STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS DIVISION

In the Matter of the petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
Petitioner	)	

The above-referenced matter came on regularly for hearing before Staff Counsel Susan Wengel on April 3, 1992, in Sacramento, California.

Appearing for Petitioner:

Appearing for the Sales and Use Tax Department: Mr. Jack Warner, District Principal Auditor; Mr. E. Wayne Hopkins, Supervising Tax Auditor

Protested Item

The protested tax liability for the period January 1, 1983 through December 31, 1985 is measured by:

	Item	State, Local and County
B.	Unreported Taxable Chemical Sales	$ 4,844,513
E.	Unreported Sales of Refuelers	240,067
F.	Overstated Exempt Sales - Bunker Fuel	12,155,327
I.	Overstated Jet Fuel Deduction	17,423,987
J.	Understated Fuel Sold To Charter Vessels	6,222,345
Q.	Unreported Self-Consumed Propane	4,905,061

(A Refinery)

S.	Use Tax - Assets Over $10 ,000	1,662,380
T.	Use Tax - Other Than Assets Over $10,000	837,822
V.	Unreported Self-Consumed Propane	20,306,869
	Measure Per Estimated Determination By Telephone	$102,063,164
	Audit Adjustment	$ 27,090,691
	Measure per Audit	$ 74,972,473

CONTENTIONS OF PETITIONER

1. The sales to _____ were either sales in interstate commerce or sales for resale. (Audit Item B.)

2. The tax liability for the sale of refueler trucks is not petitioner's responsibility. (Audit Item E.)

3. The sales to _____ should not be taxed as the ship is engaged in foreign commerce as a common carrier. In the alternative, the sales are exempt sales for use in commercial deep sea fishing or are sales for resale. (Audit Item F.)

4. The Board has erroneously charged petitioner with the responsibility of collecting and paying tax on certain sales of bunker fuel, the duty of which lies with the purchaser. (Audit Item F.)

5. The Board has erroneously treated as taxable, certain sales of jet fuel to airlines, when an airline's refueler truckers or storage facilities of other oil companies are involved. (Audit Item I.)

6. The Board has erroneously treated as taxable the use of bunker fuel for the operation of ships chartered by _____. (Audit Item J.)

7. The Board has erroneously treated as taxable the use by _____ of certain gases for fuel in its refineries. (Audit Item Q and V.)

8. The engineering charges paid in connection with the purchase of a computer from _____ are exempt. (Audit Item S.)

9. The purchases of see coke from _____ in Houston, Texas are not subject to use tax. (Audit Item T.)

10. The Board has erroneously calculated interest on the tax payments.

SUMMARY OF PETITION

Petitioner is a major oil company with refining and marketing operations in California. During an audit by the Sales and Use Tax Department (Department) numerous errors in reporting were scheduled. Because of the number and complexity of the issues petitioner, the facts pertaining to each audit item and the position of both petitioner and the Department will be discussed separately in the Analysis and Conclusion portion of the recommendation.

Analysis and Conclusion

Audit Item B.

The first audit item in question involves sales by petitioner to _____ of certain catalysts. Petitioner asserts that these products were sold to _____ for resale as evidenced by a resale certificate dated September 26, 1983. (See Exhibit A attached.) In the alternative, they assert that the sales were sales in interstate commerce.

The Department takes the position that, when petitioner made the sales to _____ the product was picked up at petitioner's _____ plant and then transported outside of California in _____ trucks. As _____ is not a common carrier, the sales were considered to be sales made in California and subject to California sales tax.

The Department likewise rejects petitioner's second contention that the sales were sales for resale. _____ was involved in a partnership with _____ called _____. Because _____ needed certain catalysts for its operations in Texas, _____ purchased the catalysts, picked them up at _____ and transported them to Texas where they were allegedly resold to _____. The sales, which took place in the first quarter 1983, the first quarter 1985, and the fourth quarter 1985, were not considered to be sales for resale because the resale certificate was not deemed to have been timely. The certificate, which reflects an effective date of 1983, was not available until two years after the audit was started. It was sent to the Department under a cover letter in 1988. The certificate indicates an “effective date” of September 26, 1983 and it is signed but not dated. Pursuant to Sales and Use Tax Regulation 1668, which requires a certificate to be timely, the Department has recommended that no adjustment be made.

Petitioner contends that the certificate is a replacement for the original certificate which was issued timely and then misplaced.

