M e m o r a n d u m

460.0026

To: Audit Review & Refund Unit (MH) May 14, 1987

From: David H. Levine
Tax Counsel

Subject: C--- & S--- N--- B--- (CSNB)
SS --- XX-XXXXXX

This is in response to your memorandum dated April 22, 1987 regarding the proper party to make a claim for refund of excess tax paid to the state by virtue of tax having been paid on rentals payable from both a prime lease and a sublease of the leased property.

CSNB has leased vehicles to L--- P--- USA, Inc. since January 30, 1986, collecting use tax on rentals payable and remitting that tax to California. I assume the vehicles are not mobile transportation equipment. L--- P--- has been subleasing the vehicles and has informed CSNB that it has also been collecting and remitting to California use tax on rentals payable. L--- P--- has issued to CSNB a resale certificate dated January 11, 1987, and CSNB is requesting a refund of use tax it collected so that it can refund those amounts to L--- P---.

Based on a memorandum with respect to a different taxpayer from Tax Counsel Les Sorensen dated November 18,k 1983, you conclude that L--- P---, and not CSNB, is the proper party to claim the refund. I agree that CSNB is not the proper party to file the claim based on my understanding of the facts. However, I note that Assistant Chief Counsel Gary Jugum explained in a memorandum dated July 13, 1984 that there are limited circumstances in which the prime lessor would be the proper claimant, as discussed below.

In a memorandum dated September 21, 1985, Principal Tax Auditor Glenn Bystrom discussed Mr. Sorensen's and Mr. Jugum's memorada:

> "The guidelines contained in Mr. Sorensen's memoradum are the general rules to be applied to lease and sub-lease situations. However, when a prime lessor/retailer and sub-lessor/lessor act simultaneously, inconsistently apply[ing] tax to their transactions, and their actions are unknown to each other, these guidelines may be modified and the prime lessor/retailer may be entitled to a refund of taxes paid. Under the situation discussed in Mr. Jugum's memorandum,

> the prime lessor paid to the state an amount equal to the use tax on rental receipts without billing or collecting reimbursement from the sub-lessor. The sub-lessor, not knowing the prime lessor was reporting these amounts, immediately leased the property to their lessees without any intervening use. Assuming that the liability was his, the sub-lessor collected and reported tax on their rental receipts. No resale certificate was issued. As Mr. Jugum states in his memorandum, the sub-lessor did not pay any sales tax reimbursement or tax on the purchase price and his lease receipts are 'sales' subject to tax. The prime lessor's transaction is a sale for resale. Therefore, the tax paid by the prime lessor is refundable and is correctly due on the sub-lessor's rental receipts.
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> "On occasion, a transaction is encountered in which it is administratively practical to deviate from established guide lines. This is one such case. Any different factual situation may not result in the same conclusion. All facts relative to all parties involved must be determined prior to any decision to depart from the guidelines contained in Mr. Sorensen's memorandum. These situations should be rare."

As made clear by Mr. Bystrom's explanation, a critical factor required to qualify for the exception to the general rules is that the prime lessor's and sublessor's inconsistent actions are unknown to each other. This requires that the prime lessor not bill or collect reimbursement from the sublessor and that the sublessor does not otherwise have notice that the prime lessor is paying the state an amount equal to use tax on rental receipts.

In this case, CSNB wants a refund so that it can forward the refund to L--- P---. This indicates that reimbursement was collected from L--- P--- which means that the sublease comes within the provisions of Regulation 1660(c)(5) and that the sublease is not a taxable sale or use. Since the sublease was not subject to tax, the amount paid to L--- P--- by the sublessee as "tax" was actually excess tax reimbursement collected by L--- P---. Thus, your conclusion that CSNB is not the proper party to make the claim for refund is correct because the amount remitted by CSNB was tax properly payable to the state. CSNB has no standing to file a claim for refund of an amount it neither paid nor collected. (See Rev. & Tax. Code § 6901.)

CSNB's claim should be denied. In the denial, you should advise CSNB that the amount it paid was tax properly due which cannot be refunded, and that L--- P--- is the proper party to claim the refund for excess tax reimbursement it collected and paid to the state.

DHL:ss

cc: Mr. D. J. Hennessy