

**STATE BOARD OF EQUALIZATION**

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January 27, 1997

VIA FACSIMILE AND U.S. MAIL

Mr. J--- M. K---, CPA
Tax Manager
W--- I---
P.O. Box XXXXX
---, CA XXXXX

Re: *Sales of Fuel to Water Common Carriers*
M--- R---, Inc. (Account No. SR -- XX-XXXXXX)
W--- I--- (Account No. SR -- XX-XXXXXX)
W--- O--- C--- (Account No. SY -- XX-XXXXXX)

Dear Mr. K---:

This is in response to your letter of December 12, 1996, in which you inquire whether water carrier exemption certificates tendered to your company conform to the requirements set forth in "Certificate E" found in the Appendix to Regulation 1621.

You explain that your companies, M--- R---, Inc., W--- I---, and W--- O--- C---, which you collectively refer to as "Taxpayers," are dealers of petroleum products. You explain that although Taxpayers may occasionally blend fuels in its storage tanks, Taxpayers are not refiners or processors of fuel. Your questions concern sales of various fuels to water common carriers. Revenue and Taxation Code section 6385, as explained by Regulation 1621, provides that, under specified conditions, gross receipts from the sales of fuel and petroleum products made to water common carriers will be exempt from the computation of sales and use taxes. Regulation 1621(b)(3)(C), in pertinent part, explains this exemption will apply to sales of fuel and petroleum products when these products are:

1. Sold to a water common carrier who holds a valid seller's permit or who has timely obtained a fuel exemption registration number,
2. For immediate shipment outside this state,
3. Consumed by the water carrier in the conduct of its business as a common carrier after the first out-of-state destination."

This provision of Regulation 1621 cautions that:

“[S]ales tax applies with respect to sales of fuel and petroleum products which will be consumed in a voyage from the California point where the fuel is taken on to the first destination outside of California.”

For purposes of Regulation 1621(b)(3)(C) the “first destination outside of California” is defined as the first point reached by the water common carrier outside of California, in the conduct of its water common carrier’s business at which either cargo, cargo containers, or passengers are loaded or unloaded, fuel is bunkered, or docking fees are charged. A “sale” occurs when the purchaser takes either title or possession of the fuel, and an “immediate shipment” occurs when the delivery of fuel is made by the vendor to the vessel for transportation outside this state.

To be eligible for this exemption the vendor must obtain a timely exemption certificate from the purchasing water common carrier. This exemption certificate must contain the purchaser’s seller’s permit number. If the purchaser is not required to hold a seller’s permit, the certificate must contain the purchaser’s fuel exemption registration number. The exemption certificate must conform in substance with one of the sample exemption certificates contained in the Appendix to Regulation 1621. In order to be considered “timely filed,” the certificate must be obtained either within the seller’s normal billing and payment cycle or 45 days from the date of delivery, whichever event occurs later. (Reg. 1621(c)(3).) The applicable format for the exemption certificate for fuel and petroleum products sold to water common carriers is “Certificate E,” found under the Appendix to Regulation 1621, a copy of which you have attached to your letter as Attachment 4.

“Certificate E” contains 17 inquiries which were formulated to obtain the information necessary to verify that a water common carrier meets the specific requirements to qualify for the exemption accorded under section 6385(c). The pertinent requirements again are: the purchaser must be a water common carrier, lawfully operating as such; the purchaser must hold a valid seller’s permit or fuel exemption certificate; the fuel must be purchased for shipment out of state; and the fuel must not be used or consumed by the purchaser until after the vessel reaches its first out-of-state destination. The information sought in the first 9 inquiries, among other things, identifies the vessel purchasing fuel; the seller’s permit or fuel exemption registration number, whichever is applicable; the vendor; the date of purchase; and the first out-of-state destination. The information sought in lines 10 through 17 is to determine whether or not the purchaser had the requisite fuel, prior to purchase, necessary to power the vessel while in port and to reach its next destination. These inquiries seek to identify the amount of fuel on board upon arrival into the California port, the amount of fuel used in port, the amount of fuel to be consumed to power the vessel to the first out-of-state destination, and the amount of fuel purchased. At the end of “Certificate E” there is a paragraph verifying that the vessel and the fuel purchased qualify for the exemption, followed by signature and date lines.

