M e m o r a n d u m

715.0120

To: San Jose – Auditing (PMS) Date: February 28, 1967

From: Tax Counsel (RHO)

This is in answer to your memo of November 22, 1966 requesting our advice on four problems relating to local tax exemptions claimed by the subject taxpayers and a possible refund of transportation tax.

Please refer to your memo of November 22 for the background information supplied therein. Your questions will be taken up in the order presented.

Problem (A). Facts: "T" purchased 36 flat bed trailers ex local tax claiming exemption as a public utility and common carrier under Ruling 2205. These trailers were never used in "T"'s operations. They were rented to "R", "D", and "S".

Question: You asked whether the local tax exemption should be allowed and whether the answer would be the same for trailers used exclusively by "D" or "P" exclusively in the highway common carrier operation.

Answer: Generally speaking, a taxpayer claiming an exemption has the burden of clearly showing he is entitled to the exemption. You state that the trailers in question are pooled by "D" and "S" and that you are unable to determine, for any particular trailer, as to which company used it, or the type of operation in which it was used. In view of the specific requirements set out in Ruling 2205 as to the use of exempt property, it would appear that the exemption should be denied in a case such as this on the general ground that the taxpayer has not clearly established that he is entitled to such an exemption.

We believe, moreover, that the exemption should be denied in this case on the specific ground that "T" did not use the equipment in its own operations, but rather rented the equipment to other corporations. While not spelled out in so many words, the proper interpretation of Ruling 2205 is that it is the purchasing utility or carrier which must make the required use of the exempt property. The fact that the equipment may have been used exclusively by another company in operations which fall with the scope of Ruling 2205 is immaterial. The controlling use is the use made of the equipment by "T". Since "T" rented the equipment, rather than using it in its operations as a public utility or common carrier, the requirements of Ruling 2205 have not been met and the exemption should be denied.

In this connection your attention is directed to anno. 1828.30, in which the public utility exemption was allowed where a wholly-owned subsidiary bought equipment which it leased to its parent in a combined rail and highway operation. In that case, it was felt that it would be extremely technical to distinguish between two closely affiliated companies engaged in a cooperative transportation operation to which both contribute. Nothing in the facts presented here suggest, however, that this reasoning should be applied to "T".

Problem (B). Facts: "D" has purchased parts, tires, tubes, and diesel fuel ex local tax claiming exemption under Ruling 2205. Some of the parts, tires, and tubes were used on trailers used by both "D" and its owner, "P". Some of this use occurred prior to and some after "P" is purported to have become a division of "D". The trailers are owned by "D" and were older than six months, prior to the audit period. Diesel fuel is used in trucks operated by "D".

Question: You asked whether the local tax exemption on parts, tires, tubes, and diesel fuel should be allowed and whether the answer is the same before and after "P" became a division of "D".

Answer: With respect to the parts, tires and tubes used on trailers used by both "D" and "P", it appears that the answer depends upon whether the property in question was used exclusively in public utility operations. (Exclusive use is satisfied if the property is used in a qualified operation for at least six months after use commences--annotation 1828.20.) Since "P" does not qualify as a public utility, it appears that the exclusive use requirement was not met and the exemption should not be allowed.

The use of property by "P" when it was a separate sole proprietorship creates another objection to the allowance of an exemption. As indicated in our answer to problem (A), Ruling 2205 contemplates that the exempt property will be used by the purchasing entity unless there are some special facts which would bring the case within the reasoning of annotation 1828.30.

With respect to the diesel fuel which was used in "D"'s trucks, the exemption should be allowed to the extent that the fuel was used in the company's public utility operations.

Problem (C). Facts: In August 1966, "R" purchased flat bed trailers. Apparently, local tax exemption was claimed under either "D" or "T".

Question: You asked whether the local tax exemption should be allowed.

Answer: Consistent with the foregoing analysis, the exemption should not be allowed on the purchases by "R" since it is neither a public utility nor a common carrier. The fact that the equipment may be rented to carriers is immaterial.

Problem (D). Facts: "D" hauls bombs for the United States Government. Rates are based on tenders submitted to the U.S. The operator generally submits two different tenders for the same shipping and destination points; one being for direct shipment and one with storage in transit.

The examples furnished indicate a rate of $145 per truckload for direct shipment and a rate of $240 per truckload for shipment with storage in transit for a period not to exceed 90 days. An additional charge of $25 per truckload is added for each 30 days or fraction thereof after 90 days. The rate includes unloading and reloading at the storage point by the carrier. The storage in transit is open storage, not in a warehouse.

Question: You asked whether the operator is entitled to a refund of transportation tax paid on the differential in rates, and whether the answer is the same prior to October 12, 1966, the date Ruling 1403 was amended.

Answer: As stated in Ruling 1403, second paragraph, receipts from storage in transit are not taxable. The fact that this was open storage, not in a warehouse, is immaterial. We do not believe that the full differential in rates is excludable from tax, however, since the tender specifically states that the rate includes unloading and reloading at the storage point. A reasonable amount allocable to one or both of these activities would be taxable under Ruling 1403 if one or both involved an operation outside city limits.

The 1966 amendment to Ruling 1403 merely reflects the interpretation of existing law stated in the case of Bekins Van Lines, Inc. v. State Board of Equalization (November 25, 1964) 62 Cal. 2d 84 [396 P.2d 713]. Hence, the answer given here is equally applicable to the period prior to the amendment of Ruling 1403.

RHO:em [lb]