

M e m o r a n d u m

To : Edward W. King, Chief
Fuel Taxes Division (MIC:33)

Date: September 5, 2006

From : Carolee D. Johnstone
Tax Counsel

Telephone: (916) 323-7713
CalNet: 8- 473-7713

Subject: I [redacted] —Exempt Bus Operation Opinion Request

In a memorandum dated March 8, 2006, you asked that a prior letter regarding the above-referenced taxpayer and the application of the Diesel Fuel Tax Law be reissued to reaffirm the analysis therein and to, additionally, analyze the application of the Use Fuel Tax Law. The prior letter, dated September 6, 2002, specifically addressed the question of whether (Taxpayer), a department of the County (County), qualified as an exempt bus operation pursuant to Revenue and Taxation Code section 60039.¹

The legal opinion expressed in the September 6, 2002, letter is still applicable: Taxpayer does not qualify as an Exempt Bus Operation under section 60039 of the Diesel Fuel Tax Law. In addition, Taxpayer does not qualify for exemption under section 8655 of the Use Fuel Tax Law.

Taxpayer's operations were described as follows. Taxpayer was a department of County that operated a local public transit system pursuant to the authority of Government Code section 26002. It provided scheduled and demand-response bus service in County and provided the same service in a contiguous county and to a town, pursuant to joint powers agreements. It also provided bus service from the area immediately north of the contiguous county to the area immediately south of County to connect the residents of the two counties with regional transportation systems. There were no regional transportation systems in either county.

Diesel Fuel Tax Law

Taxpayer stated that: "It appears that section 60039 was intended to benefit all publicly operated local transit systems." After reviewing the legislative history of the law on which section 60039 was based, Board legal staff disagreed with Taxpayer's conclusion as to the intent of the exemption. The legislative history reveals that the intent of the Legislature in 1968, when it enacted the Mills-Hayes Act, was to create the exempt bus operation exemption in the Use Fuel Tax Law² in order to benefit property owners whose local property tax dollars had been tapped to subsidize metropolitan transit. Senator James R. Mills, the author of the legislation, wrote to

¹ All future statutory references will be to the Revenue and Taxation Code unless stated otherwise.

² Up until July 1, 1995, the excise tax on diesel fuel was imposed under the Use Fuel Tax Law.

Governor Ronald Reagan urging the Governor to support the bill, describing the purpose of the legislation, in relevant part, as follows:

“ . . . I shall be introducing a bill . . . which will exempt from . . . tax all diesel . . . used in busses by transit districts and corporations subject to the jurisdiction of the Public Utilities Commission and other common carriers of passengers operating within metropolitan areas.

“[T]he bill is in keeping with the goals you have stated That is to say, this bill will assist in the solution of the transit problems in the metropolitan areas of California and will provide a certain measure of property tax relief. (Emphasis added.)

Thus, as evidenced by the author’s letter, the Legislature intended to reduce the amount of fuel taxes paid by specified bus operators, thereby reducing the amount of local property taxes required to subsidize those bus operations. At the time of enactment of the exemption, the Legislature only focused on certain transit operations in metropolitan areas of the state. While the attitudes toward public transportation may have changed since 1968, and, while the tax on diesel fuel and the exemption for exempt bus operations have been moved from the Use Fuel Tax Law to the Diesel Fuel Tax Law, the language of the exemption has remained substantially the same. The question is whether section 60100, subdivision (a)(5)(B),³ and the definitions of exempt bus operation provided in section 60039, subdivision (a)(1) or (2), operate to allow an exemption for Taxpayer.

While Taxpayer has the authority to operate a local public transit system pursuant to Government Code section 26002, Taxpayer will qualify for an exemption from diesel fuel tax only if it meets one of the definitions of an exempt bus operation under section 60039, subdivision (a). The definition at section 60039, subdivision (a)(1), requires that Taxpayer:

- Be a transit district, transit authority, or city, and
- Own and operate a local transit system itself or through a wholly owned nonprofit corporation.

The definition at section 60039, subdivision (a)(2), requires that Taxpayer:

- Be a private entity providing transportation services for the transportation of people, and
- Be under contract or agreement with a public agency authorized to provide public transportation services.

³ Exemption from backup tax for exempt bus operations.

The burden that is imposed on the taxpayer to show that it qualifies for an exemption from tax is described in *Parfums-Corday, Inc. v. State Board of Equalization* (1986) 187 Cal. App. 3d 630, 637 as follows:

First, the burden is on the taxpayer to show that its activity clearly falls within the terms of the exemption. (*H.J. Heinz Co. v. State Board of Equalization* (1962) 209 Cal. App. 2d 1, 4 [citation omitted].) ¶ Second, “statutes granting exemption from taxation are strictly construed to the end that such concession will not be enlarged nor extended beyond the plain meaning of the language employed.” (*Honeywell Information Systems, Inc. v. County of Sonoma* (1974) 44 Cal. App. 3d 23, 27 [citation omitted].) ¶ Finally, where as here, the facts are uncontroverted, interpretation of the statute is purely a question of law. (*Good Shepherd Lutheran Home v. State Bd. of Equalization* (1983) 139 Cal. App. 3d 876, 885 [citation omitted].)

In the instant case, Taxpayer does not qualify as an exemption bus operation under section 60039, subdivision (a)(1), because it is a county, not a transit district, transit authority, or a city. Likewise, Taxpayer does not qualify as an exempt bus operation under section 60039, subdivision (a)(2), because it is a public entity providing transportation services, not a private entity providing such services. In other words, Taxpayer does not clearly fall within the terms of the exemption. Absent legislative action to amend the definition of exempt bus operation in 60039, subdivision (a)(1), to include a *county*, or in 60039, subdivision (a)(2), to include a *public entity* providing transportation services, the activities described by Taxpayer do not qualify as exempt bus operations.

Since Taxpayer does not qualify as an exempt bus operation, it also does not qualify for exemption from the backup tax under section 60100, subdivision (a)(5)(B).

Use Fuel Tax Law

Taxpayer will qualify for an exemption from use fuel tax only if it meets one of the definitions of an exempt bus operation under section 8655, subdivision (b).⁴ The definition at section 8655, subdivision (b)(1), requires that Taxpayer:

- Be a transit district, transit authority, or city, and
- Own and operate a local transit system itself or through a wholly owned nonprofit corporation.

The definition at section 8655, subdivision (b)(2), requires that Taxpayer:

⁴ Section 8655 of the Use Fuel Tax Law is known as the “Mills-Hayes Act” discussed above. (§ 8655, subd. (a).)

Edward W. King, Chief

September 5, 2006

Page 4 of 4

- Be a private entity providing transportation services for the transportation of people, and
- Be under contract or agreement with a public agency authorized to provide public transportation services.

Thus, the requirements for exemption from the use fuel tax, pursuant to subdivision (b)(1) and (2) of section 8655 are identical to the requirements for exemption, as an exempt bus operation, from the diesel fuel tax, pursuant to subdivision (a)(1) and (2) of section 60039. Therefore, the analysis provided above also applies to whether Taxpayer qualifies for exemption under section 8655 of the Use Fuel Tax Law. Accordingly, Taxpayer does not qualify and is not exempt from the use fuel tax under section 8655.

If you have any questions, please do not hesitate to call me at the above-referenced number.

cc: Lou Feletto (MIC:33)
Doug Shepherd (MIC:65)
Arlo Gilbert (MIC:33)
Todd Keefe (MIC:56)
Randy Ferris (MIC:82)