

**STATE BOARD OF EQUALIZATION**

Per David Labin's instructions, the following note is added:

*The discussion of Packaging materials was clarified & superseded by letter dated 6/18/91

LK 10-24-1995

August 21, 1990

Dear

This is in response to your letter dated July 17, 1990 regarding the application of sales or use tax to cargo containers and packaging material. The facts and your questions are quoted below followed by our responses.

Cargo Containers

-For the purpose of this question, cargo containers (a.k.a. igloos) are the large empty thin-walled enclosed containers, into which the common carrier places parcels and property. When used, the cargo containers are filled and loaded into the fuselage of an aircraft. These containers are used in lieu of hand-loading all parcels into the aircraft. Most containers are standard sizes and shapes, however, the containers in question were custom designed to the specification of the carrier for ease in uniform handling by the carrier's equipment and personnel. During use in the carrier's aircraft, the containers are fastened inside the aircraft.

“Question: Do the containers qualify as aircraft parts, for purposes of Section 6385, being entitled to exemption from state and local sales and use tax?”

“Question: If (a) the common carrier picks up the empty cargo containers at Los Angeles International Airport, (b) removes them, prior to making any use thereof, to their headquarters out of state, (c) provides the seller with an exemption certificate in the form prescribed by the Board, and (d) moves the empty containers out of state prior to making any use thereof on its own bill of lading, are the containers exempt from state and local sales and use tax?”

It is not necessary to answer your first question because the exemption provided under subdivision (a) of Revenue and Taxation Code section 6385 applies to all property, except fuel and petroleum products, used by the carrier in the conduct of its business as a common carrier if the sale satisfies the requirements of the exemption. The exemption does not apply only to aircraft parts.

The sale of the cargo containers to the carrier will be exempt if it meets the requirements set forth in Regulation 1621. The requirements for the exemption are set forth in subdivision (b) (1) and proof of the exemption is set forth in subdivision (c) (1), which state:

“(b)(1) The sale of tangible personal property to common carriers, including foreign air carriers, is exempt from sales tax pursuant to Section 6385(a) of the Revenue and Taxation Code when such property is:

“(A) Shipped by the seller via the facilities of the purchasing carrier under a bill of lading, to an out-of-state point, and

“(B) Actually transported by the common carrier to the out-of-state destination, pursuant to the bill of lading, over a route the California portion of which the purchasing carrier is authorized to transport cargo under common carrier rights, and

“(C) Not put to use until after the transportation by the purchasing carrier to the out-of-state destination, and

“(D) Used by the carrier in the conduct of its business as a common carrier.

“(c) (1) Any seller claiming a transaction as exempt from sales tax under Section 6385(a) must receive at the time of the transaction, and retain, a properly executed bill of lading, or copy thereof, pursuant to which the goods are shipped. The bill of lading must show the seller as consignor. It must indicate that the described goods are consigned to the common carrier at a specified destination outside this state. Where the form of the transaction is 'freight collect,' no specific freight charge need be shown on the bill of lading, inasmuch as such charges are not ordinarily shown thereon in 'freight collect' transactions. Furthermore, the carrier need not actually collect freight charges from itself. The form and language of the bill of lading should be similar to the form and language normally used where the purchaser and carrier are not the same. A bill of lading will be considered obtained at the time of the transaction if it is received either before the seller bills the purchaser for the property, within the seller's normal billing and payment cycle, or upon delivery of the property to the purchaser.

“In addition to a bill of lading, the seller must obtain from the purchaser prior to or at the time of the transaction, and retain, a certificate in writing that the property shall be transported and used in the manner described in subdivision (b) (1) of this regulation. The

certificate shall be in substantially the same form as Certificate D or E, appearing in the appendix of this regulation. Certificate E may be used when multiple transactions claimed as exempt are made between a seller and a carrier and may be included as part of a transaction by reference to the certificate on the purchase order or other appropriate documentation for each transaction.”

Packaging Material

“The common carrier also purchases various types of non-returnable packaging materials including, but not limited to: boxes, envelopes, tubes, way bills, and sealing tape. These materials, furnished to the carrier's customers, at no direct charge, are purchased and stored for less than 90 days in warehouses in two California cities. The customers receiving these supplies are located in several western states, including California.

“Presently, the carrier is paying California sales, seller's use or consumer's use tax on all materials upon receipt of same in the California warehouses.

“Question: Is it proper for the carrier to take or claim a 'use exclusion' tax credit on said materials given to customers for first use outside of California? If so, must this be a claim for refund, or may the adjustment be made against the carrier's quarterly tax liability in the period that the materials are removed from inventory?”

“Question: Would these materials qualify as exempt non-returnable packaging materials under Regulation 1589?”

“Question: If the materials do not qualify as exempt non-returnable packaging materials, would they qualify as supplies used by a common carrier in interstate commerce, exempt from Bradley-Burns local taxes per Regulation 1805?”

These materials are not non-returnable packaging materials within the meaning of Regulation 1589. The exemption applies to non-returnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container. The carrier does not sell the contents together with the containers. The carrier also does not sell the containers to persons who place the contents in the containers and then sell them both. Rather, the carrier is consuming the materials in the conduct of its business, and the exemption set forth in Regulation 1589 does not apply. Sales or use tax applies to the carrier's purchase or use of these materials unless some exclusion or exemption applies other than the exemption for non-returnable containers.

I am unsure as to what you mean by a "use exclusion" tax credit. For purposes of this opinion, I assume you mean the exclusion from the definition of "use" under Revenue and Taxation Code section 6009.1. This section excludes from the definition of "storage" and "use" the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state. This exclusion does not apply to transactions subject to sales tax. When a transaction is subject to sales tax, it remains subject to tax notwithstanding the property's later use outside California.

When the carrier obtains property in transactions not subject to sales tax, and makes no use of the property except to keep it in California for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, then the carrier is not regarded as having purchased the property for use in California. Therefore, its purchase is not subject to use tax. If the carrier had paid use tax, it may not take a credit for such tax. Rather, it must file a claim for refund for the use tax it paid but was not required to pay. I note, however, that when the carrier supplies materials to its customers and title passes to the customers in California, the carrier has consumed the property in California and use tax applies. This is the case even if the customers' use is outside California.

Revenue and Taxation Code sections 7202 and 7203 provide exemptions from the local sales and use tax for certain property used by common carriers. As explained in subdivision (b) of Regulation 1805, these exemptions apply only if the property is used directly and exclusively in the use of aircraft as common carriers of persons or property under the authority of the laws of this state, the United States, or any foreign government. The exemptions are limited to supplies and equipment used or consumed directly in the carriage of persons or property and does not include office or shop equipment or supplies or any other property not directly used or consumed in the carriage of persons or property. You have not fully described how these materials are furnished to the carrier's customers. We therefore cannot provide you a definitive answer on this question. If the materials are used to package items which the carrier then delivers, then the materials qualify for the exemption if meeting the other requirements. If the materials are used in other ways, for example, first used by the customer to package its product and then used to deliver the product, the exemptions would not apply. We note also that the exemption under subdivision (a) (7) of section 7202 only applies to property to be used or consumed principally outside the county in which the sale is made.

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

Sincerely,

David H. Levine
Senior Tax Counsel