Revenue and Taxation Code Section 6091 provides that it is presumed that all gross receipts are subject to tax unless the contrary is established. The burden of proving that a sale of

tangible personal property is not a taxable sale at retail is on the person who makes the sale unless that person has taken a certificate from the purchaser which states that the property was purchased by them for resale. Sales and Use Tax Regulation 1668 furthers provides that the seller will be relieved of the responsibility for the tax if a certificate is timely taken from the purchaser. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or at any time within the seller's normal billing and payment cycle, or at any time prior to the delivery of or at the delivery of the property to the purchaser. Quite clearly, the certificate which the Department received in 1988 was not timely. The question is whether this certificate was a replacement for an original certificate that was taken timely.

Sales and Use Tax Regulation 1668 (c) provides that a resale certificate which is not timely taken is not retroactive and will not relieved of the tax if the seller can show that the property was in fact resold by the purchaser and not used by him. Petitioner has presented no evidence as to the ultimate resale of the property.

Likewise, if the seller can present evidence that the original resale certificate was issued timely and that the second resale certificate was merely to replace the original, relief could be granted from the liability. The cover letter which accompanied the resale certificate with an effective date of September 26, 1983, does not state that the certificate is a replacement certificate for one that was issued earlier. It does not even acknowledge that an earlier resale certificate had been issued. It merely states that "attached is the resale certificate related to the catalyst purchased from _____."

There is no evidence that _____ held a seller's permit in 1983 or that a certificate was issued previously for the sales in issue. _____ has no copy of the original certificate or record of the fact that one had been issued in 1983. Without this evidence, no relief can be recommended.

Audit Item E.

Between 1982 and 1983, petitioner began to phase out the part of its business that related to using refueler trucks to deliver fuel to the wingtip. Consequently, petitioner sold a number of refueler trucks during 1982, 1983, and the early part of 1984. Petitioner contends that under Revenue and Taxation Code Sections 6292 and 6293, the seller of either vehicles or off-the-road vehicles is neither required nor in fact authorized to collect the sales and use tax from the purchaser. Rather, it is the purchaser who is responsible to pay the use tax at the time of registration. Petitioner contends that the refuelers were 'vehicles subject to identification under Division 16.5 (commencing with Section 38000) of the Vehicle Code and thus were not subject to sales tax.

The issue of refueler trucks has been addressed in a Decision and Recommendation for a prior audit period. The recommendation, which was written by Appeals Attorney Bill Burkett, was heard by the Board. The Board concluded that the refueler trucks qualify as off-highway vehicles under the definitions set forth in California Vehicle Code Section 38006. They are not, however, off-highway vehicles "subject to identification" within the meaning of Vehicle Code

Section 38012 because they were specifically excluded by the provisions of Vehicle Code Section 38010 (b) (7). This provision provides an exclusion for commercial vehicles weighing more than 6,000 pounds unladen. The Board further concluded that the refuelers were still subject to registration under the broad provisions of Vehicle Code Section 4000. It was not until July 3, 1984 that Vehicle Code Section 4021 was passed which exempted from registration any vehicle used exclusively for refueling aircraft if the vehicle was only operated on a highway for a distance not exceeding one-quarter mile each way to and from a bulk storage facility.

In his recommendation on this matter for the prior period, Mr. Burkett concluded that:

1. The airport refueling vehicles were not off-highway vehicles subject to identification under the California Vehicle Code.

2. The vehicles were subject to registration under Section 4000, et seq. of the California Vehicle Code even though used off -highway. Thus they were subject to direct use tax payment by the purchasers.

3. After July 3, 1984, the vehicles were no longer subject to registration because of the exemption provided in Vehicle Code Section 4021. After this date, the sales of the refuelers are therefore subject t o sales tax which is the responsibility of petitioner.

It is recommended that Mr. Burkett's analysis be applied to the facts of this appeal. After July 3, 1984 the sales of refueler trucks are subject to sales tax which is the responsibility of petitioner.

Audit Item F.

Petitioner made sales of bunker fuel to the _____. _____ is comprised of about 400 companies which own between 800 and 900 fishing vessels. The fuel sold by petitioner was loaded onto _____ "mother ships" which transported the fuel and supplies to various fishing vessels which were fishing on the high seas. The "mother ships" circle from Japan to Hawaii to California where they will pick up fuel and supplies and then rendezvous with the various fishing vessels.

