STATE BOARD OF EQUALIZATION
(916) 445-5550

August 21, 1990

Mr. J--- P. L---
Vice President
E---
XXXXX --- ---
P.O. Box XXXX
--- ---, CA XXXXX-XXXX

Re: A--- P--- L---
S- -- XX-XXXXXX

Dear Mr. L---:

This is in response to your letter dated July 31, 1990. Your client, A--- P--- L--- (APL), is a common carrier who purchases bunker fuel. You state that APL made erroneous payments of tax (actually sales tax reimbursement) to its vendors. These payments were generally made because the tax reimbursement was billed by the vendors prior to their receipt of exemption certificates. APL is currently under audit, and your question is whether APL may obtain a credit during its audit for its overpayments of sales tax reimbursement or must obtain a refund from its vendors.

You believe that APL should be entitled to a credit based on the case of Delta Airlines, Inc. v. State Board of Equalization (1989) 214 Cal.App.3d 518. Delta had paid sales tax reimbursement to its fuel vendors. Under the specific circumstances of that case, the court held that Delta was entitled to pursue the matter before the Board on its own behalf. You believe that under the same rationale, APL should be allowed to receive a credit for sales tax reimbursement it overpaid on purchases of exempt bunker fuel. Based upon the facts you present, we disagree.

In Delta Airlines, the carrier had issued bills of lading and exemption certificates to its vendors which entitled Delta's vendors to partial exemptions from sales tax on sales of fuel to Delta pursuant to subdivision (c) of Revenue and Taxation Code section 6385. Under that provision, sales meeting the specific requirements of the exemption are exempt from sales tax with respect to fuel used after the first out-of-state destination. Sales tax remains applicable to fuel which is used to reach the first out-of-state destination. Delta had made estimates of its fuel usage to its first out-of-state destinations. The regulation applicable during the relevant period required Delta to submit corrected exemption certificates to its vendors showing the actual fuel used to the first out-of-state destinations. Delta did not do so.

Upon audit, a test was performed to determine the amount of fuel Delta actually used to reach its first out-of-state destination. With respect to flights in which Delta had underestimated the amount of such fuel usage, the Board assessed sales tax. With respect to flights for which Delta had overestimated the amount of such fuel usage, the Board refused to allow an offset against the amount of sales tax due for its underestimates. (This offset had been allowed before Regulation 1621 was revised to require the carriers to submit corrected certificates.)

When a purchaser provides an exemption certificate to a seller that the purchased property will be used by the purchaser in a manner entitling the seller to regard gross receipts from the sale as exempt from sales tax and the seller relies on the certificates in regarding the sale as exempt, if the purchaser thereafter uses the property in some other manner, that purchaser is liable for sales tax as if the purchaser were the retailer making a retail sale of the property at the time of such use. (Rev. & Tax. Code § 6421.) Delta had issued its vendors exemption certificates and the vendors relied on those certificates in not paying sales tax that would have otherwise been due. Delta thereafter used some of the property in a manner not entitling the seller to regard the sale of that property as exempt from sales tax. Therefore, under section 6421, with respect to those purchases Delta was regarded as a retailer and was liable for sales tax.

The court in Delta Airlines relied in part on section 6421 to reach its conclusion that Delta had standing to sue. (We note that the court upheld the Board's refusal to grant Delta the offset Delta requested.) We believe that the court's finding that Delta had standing to sue was a very limited finding. We believe the such finding applies only when the specific transaction at issue involves the same issuance to the vendor by the carrier of an exemption certificate upon which the vendor relies when reporting that sale as exempt (or partially exempt) from sales tax.

Although APL eventually issued exemption certificates to its vendor, the vendor did not receive them in time to avoid billing APL for sales tax reimbursement. APL paid that reimbursement to the vendor and the vendor apparently reported and paid sales tax on the sales to the Board. That is, the vendor did not rely on exemption certificates issued by APL in order to report the sales as exempt from sales tax. Therefore, APL is not a retailer with respect to the subject transactions, and APL has no sales tax liability (its liability for sales tax reimbursement was a contract liability to its vendor). Since APL is not a retailer with respect to these transactions and ha no sales tax liability, the reciprocity of standing before the Board granted in the Delta Airlines case is not necessary.

