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CA Tire Fee – Short Term Rental of Motor Vehicles and Equipment

On and after October 1, 2009, a rental car company is not a "retail seller," for purposes of the California Tire Fee and Public Resources Code section 42885, subdivisions (b)(2) and (3), with respect to the rental of motor vehicles (as opposed to the sale of used motor vehicles when they are removed from the rental fleet), when the motor vehicle is rented or leased for a period of four months or less. A lease for a period of time exceeding four months constitutes a "sale." Therefore, the lessor of "new tires" mounted on a motor vehicle, construction equipment, or farm equipment (or motorized equipment that is determined to be a motor vehicle or construction or farm equipment) that is leased for more than four months is a "retail seller" who must register with the Board as a "retail seller" and collect the California Tire Fee from the lessee as part of the lease cost and remit it to the Board. 5/28/09.

On or after October 1, 2009, short-term rental car companies that rent motor vehicles for periods of four months or less, including motor vehicle dealers that rent vehicles to customers for periods of four months or less, are, for purposes of section 42885 of the California tire fee law, "purchasers" of the "new tires" that are mounted on, or included as a spare with, the motor vehicles they purchase. As "purchasers," short-term rental car companies are liable for the California Tire Fee on those tires, as set forth in PRC section 42885, subdivision (b)(1). If the short-term rental car company does not pay the tire fee to the seller from whom it purchases the vehicles and tires, then the short-term rental car company must, as a purchaser of "new tires," self-report and pay the applicable tire fee to the Board. 5/28/09.

On or after October 1, 2009, construction and farm equipment dealers (and dealers of motorized equipment that is determined to be a motor vehicle or construction or farm equipment) who rent or lease their equipment for periods of four months or less, are, for purposes of section 42885 of the California tire fee law, "purchasers" of the "new tires" that are mounted on the equipment they purchase or remove from inventory for rental (and any spares that come with the equipment). As "purchasers," such equipment dealers are liable for the tire fee on those tires, as set forth in PRC section 42885, subdivision (b)(1). If the equipment dealer does not pay the tire fee to the seller from whom it purchases the equipment, then the equipment dealer must, as a purchaser of "new tires," self-report and pay the applicable tire fee to the Board. 5/28/09.

A vendor of motor vehicles or equipment (e.g., a manufacturer or dealer) may not know, at the time it sells to a motor vehicle or equipment dealer or a short-term rental car company, where the motor vehicle or equipment will end up (e.g., in the dealer's inventory for retail sale, in a lease of more than four months, in the dealer's short-term rental fleet, in the short-term rental car company's short-term rental fleet, or assigned to a company employee). Therefore, if, on and after October 1, 2009, a vendor timely takes a valid sales tax resale certificate in good faith from the motor vehicle or equipment dealer or short-term rental car company, the vendor is relieved from liability for collecting and remitting the tire fee on those tires to the Board. A dealer or short-term rental car company that does not pay the tire fee to its vendor when purchasing equipment or a vehicle that it subsequently uses itself (e.g., for short-term rental) must self-report and pay the tire fee to the Board. 5/28/09.

Memorandum

To: Julia Findley, Acting Chief
Environmental Fees Division (MIC: 48) Date: May 28, 2009

From: Carolee Johnstone, Tax Counsel III (Specialist) Telephone (916) 323-7713
Tax and Fee Programs Division (MIC: 82)

Subject: **ASSIGNMENT NO. 08-209**
CALIFORNIA TIRE FEE – RENTAL OF MOTOR VEHICLES, FARM EQUIPMENT,
CONSTRUCTION EQUIPMENT, AND MOTORIZED EQUIPMENT

This memorandum is in response to a request from the Environmental Fees Division to Assistant Chief Counsel Randy Ferris for a legal opinion regarding appropriate application of the California Tire Fee to new tires mounted on motor vehicles, construction equipment, farm equipment, and certain motorized equipment that are rented or leased to others by the owners of the vehicles or equipment. The California Tire Fee (Fee) is imposed on persons who purchase a “new tire,” as defined below. (Pub. Resources Code, § 42885, subd. (b)(1).)¹ Under most circumstances, the retail seller of the tire collects the Fee from the retail purchaser and remits it to the Board of Equalization (Board). (§ 42885, subd. (b)(2) & (3).) A “new tire” is presently defined, for purposes of imposing the Fee, as, in part:

[A] pneumatic or solid tire intended for use with on-road or off-road motor vehicles, motorized equipment, construction equipment, or farm equipment that is sold separately from the motorized equipment, or a new tire sold with a new or used motor vehicle, as defined in Section 42803.5, including the spare tire, construction equipment, or farm equipment. (§ 42885, subd. (g).)