Petitioner has presented several contentions as to these sales. The first contention is that a portion of the sales are exempt sales to a common carrier. Petitioner contends that the "mother ships" are common carriers and that sales of fuel used by these vessels after the first out-of-state destination, are exempt under the provisions of Revenue and Taxation Code Section 6385. This statute is clarified in Sales and Use Tax Regulation 1621, which provided during the audit period in question, that a "common carrier" was defined as any person who engaged in the business of transporting persons or property for hire or compensation and who offered serviced indiscriminately to the public or to some portion of the public. With respect to water transportation the term included any vessel engaged, for compensation, in transporting persons or property in interstate of foreign commerce. This included those vessels commonly called "ocean tramps", "trampers", or "tramp vessels".

We cannot conclude that the exemption afforded to sales to common carriers will apply to the fuel sold to _____ which is used after the first out-of-state destination on the “mother ships”. Even if it could be shown that _____ “mother ships” had specific rendezvous points with specific fishing vessels and these locations were shown on the bills of lading and the supporting exemption certificates, this "destination" at sea would not constitute transportation in interstate or foreign commerce. Without activities in interstate or foreign commerce, _____ “mother ships” cannot be considered to be common carriers within Section 6385.

It is noted that petitioner did accept combined bills of lading and supporting exemption certificates. The documents contain a certification by _____ that it was a common carrier and that it was engaged in transporting cargo as a common carrier. It is further provided that "In the event the State requires sales tax to be paid on this transaction, purchaser agrees to reimburse seller for such charges, penalties and interest, if any." The facts indicate that petitioner knew that _____ was placing this fuel aboard a ship for use in powering the ship or for use in fueling federation vessels. As this was not use in common carriage, petitioner could not accept the exemption certificate from a purchaser it knew was not a common carrier. Petitioner did, in fact, place language in the certificate which would provide for reimbursement from if tax was found to be due. Given these facts, it cannot be concluded that the existence of the exemption certificates will relieve petitioner of the sales tax liability.

Petitioner's second contention is that a portion of the sales of bunker fuel were made to vessels engaged in commercial deep sea fishing operations. (See Revenue and Taxation Code Section 6368.2.) We cannot conclude that this exemption is applicable because a ship that carries bunker fuel to other fishing vessels is not engaged in a fishing operation. The income for _____ “mother ship” comes from fees charged to the fishing vessels and not from gross receipts from commercial fishing.

Petitioner’s third contention is that a portion of the sales to _____ were sales for resale. It is well established that the burden of proving that a sale of tangible personal property is not at retail is on the seller unless the seller timely takes a certificate from the purchaser that the property is purchased for resale. (See Revenue and Taxation Code Section 6091 and Sales and Use Tax Regulation 1668(a).) As petitioner did not receive resale certificates from_____ it is now responsible for proving that _____ did, in fact, resell the fuel. If the “mother ships” and the fishing vessels are all part of one entity called _____, then arguably _____ is buying fuel to supply its own ships. If the “mother ships” are part of _____ but the fishing vessels are owned by other entities, then it is possible that _____, through it’s “mother ships”, is reselling the fuel to the various owners of the fishing vessels, and then the sales to _____ could be sales for resale. Petitioner must submit the evidence to support its position.

There are numerous other transactions involving sales of bunker fuel which petitioner contends should not be subject to sales tax. The sale to _____ has now been conceded by petitioner as taxable. The sales to _____ and the sales to _____ have been conceded by the Department, as both purchasers have been shown to be common carriers, and these sales should be deleted from the measure of tax.

The following sales are also disputed by petitioner and will each be discussed separately.

1. The sale to _____ for $175,804 was disallowed as a sale to a common carrier as the combined bill of lading and the exemption certificate was not signed by the customer. Petitioner contends that although the exemption certificate was not signed, the cover letter which was issued on the same day was signed. (See Exhibit B attached.) The cover letter states:

> "Attached you will find the combined bill of lading and tax exemption certificate supporting the deliveries."

It is signed by _____ of _____.

Sales and Use Tax Regulation 1621, as it read during the audit period, provides in pertinent part:

> "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…"

In determining whether a bill of lading or exemption certificate has been "properly executed", the Board has historically held that a signature of the carrier or authorized agent is information that is critical to a properly executed document. The signature may be located anywhere on the documents and may be written, printed, initialed, stamped, or typewritten. In the documents for _____ there is a cover letter which was received at the same time as the combined bill of lading and exemption certificate. It is clear that the cover letter relates to the certificate in question as the vessel, voyage, and date are identical on both passed of the documents. Given the incorporation of the cover letter into the combined bill of lading and exemption certificate, it is concluded that the signature of the carrier was secured. The requirements of the exemption have been met. This item should be deleted from the measure of tax.