In your letter you include formats of two certificates that have been tendered to Taxpayers and have asked the Board to analyze these certificates to see if they meet all of the criteria required by "Certificate E." Your concerns appear to be whether the certificates submitted by Taxpayers' customers conform to "Certificate E" and whether these certificates have been properly completed.

The first certificate you refer to, Attachment 1, which you state was received within 45 days after the date of delivery, appears, in format, to contain substantially the same verbiage as required by "Certificate E." All of the 17 categories of inquiries are included, with corresponding lines to be filled in by both the purchaser and the vendor. The closing paragraph of Attachment 1 is substantially the same as that found in "Certificate E," except it does not contain the last sentence which states: "To qualify for the exemption, a water common carrier who is not otherwise required to hold a valid seller's permit must register with the Board of Equalization and obtain a fuel exemption number within 45 days after taking fuel on board." Nor does Attachment 1 include the word "lawfully" between the terms "common carrier" and "operating as such." It is recommended that purchasers using this certificate redraft the exemption certificate to include the word "lawfully" to verify that it is, in fact, lawfully operating as a common carrier. While we do not believe that the omission of the last sentence would render Attachment 1 invalid, it was included in "Certificate E" as a notice to sellers that the purchaser is required to have a seller's permit or fuel exemption registration number in order to be eligible for the exemption. That is, without regard to this sentence, if the purchaser does not have a seller's permit or fuel exemption registration number, the sale will not qualify for the exemption.

As I review the content of Attachment 1, I note that four of the categories of information have not been filled out, specifically, on line 1, the carrier's name is omitted; on line 2, there is no entry of either a seller's permit number or fuel exemption number; on line 3, the vessel's name is not identified; on line 6 no delivery date is stated; and line 9 does not provide the invoice number of the purchase. In addition, the certificate does not appear to be signed or dated. Accordingly, as submitted, this certificate does not qualify as a valid and complete exemption certificate.

In your letter you express concern that the purchaser may have purchased additional fuel from other sources while in the California port which may not be reflected on this certificate. "Certificate E" does not require this information, nor do Taxpayers have the obligation of determining whether other such purchases are made while the vessel is in the California port. If the water common carrier made other "exempt" purchases from other vendors while in a California port, these purchases would be reflected on exemption certificates tendered to the other vendors. If the water common carrier tenders an exemption certificate, but uses the fuel in an otherwise taxable manner, the purchaser will be liable for the sales tax. (Reg. 1621(e).) Thus, so long as Taxpayers have accepted, in good faith, a fully completed exemption certificate that conforms in substance to "Certificate E," with responses to the inquiries found on lines 1 through 17, which Taxpayers believe accurately states the basis for the exemption, then Taxpayers have met their obligations under Regulation 1621(c)(3).

The next certificate, Attachment 2, about which you inquire also appears to substantially conform in format to "Certificate E," except for the last sentence explaining the need for the purchasers without seller's permits to obtain a fuel exemption number within 45 days after taking fuel on Board. As previously explained, this omission would not render the certificate invalid, but serves as a notice to the seller that the purchaser is required to have either a seller's permit or a fuel exemption registration number in order to qualify for the exemption. As in Attachment 1, the information requested in lines 1, 2, and 6 of Attachment 2 do not appear to have been completed. In addition, the purchaser has not fully responded to the inquiries contained in lines 10 through 17. As explained above, the information sought in lines 10 through 17 is to determine whether or not the purchaser had the requisite fuel, prior to purchase, necessary to power the vessel while in port and to reach its next destination. This information would serve as evidence that the fuel being purchased would not be used until after the vessel reached its first-out-of state destination. According to this purchasers responses, this purchaser did not have any fuel at the time it purchased fuel from Taxpayers. The only entries which had a response other than "0" to the inquiries on lines 10 through 17 were responses to the amount of fuel loaded and the amount of fuel the purchaser claimed was exempt from sales tax. A literal review of the purchaser's responses to inquiries found on lines 10 through 17, indicates that the purchaser did not have any fuel on board when it arrived in the California port. Thus, it can only be concluded that at least some of the fuel purchased from Taxpayers was for use in California territorial waters from the point of departure until the first out-of state destination. Based upon these responses, or failure to respond, the purchaser is not entitled to the exemption and Taxpayers are responsible for the sales tax attributable to this purchase.

