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April 24, 2009

SENT VIA U.S. MAIL & FAX (214-465-2875)

Edward N. Peterson, Esq.
Associate General Counsel
General and Revenue Recovery Law Division
Attn: GC-G&R
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Re: ASSIGNMENT NO. 08-482: APPLICATION OF DIESEL FUEL TAX,
CHILDHOOD LEAD POISONING PREVENTION FEE, AND OIL SPILL
RESPONSE, PREVENTION, AND ADMINISTRATION FEES TO THE AAFES

Dear Mr. Peterson:

This letter is in response to your e-mail inquiry regarding application of certain taxes and fees administered by the California Board of Equalization (Board) to the Army and Air Force Exchange Service (AAFES). Specifically, you have asked if the exemption from the California diesel fuel tax that applies to sales by a supplier of diesel fuel to the AAFES is restricted to the AAFES's purchases of diesel fuel that it uses in its own vehicles or if the exemption applies more generally to all of its diesel fuel purchases, including purchases for resale. You have also asked if the AAFES is exempt from paying the Childhood Lead Poisoning Prevention fee or the Oil Spill Response, Prevention, and Administration fees on its purchases of diesel fuel. I will address each of these questions in turn, as follows.

Provided that the facts discussed below are accurate and verifiable by audit, the taxpayer may rely on this response for purposes of Revenue and Taxation Code sections 60210, 43159, and 46158, respectively. (See Cal. Code Regs., tit. 18, § (Regulation or Reg.) 4902, subd. (b) [describing the circumstances under which relief from liability is available for reasonable reliance on written advice given by the Board].)

Diesel Fuel Tax

The California diesel fuel tax¹ of \$0.18 is generally imposed on each gallon of diesel fuel when it is removed from a terminal or refinery rack in California, when it enters (i.e., is imported into) the state for sale, use, or storage, or when it is blended with tax-paid diesel fuel, whichever is applicable. (Rev. & Tax. Code, §§ 60050, 60051, 60052.)² The persons who supply the diesel fuel at the terminal or refinery rack, import the fuel, or blend the fuel (collectively, suppliers) must pay the diesel fuel tax to the Board and may pass along the expense of the tax to their customers as one component of the cost of the fuel. (See, e.g., §§ 60033, 60053, 60054, 60055, 60061.)

However, diesel fuel sold by suppliers to the United States government and its agencies and instrumentalities is exempt from the diesel fuel tax, and the supplier may either claim an exemption from the tax on such fuel or claim a credit for the tax paid on such fuel on the tax return it submits to the Board. (§ 60100, subd. (a)(8); Reg. 1434, subds. (a), (b) & (c)(1).) In addition, any person (e.g., a wholesaler or retailer) who sells tax-paid diesel fuel to the United States and its agencies and instrumentalities may claim a refund from the Board of the tax he or she paid on such fuel. (§ 60501, subd. (a)(4)(H); Reg. 1434, subd. (c)(2) & (3).) As noted above, you have asked if these provisions exempt diesel fuel sold to the United States, its agencies, and its instrumentalities from the diesel fuel tax for all purposes or only if the fuel is used in government vehicles, which would also include AAFES vehicles.

First, it is our understanding and assumption that the AAFES is a federal instrumentality; therefore, diesel fuel sold to the AAFES qualifies for exemption from and refund of the diesel fuel tax. Second, it would appear that there is nothing in these statutes or the regulation that indicates how a federal instrumentality must use the diesel fuel it purchases in California in order for the fuel to qualify for the exemption. There is no provision limiting the exemption, such as to use of the fuel in the instrumentality's own vehicles, or excluding fuel purchased for resale from the exemption.

On the other hand, the question remains as to whether the AAFES may be subject to the diesel fuel "backup tax" (§ 60058), based on the provisions of the Hayden-Cartwright Act (4 U.S.C.A. § 104) (Act). Under the Act, Congress waived federal immunity from state taxes related to the sale of gasoline and "other motor vehicle fuels," with respect to federal instrumentalities such as the AAFES. (4 U.S.C.A. § 104(a).)³ Under the California Diesel Fuel Tax Law, a "backup tax" of \$0.18 per gallon is imposed, for example:

- (a) On the delivery into the fuel tank of a diesel-powered highway vehicle of: . . .
- (3) Any liquid on which tax has not been imposed by [the diesel fuel, motor vehicle fuel, or use fuel tax laws]; [and] [¶] . . . [¶]

¹ Imposed under the Diesel Fuel Tax Law, Part 31 (commencing with section 60001) of Division 2 of the Revenue and Taxation Code.