APL is not a retailer pursuant to section 6421 and has no standing to file a claim for refund of overpaid sales tax reimbursement on its own behalf before the Board. APL is also not entitled to a credit for such overpayments during the audit. Rather, with respect to the subject transactions, APL must be treated as is any other consumer who pays sales tax reimbursement to its vendor and thereafter discovers that the sale may have been exempt from sales tax. The retailer with respect to the subject transactions, and the person who paid the sales tax, is APL's vendor. The vendor is the person who has standing to file a claim for refund for any taxes it believe were overpaid. If the claim were granted, the vendor would be required to refund the sales tax reimbursement to APL that relates to the refund of sales tax to the vendor.

We note that you included an authorization letter from APL giving you authority to discuss this matter with us. Although the vendor is the person who must file the subject claim for refund, it may authorize APL to file the claim for refund on its behalf. However, we note that the refund must actually be claimed by the taxpayer, that is, APL's vendor.

If you have further questions, feel free to write again.

Sincerely,

David H. Levine
Senior Tax Counsel

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STATE BOARD OF EQUALIZATION
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September 11, 1990

Mr. J--- P. L---
Vice President
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XXXXX --- ---
P.O. Box XXXX
--- ---, CA XXXXX-XXXX

Re: A--- P--- L---
S- -- XX-XXXXXX

Dear Mr. L---:

This is in response to your letter dated August 23, 1990. In a letter dated August 21, 1990, I concluded that A--- P--- L--- (APL) did not have standing to file a claim for refund of sales taxes paid by its vendor. You now make additional arguments to support your view that APL does have standing. Each of these arguments is addressed below.

APL purchased fuel for use in its common carrier operations and was billed, and paid, sales tax reimbursement to its vendor. In your original letter, you explained that although APL did issue some exemption certificates pursuant to Regulation 1621, the vendor did not receive them in time to avoid billing APL for sales tax reimbursement. You now state that "exemption certificates had, in some instances, been provided prior to the vendor's billing, but were inexplicably ignored and tax was erroneously billed and paid." Based upon the information provided in your original letter, I had stated that "the vendor did not rely on exemption certificates issued by APL in order to report the sales as exempt from sales tax." Based in this lack of reliance, I concluded that APL is not regarded as a retailer with respect to the subject transactions and has no standing to file a claim for refund on its own behalf for taxes paid by its vendor.

The facts you now present do not affect my conclusion. For whatever reason, the vendor did not rely on exemption certificates in order to report the sales as exempt (or partially exempt) from sales tax. In fact, neither did APL since it paid sales tax reimbursement to the vendor with respect to these transactions. Since the vendor treated itself as a retailer making sales that were fully taxable, APL does not have standing to file a claim for refund on its own behalf by virtue of certificates not relied upon by the vendor. The court in Delta Air Lines explains when a carrier is treated as a retailer: "in the circumstances of underpayment of taxes pursuant to an exemption certificate, the Legislature has seen fit to treat plaintiffs such as Delta as retailers, rather than purchaser." (Delta Air Lines v. State Board of Equalization (1989) 214 Cal.App.3d, 518, 527

(emphasis in original).) Unlike the situation in Delta Air Lines, APL's vendor did not underpay taxes pursuant to exemption certificates, which is the reason that Delta Air Lines does not stand for the proposition that APL is to be treated as a retailer for these transactions.

You explain your belief that the issuance of exemption certificates is not relevant as follow:

> "Our assumption that the exemption certificates did not matter is based on our conclusion from…the Delta Air Lines decision that the tax paid on bunker fuel by a common carrier for use after its first out-of-state destination is a use tax; not a sales tax. As you know, a purchaser can always directly apply to the state for an overpayment of use tax.
>
> [Quotation from the Delta Air Lines case.]
>
> "This language acknowledges that a common carrier taking possession of fuel to be consumed after the first out-of-state destination is not taking possession as a purchaser, but as a common carrier for delivery outside the state. Therefore, since delivery by the 'purchaser' was taken out-of-state, the tax collected by the vendor is not a sales tax, but a use tax."

Your interpretation that the Delta Air Lines case stands for the proposition that the tax applicable to fuel used after the first out-of-state destination is a use tax is incorrect. A retailer owes sales tax on its retail sale of tangible personal property in this state unless that sale is specifically exempt by statute. (Rev. & Tax. Code § 6051.) When the sale of tangible personal property purchased from a retailer for use in California is not subject to sales tax, it is subject to use tax unless that use is specifically exempt by statute. (Rev. & Tax. Code §§ 6201, 6401.) When a retailer makes a retail sale of tangible personal property in California to a purchaser for use in this state, it is the sales tax, and not the use tax, that applies unless the sale is specifically exempt from sales tax but the use is not exempt from use tax. (Rev. & Tax. Code §§ 6210, 6401.)