2. Two sales were made to _____ on July 13, 1985 for $13,318 and $151,750. The issue affecting these sales is whether the corrected bill of lading was received "timely". Sales and Use Tax Regulation 1621, as it read during the audit period, provides in pertinent part:

> "In regard to sales of fuel and fuel oil the bill of lading will be considered received at the 'time of the transaction' only if a copy of the original bill of lading is received by the vendor within 30 calendar day of delivery of the fuel or fuel oil to the carrier, and any corrected bill of lading is received by the vendor within 45 calendar days after the date of the delivery of the fuel or fuel oil, or, where the fuel is used in a vessel within 10 calendar days after the end of the voyage, whichever is later. The time will be extended for a reasonable period if the vendor establishes that the bill of lading was issued within the

> above time limits but that an unusual and unavoidable delay occurred before it was delivered to the vendor…
>
> * * * * *
>
> "When the bill of lading is mailed by the carrier to the vendor, the postmarked date will be deemed to be the date received by the vendor. If a postmark is not available, the date of receipts may be established by a bone fide date received stamp of the vendor or by other evidence satisfactory to the board."

A timely a properly executed bill of lading was received by petitioner on August 12, 1985. A corrected bill of lading was sent to petitioner dated August 3, 1985. This bill of lading, unlike the original bill of lading, was not stamped dated by petitioner as to the date it was received. The Department disallowed the corrected bill of lading because it could not be verified that it was timely. (See Exhibit C attached.) As petitioner had possession of both documents at the time of the audit, there is evidence that the original document was received timely, and there is no evidence that the corrected bill of lading was not received timely. We conclude that the greater weight of evidence warrants a finding that the corrected document was timely. These sales should be deleted from the measure of tax.

3. A sale was made to _____ for $158,333. The Department disallowed the transaction as the exemption certificate was not signed. Petitioner did provide the Department with a photocopy of the exemption certificate which was signed but this was received after the auditor had received the original document and found it to lack the necessary signature. We must conclude that even though petitioner was able to secure a signature on the document after the audit, a properly executed document was not received at the time of the transaction as required by Regulation 1621. No adjustment can be recommended.

4. Two sales were made to _____ for $18,572 and $137,285. The Department disallowed these sales as the combined bill of lading and exemption certificate did not list a shipper. It was assumed that _____ picked up the fuel. The Board has historically considered the shipper's name to be a critical piece of information of a bill of lading. The shipper must be the retailer of the fuel. Without petitioner named as the "shipper" the requirements for exemption have not been met. No adjustment can be recommended.

5. A sale was made to _____ for $126,383. This sale was disallowed by the Department because _____ was listed as the shipped. Sales and Use Tax Regulation 1621 requires that the seller must be the consignor and that the bill of lading must so indicate. (See, Satco Inc. v. State Board of Equalization (1983) 144 Cal. App. 3d 12.) As _____ is the entity listed, no adjustment to the tax can be recommended.

6. Several sales were made to _____ for $30,732 and $176,193. The Department disallowed the claimed exemption because the corrected bill of lading was not timely received. The sale took place on June 8, 1984. The original bill of lading was received on July 3, 1984 along with a note that after several requests the customer sill had not received the back up papers for the vessel. The corrected bill of lading was received by petitioner on August 7, 1984.

Sales and Use Tax Regulation 1621 sets out specific time limits for when the original bill of lading must be received. Quite clearly the original was received by petitioner within the 30 calendar days required. The corrected bill of lading was to be received by petitioner within 45 days after the date of the delivery or within 10 calendar days after the end of the voyage, whichever is later. This time may be extended for a reasonable period if the vendor establishes that the bill of lading was issued within the above time limits but that an unusual and unavoidable delay occurred before it was delivered to the vendor. When the bill of lading is mailed by the carrier to the vendor, the postmark date will be deemed to be the date received by the vendor. The corrected bill of lading was mailed on August 1, 1984. As the evidence submitted by petitioner indicates that the carrier was having trouble getting the information necessary to complete the bill of lading and it is not known how long it took the vessel to reach its Panama destination, it is concluded that the greater weight of evidence warrants a finding that the corrected bill was timely. These sales should be deleted from the measure of tax.

