that the transaction was handled similar to bank issued credit card sales whereby the retail sale is made by the retailers where the customer shops, and the card issuer has only a financing arrangement with the customer. We now realize that the Z transactions are not of that nature. Rather, the credit card issuer (Foreign Participant) has actually contracted to sell the fuel to the cardholder and purchases the fuel from the Host Participant for resale. The result then is that the Foreign Participant makes the retail sale and the Host Participant delivers the product on behalf of the Foreign Participant. We believe that, when an out-of-state Foreign Participant has joined Z and has Host Participants in California deliver fuel on a regular basis on behalf of the Foreign Participant, the Foreign Participant is a “retailer engaged in business in this state” for purposes of Revenue and Taxation Code section 6203.

Whether or not the Foreign Participant is engaged in business in California is a matter of fact. The Board would assume that the Host Participants are making taxable retail sales under Revenue and Taxation Code section 6007 until the Foreign Participant registers with the Board as a retailer. This point is covered at Business Taxes Law Guide Annotation 495.0790, which provides:

“Until an out-of-state retailer with a representative/agent in California registers with the Board as a retailer engaged in business in this state, it may be assumed that the retailer is not engaged in business in this state for purposes of Section 6007. Therefore, all deliveries in this state made by the representative/agent will be assumed to be taxable retail sales by the representative/agent. The representative/agent has the burden of overcoming the assumption by establishing to the satisfaction of the Board that the out-of-state retailer was engaged in business in this state within Section 6203. If the representative/agent satisfactorily overcomes the assumption, the deliveries by the representative/agent will not be considered taxable retail sales even though the out-of-state retailer has not registered with the Board as a retailer engaged in business in this state.

“To overcome the assumption, the representative/agent must establish to the satisfaction of the Board that the out-of-state retailer regularly sells to California customers and has the tangible personal property delivered by in-state representative/agents. An infrequent sale through an in-state representative/agent will not suffice to overcome the assumption that an unregistered out-of-state retailer is not engaged in business in this state.

If the representative/agent charges a service fee for completing the required paperwork, which fee the customer must pay to receive the tangible personal property, such fee is subject to tax. When the representative/agent must collect the tax, it should add the fee to the invoice price and collect tax on the total amount. When the out-of-state retailer must collect the tax, it should also collect tax on the invoice price plus the fee, even if the fee is paid directly to the representative/agent by the customer. 8/19/89”

The Foreign Participant should hold a Certificate of Registration – Use Tax and collect the use tax from the Foreign Participant’s customers. We are writing to Mr. P--- to inform him of this conclusion.

“B. Fuel purchased at site outside California; Foreign Participant is operating in California.”

You request our opinion that, if fuel is purchased at site outside California, the retail sale occurs outside California and California sales tax does not apply to either the sale from the Host Participant to the Foreign Participant nor to the sale from the Foreign Participant to its customer.

We agree with your conclusion. Both the sale by the out-of-state Host Participant and the California Foreign Participant occur outside California. Neither sale is subject to California sales tax. Assuming that the purchaser does not bring the fuel to California for use here, California use tax does not apply to the transaction.

“C. Fuel purchased at California site; both Foreign Participant and Host Participant are operating in California”

You requested our opinion that, if fuel is purchased at a California site by a customer of a Participant operating in California, the sale from the Host Participant to the Foreign Participant constitutes a sale for resale, and the retail sale is the sale from the Foreign Participant to its customer. We agree with your conclusion. The analysis applicable to situation A as to which Participant is the retailer is applicable to this situation as well. Based on our telephone conversations, we understand that, in this situation, the participants are not only engaged in business in California, but there is no involvement with out-of-state retailers. Rather, the transactions are sales in California by California retailers and subject to the sales tax. The sale by the California Foreign Participant is the retail sale. The Host Participant makes a nontaxable sale for resale to the Foreign Participant and delivers the fuel to the customer on behalf of the Foreign Participant. The Foreign Participant is liable for sales tax on the retail sale in California.

You noted that Z believes that all motor vehicle fuel purchased by Z Participants who operate in California is tax-paid fuel for purposes of the Motor Vehicle License Tax Law. Z also believes that all Participants operating sites in California are registered in California as motor vehicle fuel brokers. Z expects no single transaction in motor vehicle fuel to exceed 200 gallons. Given this information, you request our opinion that a Participant who otherwise is not operating in California whose customers use a card issued by such Participant to purchase motor vehicle fuel at the site of a Participant operating in California, will not be required to register as a broker or otherwise under the Motor Vehicle Fuel License Tax Law as a result of participation in the Z network if the Participant would not otherwise be required to register.

Assuming that Z is correct in its belief that all of the fuel purchased by the Participants is tax-paid and that none of the transactions will exceed 200 gallons, the Foreign Participant will not be required to obtain a license under the Motor Vehicle Fuel License Tax Law.

You noted that Z believe each Participant who operates sites in California is registered as a vendor under the Use Fuel Tax Law. You request our opinion that each Participant will be treated as the vendor with respect to all transactions occurring at the sites operated by such Participants, and that the Foreign Participants will not be treated as a vendor within the meaning of Revenue and Taxation Code section 8610 with respect to transactions occurring at a site in California and, if not otherwise required to register under the Use Fuel Tax Law will not be so required as a result of participation in the Z network.

We cannot give such an opinion. We have previously taken the position that, when a person makes a sale of fuel to a customer and provides the customer with a card allowing the customer access to a cardlock facility, the seller is the vendor of the fuel for purposes of the Use Fuel Tax Law.

We hope this answers you questions; however, if you need further information, feel free to write again.

Very truly yours,

Ronald L. Dick
Tax Counsel

RLD:sr