When a retailer makes a retail sale of fuel in California to a purchaser such as APL who will use that fuel both inside and outside California, the applicable tax is a sales tax, and not a use tax. All gross receipts from that sale are included in the retailer's measure of sales tax unless the exemption provided for by subsection (c) of section 6385 applies. That exemption is specifically an exemption from sales tax; it is not an exemption from use tax. If a person purchase fuel for use in California, the section 6385 exemption does not apply to the fuel used by APL after its first out-of-state destination because it was presumably purchased for use outside California (after APL's first out-of-state destination).

When a purchaser meets the requirements of section 6385, that purchaser is regarded as wearing two hats with respect to its purchases of fuel, as a purchaser and, with respect to fuel for use after its first out-of-state destination, also as a transporting carrier. If your interpretation were correct, there would be no need for the exemption provided by section 6385 because sales tax would apply only to that fuel used by the carrier to reach its first out-of-state destination. Since the

applicable tax with respect to the remainder of the fuel would be use tax and since that fuel would not have been purchased for use in California, no tax would apply. The fact that section 6385 is necessary to create the exemption it provides disproves your analysis. It is only by virtue of strict compliance with section 6385 and Regulation 1621 that the carrier is regarded as wearing two hats for sales tax purposes.

You state: "you state in your letter that APL is not a retailer pursuant to section 6421 because (in summary) APL did not make a taxable use of the property subsequent to providing an exemption certificate to the seller." This is not what I stated. Again, my conclusion was based not on when APL made a taxable use of the property, but rather on whether the retailer relied upon an exemption certificate when reporting the sale as exempt (or partially exempt) from sales tax.

You also state your belief that section 6421 makes no provision for the timing of providing the certificate with respect to the taxable use and that both section 6385(c) and section 6421 only state that the seller must accept the certificate in good faith. You further state that Regulation 1621(d)(3) provides that an exemption certificate is not required at all if the seller presents satisfactory evidence that the sale met the requirements of section 6385(c). There are several problems with your analysis. First, the Regulation 1621 to which you refer became effective October 1, 1987. That is, for almost all of the period at issue the prior Regulation 1621 is the applicable regulation. Furthermore, subdivision (d)(3) of the current Regulation 1621 does not state that an exemption certificate is not required at all. Rather, that would be one of the items of evidence which would be required to be presented by the retailer, even though the retailer would likely obtain that certificate well after the time of the sale. Finally, and most importantly, this has nothing at all to do with whether the purchaser would have standing to file a claim for refund on its own behalf. The regulation clearly states that the seller will be relieved of liability for tax only under certain circumstances.

With respect to the transactions involved here, there is no basis whatsoever to treat APL as a retailer. APL did not issue exemption certificates to the vendor upon which the vendor relied in failing to report the sales as subject to sales tax. The vendor reported its own sales tax liability on these sales. APL paid sales tax reimbursement to the vendor, but this was not sales tax and provides APL no standing to file a claim for refund for sales tax it did not pay.

Your final argument is to cite subdivision (k) of section 6385 which provides that the failure of a carrier who claims an exemption pursuant to subdivisions (a), (b), or (c) of section 6385 to document its transportation of the property to the first out-of-state destination subjects the carrier to liability for payment of sales tax as if it were a retailer. You believe that this means that the failure of a carrier to provide an exemption certificate in itself causes the carrier to be regarded as a retailer. You are mistaken. This subdivision has no effect whatsoever if sales tax has been fully reported on the sale. Obviously, if the true retailer regards a sale as a taxable retail sale, there is no reason to

the state. Rather, subdivision (k) applies to transactions in which the retailer treated the sale as entitled to the exemption provided by subdivision (c) of section 6385 in reporting the sale as exempt or partially exempt from sales tax in reliance on documents provided by the purchaser. If the

purchaser thereafter fails to document that it transported the fuel out of state in a manner satisfying the requirements of the exemption, that purchaser will be treated as a retailer for purposes of its purchase. We note that if a purchaser chooses not to avail itself of the exemption and elects to treat the sale as fully taxable, it would be under no risk of being treated as a retailer under subdivision (k) (e.g., if the retailer tries to claim the exemption because the retailer neglected to contract for sales tax reimbursement from the purchasing carrier).

Our opinion remains that APL has no standing to file a claim for refund of sales taxes that were paid by another person.

Sincerely,

David H. Levine
Senior Tax Counsel

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