7. The Department disallowed an exemption to several sales to _____ and _____ on November 8, 1983. The invoice shows that tax was collected for the sales. A timely bill of lading and exemption certificate had been received. At the conference, petitioner's representative brought in a corrected invoice that deleted the state and local taxes and listed _____ as the purchaser. The invoice showed the same invoice number and fuel amounts, but listed a difference customer number. Although an explanation was requested on this transaction, petitioner was unable to explain how these two entities were related. Assuming that petitioner is correct as to which invoice is the "corrected" invoice, there is now an invoice and a bill of lading which show two different purchasers. Given this ambiguity, no adjustment can be recommended.

8. Several sales were made to _____ on May 31, 1984 for $11,986 and $72,299. The combined bill of lading and exemption certificate was stamped as having been received by petitioner on July 9, 1984. The Department disallowed the exemption because the document was not timely. It has been shown that the document was signed on June 27, 1984 and assumedly sent to petitioner. The date on the mailing is not available but it is reasonable to assume that it would take 10 to 12 days for mail from Copenhagen, Denmark to reach petitioner's headquarters. It is recommended that these sales be deleted from the measure of tax.

9. A sale to _____ or $249,435 was disallowed as exempt because the Department could not ascertain that _____ is a common carrier. As no evidence has been presented to establish a sale to a common carrier, no adjustment can be recommended.

10. The sale to _____ for $40,233 and the sales to _____ for $21,475 and $58,145 should be deleted from the measure of tax as the Department now agrees that the sales were sales for resale.

11. The sales to _____ and _____ were properly included in the measure of tax as the purchasers shown on the invoices do not match the purchasers shown on the bills of lading.

AUDIT ITEM I.

Petitioner charges tax on all its sales of jet fuel. Once the completed documentation is received, petitioner credits the customer's account for the portion claimed as exempt under Revenue and Taxation Code Section 6385.

Petitioner does not bill the customer for each individual load of jet fuel. Rather, billings are gross amounts for a day or for a numbers of days' deliveries. When the combined bill of lading and exemption certificate is received, petitioner reviews the document for timeliness and completeness and then issues the customer a Section 6385 credit.

Initially it is noted that since the audit was originally completed, sales to _____ at _____ for the period January 1, 1983 through December 31, 1985 have been eliminated from the audit in accordance with the September 5, 1989 memo from Principal Tax Auditor Glenn A. Bystrom.

When the Department audited petitioner's records the auditor found that, for two contracts, petitioner was passing title at the time the fuel was placed into the airplane's bulk storage tanks. The sales to _____ were disallowed by the Department as exempt sales because the contracts indicate that the jet fuel was sold in into storage. Petitioner concedes that these sales are taxable.

The second contract of sale was to _____ at _____ and covers the period from January 1, 1983 through January 31, 1984. Pursuant to Glenn Bystrom's memo regarding delivery into day storage prior to April 1, 1985, this audit item has been deleted from the audit.

For the period April 1, 1985 through December 31, 1985, the Department treated as taxable certain sales of fuel to _____ at San Francisco Airport that involved the use of _____ refueler trucks. When _____ would need fuel for its places, it would estimate the number of gallons needed for each place. This amount of fuel would be loaded into a refueler truck and the truck would drive to the wingtip of the aircraft and deliver the fuel. If the estimate was too high and there was fuel left over, that fuel would be left in the truck for future use. _____ had key-lock access to petitioner's fuel and was able to take fuel from the storage facility as needed. The Department treated all the fuel taken from petitioner's tanks as taxable because it was delivered into storage and was not for immediate use.

In January 1985, Glenn Bystrom, then Principal Tax Auditor, wrote to petitioner and discussed the issue of fuel delivered into refueler trucks. He discussed a 1974 letter from Bob Nunes and a 1983 letter from _____. The Nunes letter stated that tax applies to the sale of fuel which is delivered into a holding tank, whether fixed or portable, from which the customer withdraws fuel as required for fueling aircraft. The 1983 letter stated that the exemption allowed under Section 6385 can apply to sales of jet fuel delivered into an aircraft or into other facilities of an airline, such as refueler trucks, for immediate loading into an aircraft. The exemption will not apply if the fuel is delivered into an airline's storage tanks for future use. Mr. Bystrom informed petitioner that sales can only be allowed as exempt under Section 6385 if the retailer can establish that (1) all the fuel loaded into the refueler truck is consigned to a single aircraft at the time the fuel is placed into the refueler, (2) all the fuel is immediately loaded into one aircraft

