

**STATE BOARD OF EQUALIZATION**

June 8, 1988

Dear

This is in response to your letter dated April 22, 1988 regarding application of the Revenue and Taxation Code Section 6385 exemption from sales tax to sales of fuel.

_____ has constructed an underground fuel storage facility which it intends to lease to _____. You note that the Section 6385 exemption requires fuel sold to a common carrier to be for "immediate shipment," and you ask whether _____ be exempted from the use tax under the proposed lease with _____.

Initially we note that the tax generally applicable to a sale of fuel by _____ to _____ in California would be a sales tax imposed upon _____, the seller, for which _____ could collect reimbursement from _____ pursuant to contract. (Civ. Code § 1656.1, Rev. & Tax. Code § 6051.) The exemption to which you refer is provided by Revenue and Taxation Code Section 6385(c) for sales of fuel to a water, air, or rail common carrier for immediate shipment outside this state in the conduct of its business as a common carrier after the first out-of-state destination. The sale of fuel used in reaching that first out-of-state destination is not exempt from sales tax.

As explained in regulation 1621(b) :

"To qualify for the exemption, the 'sale' of the fuel (or other petroleum product) must be for 'immediate shipment'. A 'sale' occurs when the purchaser takes either title or possession of the fuel. An 'immediate shipment' occurs when the delivery of fuel by the seller is directly to a ship, aircraft, or rail car (hereinafter referred to as conveyance) for transportation outside this state and not for storage.

"Fuel is sold for storage, and not for immediate shipment, if the fuel is transferred by the seller into a storage facility controlled by or leased to the purchaser or to any third party who takes delivery for the purchaser. Tax applies notwithstanding the contract of sale providing that the seller shall retain title to the fuel until the fuel is loaded onto the conveyance. In such cases, any attempt by the seller to retain title is limited in effect to the reservation of a security interest.

"Fuel is sold for immediate shipment, and not for storage, if the fuel is transferred by the seller into storage facilities maintained by a third party, the seller has contracted with the third party to store the fuel, and title does not pass to the purchaser until the fuel is loaded onto the conveyance.

"Fuel is sold for immediate shipment, and not for storage, if the fuel is transferred by the seller to storage facilities maintained by a third party, even though the purchaser may have contracted with the third party to store the fuel, if the sale occurs when the fuel is loaded onto the conveyance and the seller has the legal obligation to deliver the fuel to the purchaser's conveyance. If the obligation of the seller to deliver the fuel is complete upon transfer of the fuel to the third party, then any retention or reservation of title to the fuel after such transfer is limited in effect to a reservation of security interest, and the fuel will be regarded as having been delivered to the purchaser for storage and not for immediate shipment outside this state. A mere recital will occur at the conveyance, or that the seller will retain title to the fuel until delivery at the conveyance, is insufficient of itself to establish that delivery of the fuel by the seller is directly into the conveyance. In determining whether the delivery occurs at the conveyance, and not upon transfer of the fuel to the third party, the board shall consider the following factors; whether the losses during storage are for the account of the seller; whether the seller has the right to remove the fuel from the storage facilities; whether the seller has the duty to remove the fuel from the storage facilities at the seller's expense should the seller's deliveries into the storage facilities exceed specified quantities, and whether the contract between the seller and purchaser is a requirements contract. The presence or absence of one or more factors is not conclusive."

As explained in this provision, we regard fuel as being sold for storage, and not for immediate shipment, when the seller transfers fuel into a storage facility controlled by the purchaser. Although your letter characterizes the proposed agreement as a lease of facilities to _____ the agreement itself is entitled "Terminalling Agreement," and this appears to be appropriate since _____ maintains control of the facilities. We conclude that the fuel sold by _____ to _____ is for storage, and not for immediate shipment, since the fuel is transferred by _____ into storage facilities controlled by _____.

This conclusion is supported by several aspects of the terminalling agreement. Although a third party may be retained to operate the storage facility, that operator would be under the direction of _____. Section 7(c) of the agreement specifically refers to fuel in _____ custody. Section 12 provides that _____ shall be liable for loss of fuel stored pursuant to the agreement and _____ assumes all risks of loss of or damage to the fuel for any cause except from negligence or willful misconduct of _____ or its agents or employees.

We therefore regard fuel stored in _____ facilities as being sold for storage and not for immediate shipment. Such sales would not qualify for the Section 6385(c) exemption. If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Tax Counsel