You express your beliefs that this purchaser had enough fuel on board at the time of purchase for use in the California port and to power the purchaser to its first out-of-state destination and that the purchaser did not burn the fuel purchased from Taxpayers until after it reached its first out-of-state destination. Your belief that the purchaser did not burn the fuel purchased until after it reached its first out-of-state destination, is not enough. If Taxpayers accept this incomplete certificate, Taxpayers will be liable for the sales tax attributable to this purchase.

You state the purchaser explained that, in accordance with industry standards, it is not obligated to release information regarding the quantity of fuel on board at the time of arrival in port (line 13); the amount of fuel to be consumed while in port (line 10); or the amount of fuel to be consumed to reach the first out-of-state destination (line 11). In other words, it is the purchaser's contention that to divulge this information would be tantamount to releasing trade secrets. There is no merit to this proposition as there is nothing on this form which would apprise Taxpayers of the identity of other vendors from which the purchaser obtained its fuel. As explained above, the responses to inquiries 10 through 17 are to verify that the purchaser is, in fact, entitled to the exemption provided under section 6385. If the purchaser is not willing to provide this information, then the purchaser is not entitled to the exemption.

The last document you have included, Attachment 3, is a document you propose to use in the event that an exemption certificate is not tendered to Taxpayers within the later of 45 days after the date of delivery, or the vendor's normal billing and payment cycle. You believe that Attachment 3 would satisfy the evidence requirements of Regulation 1621(d)(3). This subsection of Regulation 1621 provides that in the event an exemption certificate is not received within the time permitted the seller may nonetheless be relieved of sales tax liability:

“if the seller presents satisfactory evidence that the sale met the requirements of Sections 6357.5 or 6385(c) of the Revenue and Taxation Code, including the requirement that the purchaser held a valid seller's permit at the time of the sale or a fuel exemption number with the Board at the time of sale or within 45 days after taking the fuel on board.”

Attachment 3 includes the first 9 inquiries found under “Certificate E” but does not contain inquiries 10 through 17 which, as explained above, provides the information necessary to determine whether the fuel purchased qualifies for the exemption provided under section 6385. An affidavit submitted after the 45 days have elapsed should provide at least the same information elicited by “Certificate E,” not less. Thus, your proposed affidavit should not only contain inquiries which would elicit the same responses as those found on lines 10 through 17 of “Certificate E,” but should also elicit verification from the purchaser, such as copies of the purchasers log abstracts or cargo manifests documenting the transportation of the fuel to the first out-of-state destination. The purchaser is required to maintain such evidence, pursuant to Regulation 1621(e), to document that the fuel purchased pursuant to the exemption certificate qualified for the exemption allowed under section 6385. Thus, as drafted, your proposed affidavit does not provide either the purchaser or the vendor the opportunity to present satisfactory evidence that the water common carrier's purchase of the fuel met the requirements of section 6385.

I hope that this response has addressed your inquiries. If you have any further questions, please feel free to contact this office again.

Sincerely,

Patricia Hart Jorgensen
Senior Tax Counsel

PHJ:cl

cc: Sacramento District Administrator (KH)
Santa Ana District Administrator (EA)