for shipment out-of-state, and (3) title to the fuel passes to the airline when the fuel is placed into the refueler or into the aircraft. Fuel placed into a refueler truck owned or operated by an airline or its agent which will later be dispatched to fuel more than one aircraft is not being shipped by the retailer to an out-of-state destination. The transaction, therefore, could not be considered as exempt as the fuel was delivered into a storage facility of the airline and the fuel was delivered to the airline in its capacity as a purchaser rather than a carrier. Because there was a possibility of confusion as to the consistency of these two letters, petitioner was given until April 1, 1985 to implement the guidelines set out by Mr. Bystrom.

Revenue and Taxation Code Section 6385, in effect prior to September 27, 1985, provided in pertinent part:

> "(a) There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading whether the freight is paid in advance, or the shipment is made freight charges collect, to a point outside this State and the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier."

Effective September 27, 1985, this statute was amended to provide in pertinent part:

> "(c) There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of fuel and petroleum products to a water, air, or rail common carrier, for immediate shipment outside this state for consumption in the conduct of its business as a common carrier after the first out-of-state destination."
>
> * * *
>
> " (g) 'Immediate shipment,' as used in this section, means that the delivery of the fuel and petroleum products by the seller is directly into a ship, aircraft, or rail car for transportation outside this state and not for storage by the purchaser or any third party."

The critical requirement to qualify for the exemption is that the fuel must be sold for immediate shipment. As Mr. Bystrom indicated in his letter to petitioner, this further means that all the fuel loaded into the refueler must be placed into one aircraft for immediate shipment out-of-state. Title to the fuel must pass to the airline when the fuel is placed into the refueler or into the aircraft. Fuel sold for storage will not qualify for the exemption.

The facts of this appeal indicate that petitioner estimated the amounts of fuel needed to fuel an aircraft and that when the estimate was too high, the fuel was left in the refueler to be used to fuel a second or third aircraft. We must conclude that only when all the fuel placed into the refueler is used to fuel one aircraft can the exemption apply. Petitioner was specifically told that this was the Board's interpretation of the statutes and regulations. Petitioner should be given

30 days from the date on the cover letter of this Decision and Recommendation in which to identify any sales where all the fuel went to one plane. If these sales can be identified and documented, adjustments should be made to allow these sales as exempt sales in interstate commerce.

Petitioner sold jet fuel to _____, _____, _____, _____ and _____ at San Francisco Airport (SFO). As to _____ and _____ petitioner was using _____ facilities to services the airplanes. The audit staff found that bulk deliveries of jet fuel were made by petitioner into _____ storage tanks. All deliveries during the audit period for these customers were considered to be sales into storage. Petitioner contends that, in July 1983, it entered into an exchange agreement with _____ whereby _____ would supply fuel to petitioner's customer airlines at SFO. Petitioner did not have a hydrant in the portion of the airport terminal used by the above mentioned airlines and _____ did have the necessary facilities. In exchange, petitioner would perform the same services for _____ in Anacortes, Washington where _____ lacked the necessary facilities.

Petitioner contends that after July 1983, _____, _____ and _____ were receiving fuel at the wingtip. The Department's auditor found that in the middle of August 1983 petitioner was showing inventory in _____ tanks. By February 1984 the records had been changed to indicate delivery via wingtip exchange. All the necessary bills of lading and exemptions certificates were obtained. From January 1, 1984 through the entire audit period the exemptions have been allowed. The exemptions were not allowed for July through December 1983 because of the question of whether petitioner was storing fuel in _____ tanks. The Department has assumed that the method of delivery changed in 1984.

Petitioner contends that as of July 1983 all fuel was sold directly into planes for all the above mentioned airlines and that it took time for its accounting methods to reflect the change implemented in the exchange contract.

The Department acknowledges that after January 1, 1984 the sales of fuel qualify as exempt transactions. The only issue is when petitioner changed its practices. It is concluded that petitioner's procedures changed when the exchange agreement was signed in July 1983. It is reasonable to conclude that it would take petitioner time to correct its stock records to reflect that the fuel was sold at the wingtip. It is known that by January 1984 the records had been corrected. It is recommended that, for the period July 1983 through December 1983, the sales of fuel be considered exempt sales.

