

Memorandum

To : Ed King, Chief
Fuel Taxes Division MIC: 33

Date: February 18, 1998

From : Monica Gonzalez Brisbane *MGB*
Tax Counsel

Subject:

QUESTION PRESENTED:

I am writing in response to your July 24, 1997 memorandum to Mary Armstrong, in which you state that your division is currently reviewing claims for refund filed by the above named taxpayer under the Diesel Fuel Tax Law. According to your memorandum, the taxpayer is claiming off highway usage of tax paid clear diesel fuel for the operation of diesel powered shuttle buses at airports such as Los Angeles International, San Francisco International and San Diego Airport. The basis of the taxpayer's claims is that the roads within the airport do not constitute "highways" as defined in Section 60016 of the Diesel Fuel Tax Law. You have asked us to review the law and the cases cited by the taxpayer and provide you with our opinion on whether airport roads constitute "highways" as defined in Section 60016 of the Diesel Fuel Tax Law.

BRIEF ANSWER:

Based on the discussion below, roads within an airport are not "publicly maintained," and therefore do not constitute a "highway" as defined in Section 60016 of the Diesel Fuel Tax Law. Therefore, the taxpayer is entitled to a refund of the tax paid on diesel fuel used in the operation of its diesel powered shuttle buses on airport roads open to the public for purposes of vehicular travel.

DISCUSSION:

Pursuant to Revenue and Taxation Code Section 60501, a person who paid tax for diesel fuel will be refunded that tax if the fuel is used for purposes other than operating motor vehicles on the public highway of the State. The term "highway" is defined at Section 60016 to include "any way or place, of whatever nature, that is publicly maintained and open to the use of the public for purposes of vehicular travel." The airport roads at issue in this matter are clearly open to the use of the public for vehicular travel. Thus, the only issue is whether the roads are "publicly maintained".

There is no case law interpreting the definition of "highway" as set forth in Section 60016 nor are the words "publicly maintained" defined. However, Section 60016 is identical to the definition of "highway" set forth in the Vehicle Code at Section 360, which was interpreted in Vazquez v. Pacific Greyhound Lines, (1960) 178 Cal.App.2d 628. The Vazquez court found that the words "publicly maintained" were intended to mean "maintained by a public agency", rather than "openly maintained."

The taxpayer cited two cases in support of its claim for refund: City of Oakland v. Burns (1956), 46 Cal.2d 401 and Checkmate Yellow Car (1979) 2 CPUC2d 263. In City of Oakland, defendant challenged an injunction which restrained the operation of its limousine and bus service from and on the Oakland Municipal Airport, specifically on Earhart Road, the principal roadway within the airport which is used generally by the public. The Court found that plaintiff, the City of Oakland, owned the airport and operated it through a board in its proprietary capacity. The plaintiff claimed that Earhart Road is entirely a private road within the airport and no part of it is public. The Court specifically agreed that "Plaintiff has all power over Earhart Road so far as the same is located in the airport property held by plaintiff in its proprietary capacity." Therefore, plaintiff could restrict defendant's access to the airport even though defendant was duly licensed by the city to operate a limousine for hire on public streets of the city.

A similar outcome resulted in Checkmate Yellow Cab. The applicant sought to have removed from its charter-party carrier permit a restriction against conducting any operations on the property of or into any airport unless such operation was authorized by the airport authority involved. The Public Utilities Commission (PUC) decided that the street known as World Way, lying wholly within the boundaries of LAX, is not a dedicated public street and is not maintained or operated from public tax funds. "World Way is under the control of and is maintained by the Department of Airports, a separate proprietary department of the City which is a self-sufficient entity operating under its own generated income under the authority granted it in Article XXIV of the Los Angeles City Charter." In making this ruling, the PUC specifically agreed with the City of Oakland case. Therefore, in conjunction with other findings not relevant to this discussion, the PUC found that the clause restricting the applicant's permit within the airport roads was allowable.

Although not identical to the issue at hand, the cases discussed above are instructive to the extent they establish that the roads within LAX and Oakland Municipal Airport are private roads, not maintained by tax dollars, although open to the use of the public.

In addition, I had several conversations with a City Attorney of San Francisco and County Counsel for Sacramento. The City Attorney for San Francisco confirmed that the roads within the San Francisco Airport, while for the most part open to the use of the public, are not

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considered public roads. They are private roads maintained by airport revenues (pursuant to the City Charter § 4.115, Airport Revenue Fund 16.104) and not taxes. Similarly, County Counsel for Sacramento confirmed that the roads within the Sacramento Airport are considered private roads, not "highways" as defined by the Vehicle Code, and that the roads are not maintained by the County, but instead by the Airport Enterprise Fund supported only by airport revenues.

Based on the foregoing, it is my opinion that roads within an airport are not maintained by a public agency and are therefore not "publicly maintained" for purposes of the definition of highway under Rev. & Tax. Code Section 60016. is entitled, therefore, to a refund of the tax paid for diesel fuel used for the operation of diesel powered shuttle buses on airport roads open to use by the public.

MGB:es

cc: Ms. Mary C. Armstrong
Ms. Janet Vining
Ms. Judy Nelson
Ms. Susan Bennett
Mr. Robert Frank (MIC:30)
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