² All future statutory references will be to the California Revenue and Taxation Code unless otherwise indicated.

³ The Act states, in relevant part, that: "All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, . . . with respect to such fuels when sold by or through post exchanges, . . . commissaries, filling stations, . . . and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States." (4 U.S.C.A. § 104(a) [emphasis added].)

(c) On the sale and delivery into the fuel tank of a diesel-powered highway vehicle of . . . any liquid on which the tax has not been imposed by [the diesel fuel, motor vehicle fuel, or use fuel tax laws]. (§ 60058.)

Liability for the backup tax is imposed, jointly and severally, on the “highway vehicle operator/fueler.” (§ 60057.) A “highway vehicle fueler” is “[a]ny person . . . who sells and delivers or causes to be delivered in the fuel tank of a diesel-powered highway vehicle [diesel fuel] or any liquid on which tax has not been imposed” (§ 60034, subd. (b) [emphasis added]), which would include the AAFES. Accordingly, if the AAFES sells and delivers into the fuel tanks of diesel-powered highway vehicles diesel fuel on which it has not paid the diesel fuel tax, then, as permitted by the Act, it would be anticipated that the AAFES, as supposed highway vehicle fueler, would be required to pay the diesel fuel backup tax to the Board. However, because the “United States” is not included in the definition of “person” under the Diesel Fuel Tax Law, the AAFES cannot be a “highway vehicle fueler.”⁴ (§ 60008.)

Thus, not only is diesel fuel sold to the AAFES exempt from the diesel fuel tax, but the backup tax on diesel fuel sold by the AAFES and delivered into the fuel tanks of diesel-powered high vehicles is not imposed on the AAFES.⁵ The AAFES may wish to request a refund of the tax from the diesel fuel suppliers and other persons that passed on the cost of the diesel fuel tax to the AAFES. These suppliers who sold tax-paid diesel fuel to the AAFES could claim a credit or a refund from the Board for the taxes they paid, provided they have refunded the tax to the AAFES. (See § 60507 [statute of limitation for filing refund claims].)

Childhood Lead Poisoning Prevention Fee

The Childhood Lead Poisoning Prevention (CLPP) fee⁶ is imposed “on manufacturers and other persons . . . formerly [and/or] presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed historically [and/or] currently contribute . . . to environmental lead contamination.” (Health & Saf. Code, § 105310, subd. (a).) The Department of Public Health (DPH) (previously, the Department of Health Services) determined that the “manufacturers and

⁴ In contrast, under the Motor Vehicle Fuel Tax Law (Part 2 (commencing with section 7301) of Division 2), “the United States” is included in the definition of “person” (§ 7329), and there is no exemption for sales of motor vehicle fuel (i.e., gasoline) to the United States or its agencies or instrumentalities, except for motor vehicle fuel sold to the United States armed forces for use in ships or aircraft, or for use outside the state. (§ 7401, subd. (a)(5).) In California, except for the “backup tax” (§§ 7364, 60058), both the motor vehicle fuel and diesel fuel taxes are imposed on the supplier, not on the retailer or user of the fuel. The California Legislature chose, however, to exempt sales of diesel fuel to the United States and its agencies and instrumentalities from the diesel fuel tax, while providing a more limited exemption from the motor vehicle fuel tax.

⁵ On the other hand, a “highway vehicle operator” would be liable for the backup tax under the Diesel Fuel Tax Law. A “highway vehicle operator” is a “person . . . that owns, operates, or otherwise controls a diesel-powered highway vehicle and delivers, or causes to be delivered, diesel fuel or any liquid [on which tax has not been imposed] into the fuel tank of a diesel-powered highway vehicle. (§ 60034, subd. (a) [emphasis added].) A “person” under the Diesel Fuel Tax Law includes individuals, partnerships, associations, corporations, the state and political subdivisions thereof, and numerous other types of entities (§ 60008), which would likely describe virtually all of the purchasers of diesel fuel at AAFES filling stations.

⁶ Imposed pursuant to the Childhood Lead Poisoning Prevention Act of 1991 (Chapter 5 (commencing with section 105275) of Part 5 of Division 103 of the California Health and Safety Code). (See Rev. & Tax. Code, §§ 43057, 43152.14, 43554.)