The final transactions are sales of fuel to _____ at Los Angeles Airport (LAX). Pursuant to a contract with _____ petitioner contracted to sell fuel to _____ at numerous airports. Deliveries of the fuel were to be made to each airport at the delivery points designated by _____. Title to and all risk of loss and damage to the fuel was to pass to _____ at these delivery points. At the Los Angeles Airport, the delivery point was designated at "Into-plane".

At LAX petitioner did not have any storage facilities near _____ gates, therefore, petitioner's contract with _____ required that it delivery the fuel into facilities operated by _____. _____ was to have a thruput agreement with either _____ or petitioner. It is not

known with which entity _____ had the thruput agreement, however, petitioner's contract with _____ provides that _____ was to provide the facilities into which the delivery was to be made and was to have the same ready to receive the delivery. It is therefore assumed that _____ and not petitioner had the thruput agreement with _____. This conclusion is further supported by the fact that if the delivering party _____ were to terminate for any reason, petitioner could suspend deliveries until such time that _____ made other arrangements. Unless otherwise agreed to by petitioner _____ was to make payment directly to the Delivering Party _____ for all arrangements.

Once petitioner has delivered the fuel to _____ the risk of loss, except for such loss resulting from _____ failure to use reasonable care in the receipt, storage or handling of the fuel, was to remain with petitioner.

The auditor found that petitioner would twice a month make deliveries to _____ of approximately 500,000 gallons of fuel. At the time of each delivery into the 500,000 gallon storage tanks contracted for with _____, _____ was required to pay petitioner for the fuel. When the fuel was subsequently delivered into the planes through a hydrant system, petitioner would again bill the airline and then offset this billing against payments already made for the bulk deliveries. It has been documented that it could take as long as two weeks for the fuel to be taken from the bulk storage tanks and pumped into an aircraft.

The Department found that _____ took delivery into storage and disallowed any deductions under Section 6385. The noted that day storage tanks hold only about 50,000 gallons of fuel and could not accept the large amount of fuel delivered by petitioner.

Petitioner contends that because it has the risk of loss during the time the fuel is stored in _____ facilities, the sales does not take place until the fuel is placed in the wingtip.

The term "sale" is defined in Revenue and Taxation Code Section 6006 as any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by an means whatsoever, of tangible personal property for a consideration. When petitioner transferred possession of the fuel to a storage facility acquired by a throughput agreement with _____ and _____ became obligated to pay for the fuel, a sale took place. The fact that petitioner may have retained a security interest in the fuel or retained the obligation to insure the fuel against certain losses, does not mean that a sale did not occur. At the time _____ took possession of the fuel, it did not know what plane was going to use the fuel. An exemption certificate could not have been issued. _____ therefore, took delivery as a purchaser for storage until the fuel would be used at a later date. No adjustment can be recommended.

AUDIT ITEM J.

Petitioner purchases crude oil from a number of sellers which it then refines in its California refineries. One of the refined products is bunker fuel which can either be sold to various purchasers or retained and used on ships chartered by petitioner. The Department determined that the bunker fuel used on the ships chartered by petitioner was sold to the shipping

company providing the charter service. The tax was measured by the fair market value of the bunker fuel.

Petitioner contends that the bunker fuel was not sold to the shipping companies but was used by _____ for its own purposes.

The Board has consistently held that the bunker fuel was provided to the shipping companies as part of an integrated agreement to provide transportation services to petitioner. What petitioner received in exchange for the bunker fuel was a reduced price for the shipping services. The Board concluded that petitioner did bargain for and receive consideration for the bunker fuel and that the transaction is an exchange sale under the provisions of Revenue and Taxation Code Section 6006(a). The measure of the sale is the fair market value of the bunker fuel, the amount the ship operators would have otherwise had to pay for the fuel. As the transactions were properly classified as sales, no adjustment can recommended.

AUDIT ITEMS Q AND V.

In petitioner's refining operations at _____ and _____, crude oil is refined in various distilling units. As part of the distillation process, various gases are generated. Butane and propane are two such gases. Petitioner contends that when it disposes of these products by using them as fuel in the refining process this is an exempt use. The basis of the exemption is that the products, primarily propane, are taken off the line in gaseous form and are within the utilities exemption in Revenue and Taxation Code Section 6353. Alternatively, petitioner relies on Revenue and Taxation Code Section 6358.1 which exempts from taxation waste byproducts and still gases.

Initially we note that the Board has already held that the propane and butane do not qualify for exemption under Revenue and Taxation Code Section 6358.1. In a decision interpreting Union Oil of California v. State Board of Equalization (1990) 224 Ca l. 3d 665, the Board concluded that butane and propane are not "still gas" within Section 6358.1(b), and are moderate-to-high value byproducts and thus are not "waste byproducts" within the meaning of the statute. No relief can be granted under this statute.

Revenue and Taxation Code Section 6353 provides, in pertinent part, that:

> "There are exempted from the taxes imposed by this part the gross receipts from the sales, furnishing, or service of and the storage, use, or other consumption in this state of gas, electricity, and water, including steam and geothermal steam, brines, and heat, when delivered to consumers through mains, lines, or pipes..."

The Department has taken the position that this statute cannot apply as petitioner is delivering the propane to itself. We agree. The statute requires that there is both a seller and a buyer and that delivery of the product sold must be by the seller to the buyer through a pipeline. Without delivery to a buyer/consumer, there can be no exemption. No adjustment can be recommended.

AUDIT ITEM S.

The Department's auditor in performing an audit of purchases of over $10,000 scheduled progress payments for the purchase of computer equipment from _____ which totaled $1,342,014. The amount included a contract price of $828,923 plus labor of $513,091. Petitioner contends that engineering charges of $36,416 related to the purchase of the computer are nontaxable as the engineering charges were contracted for separately.

A review of the billing summaries available indicate that the project for the _____ had started at least as early as February 1985. The copies of proposals for the engineering effort for the _____ were dated July 23, 1985. (There is no evidence furnished of any contracts.) Quite clearly the project was well under way by the time this proposal was submitted. Furthermore, the proposals relate to work to be done to replace and combine _____ and the _____ instruments. There is no evidence that the $36,416 for these engineering charges is any way related to the charges being claimed as nontaxable under the project to modernize _____. Without further evidence that these charges are part of the charges picked up in the audit, no adjustment can be recommended. (We note that _____ billed petitioner tax on the entire amount.)

AUDIT ITEM T.

Petitioner contends that purchases of seed coke are not subject to use tax because they qualify as exempt waste byproducts. In accordance with the case of Union Oil Company of California v. State Board of Equalization (1990) 224 Cal. App. 3d 665 the Department now concedes that these purchases are not subject to the use tax. This item is to be deleted from the measure of tax.

INTEREST CALCULATIONS

Petitioner contends that the Department has erroneously calculated interest on the tax payments. The Department has agreed to recompute the interest after the adjustments recommended in this Decision and Recommendation have been made. They have agreed to show in detail the interest rates for the different periods of time.

CONCLUSIONS AND RECOMMENDATIONS

It is recommended that the following adjustments be made.

1. As to Audit Item E, it is recommended that, after July 3, 1984, the sales of the refueler trucks are subject to sales tax which is the responsibility of petitioner.

2. As to Audit Item F, petitioner is given 30 days in which to submit evidence that the sales to _____ were sales for resale. If no evidence is received, redetermine without adjustment.

As to the other transactions involving sales of bunker fuel under this audit item, the sales to _____ and _____ are to be deleted from the measure of tax. The sale to _____ for $175,804 should also be deleted from the measure of tax. Likewise, the two sales made to _____ are to be deleted.

Several sales to _____ and to _____ are also to be deleted. Finally, the sale to _____ for $40,233 and the sales to _____ for $21,475 and $58,145 should be deleted from the measure of tax.

3. As to Audit Item I, it is recommended that for the period July 1983 through December 1983 all sales to _____, _____, _____, _____ and _____ at San Francisco Airport be deleted from the measure of tax. As to the sales of jet fuel to _____ at San Francisco Airport that involved the use of _____ refueler trucks for the period April 1, 1985 through December 31, 1985, it is recommended that petitioner be given 30 days from the date on the cover letter of this Decision and Recommendation in which to submit evidence that any sales meet the requirements for exemption set out in this recommendation.

4. Audit Item T is to be deleted from the measure of tax in accordance with the case of Union Oil Company of California v. State Board of Equalization (1990) 224 Cal. App. 3d 665.

5. The Department is to recalculate the interest on the tax payments in accordance with this Decision and Recommendation.

All remaining liabilities are to be redetermined without adjustment.

_____ December 14, 1993

Susan M. Wengel Date