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other persons” upon whom the fee should be imposed are architectural coatings distributors (i.e., paint manufacturers and distributors), motor vehicle fuel distributors (i.e., gasoline manufacturers and distributors),⁷ and facilities that release lead into the ambient air in California, as defined in regulations promulgated by the DPH. (Cal. Code Regs., tit. 17, § 33001 et seq.)

The AAFES is not in one of the industries identified by DPH as currently or historically contributing to environmental lead contamination; in fact, retailers of products containing lead (e.g., gasoline) are expressly excluded from imposition of the fee. (Health & Saf. Code, § 15310, subd. (b).) Therefore, the CLPP fee is not imposed on the AAFES by law. However, a person who supplies or sells motor vehicle fuel (other than a retailer) may be subject to imposition of the CLPP fee as a “motor vehicle fuel distributor” and may pass along the expense of the fee to his or her customers as a component of the cost of the fuel.

I am assuming from your question that the invoices you receive from your diesel fuel suppliers/vendors include a charge for the CLPP fee. I also assume that a charge for the CLPP fee is also stated on the invoices for gasoline purchased by the AAFES. Even though a charge for the CLPP fee may be separately stated on invoices for diesel fuel and gasoline sold to the AAFES,⁸ the fee is not imposed on the AAFES but is, instead, merely a component of the cost of the fuel that the AAFES purchases from the supplier or vendor. Accordingly, there is no provision exempting the AAFES from payment of CLPP fee reimbursement to its suppliers/vendors because the fee is not imposed on the AAFES.

Oil Spill Response, Prevention, and Administration Fees⁹

The oil spill prevention and administration (oil spill) fee¹⁰ is imposed on persons who own crude oil or petroleum products at the time the crude oil or petroleum products are received at a marine terminal from within and/or outside the state and on operators of pipelines carrying crude oil across, under, or through marine waters of the state. (Gov. Code, § 8670.40, subd. (b).) The marine terminal operators, who are required to collect the fee from the owners of the crude oil and petroleum products, and the pipeline operators must remit the fees to the Board. The fee is imposed per each barrel of crude oil or petroleum products. (*Id.* at § 8670.40, subds. (a) & (b).)

Just as with the CLPP fee, the AAFES does not meet the definition of those persons on whom the oil spill fee is imposed, so the oil spill fee is not imposed on the AAFES by law.

⁷ It should be noted that the CLPP fee is imposed on gasoline manufacturers and distributors because, prior to the mid-1990s, gasoline contained lead; diesel fuel never contained lead.

⁸ It should also be noted that, since the CLPP fee is assessed based only on the manufacturer's or distributor's historic distributions of gasoline, a CLPP fee charge on a diesel fuel sales invoice would not be appropriate. If a manufacturer or distributor has chosen to separately state the cost of its assessed CLPP fees, it should be doing so only on its gasoline sales invoices.

⁹ Imposed pursuant to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (Chapter 7.4 (commencing with section 8670.1) of Division 1 of Title 2 of the California Government Code), and administered pursuant to the Oil Spill Response, Prevention, and Administration Fees Law (Part 24 (commencing with section 46001) of Division 2 of the California Revenue and Taxation Code).

¹⁰ There are two fees imposed under the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act. At present, only the oil spill prevention and administration fee is being collected. The fund supported by the oil spill response fee reached the maximum amount allowed by law in 1991 and is not presently being collected.

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Again, however, a person who does owe the oil spill fee may pass along the expense of the fee to his or her customers as a component of the cost of the fuel.

As with the CLPP fee, I am assuming from your question regarding the oil spill fee that the invoices you receive from your gasoline and/or diesel fuel suppliers/vendors include a charge for the oil spill fee. Again, although a charge for the oil spill fee may be separately stated on the invoices for fuel sold to the AAFES, the fee is not imposed on the AAFES but is, instead, merely a component of the cost of the fuel that the AAFES purchases from the supplier or vendor. Accordingly, there is no provision exempting the AAFES from payment of oil spill fee reimbursement to its suppliers/vendors because the fee is not imposed on the AAFES.

If you have any questions about the information provided here or would like further assistance regarding any of these matters, please contact me as provided above.

Sincerely,



Carolee D. Johnstone
Tax Counsel III (Specialist)

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