This definition has read essentially the same since it was adopted effective January 1, 2001.² Prior to that date, the Fee was imposed only on new tires that were sold separately from vehicles and equipment on which they were intended to be used. (§ 42885, subd. (c) [in effect 1/1/97 – 12/31/00].) Unfortunately, the expanded definition of “new tire” left several unanswered questions, including how the Fee should be applied to new tires sold with motor vehicles and equipment purchased for rental or lease to others on a short-term basis. Since the Legislature expanded the definition of “new tire,” the Board has issued inconsistent opinions regarding the application of the Fee when new tires are sold with motor vehicles to rental car businesses.

The first letter that addressed this matter was issued on January 30, 2001, by the Excise Taxes Division (2001 Letter, Attachment 1) and stated, as is relevant here, that:

¹ All futures statutory references shall be to the Public Resources Code unless stated otherwise.

² The phrase “as defined in Section 42803.5” was added effective September 17, 2002.

Julia Findley, Acting Chief

May 28, 2009

Page 2 of 9

If rental car companies (such as Hertz, Avis, Enterprise, etc.) purchase motor vehicles from vehicle dealers as wholesale fleet transactions, the fee is not due for the vehicle dealer. The fee is due from the rental car company on the first retail sale of the new vehicle. In this case, it would be the first lease/rental of the new vehicle. (2001 Letter, at p. 2.)

The second letter, issued June 16, 2003, by the Legal Department (2003 Letter, Attachment 2), concurs with the opinion expressed in the 2001 Letter. As stated above, the fee is collected by "retail sellers," a term that is not defined with respect to the Fee. The first two letters import concepts from the Sales and Use Tax Law in rendering an opinion as to which persons are the retail seller and retail purchaser.

In contrast, the third letter, issued April 18, 2007, by the Legal Department (2007 Letter, Attachment 3),³ opined that, when a short-term rental car company purchases, and registers with the DMV, new motor vehicles on which new tires are mounted, the short-term rental car company becomes the consumer and user of the motor vehicles and new tires "at the time of sale." As such, if the short-term rental car company did not pay the Fee when it purchased the vehicles, it must self-report and pay the fee to the Board. (2007 Letter, at p. 4, fn. 1.)

You have asked for a legal opinion specifically addressing the application of the Fee to new tires mounted on motor vehicles and equipment that are purchased and subsequently rented or leased to others by the purchasers of the vehicles and equipment to clarify this matter and ensure correct and consistent application of the Fee.

Prior to finalizing this opinion, representatives of the various industries that would be affected, including motor vehicle dealers, equipment dealers, and short-term rental car companies, were asked to review a draft version of the opinion and provide input. We also offered to meet with these representatives if any areas of dispute arose. One representative suggested that one conclusion be clarified with respect to his constituents, and we incorporated his suggestion. Other than this one suggestion, all feedback received was favorable and supportive. No one asked to meet with us to discuss any aspect of the opinion. Accordingly, we do not anticipate any opposition to putting the changes set forth in this opinion into practice.

SHORT ANSWER

As discussed in detail below, a person who purchases new tires mounted on or included as a spare with new or used motor vehicles, construction equipment, farm equipment, and motorized equipment that

³ The Legal Department issued a fourth letter on August 22, 2007, that clarified, superseded, and replaced the 2007 Letter regarding application of the Fee to the spare tire and tires mounted on a motor vehicle that is withdrawn from inventory and used by the automobile dealer as a demonstrator vehicle. The comments regarding application of the Fee to new tires mounted on motor vehicles purchased for use by short-term rental car companies were not included in this later letter.

Julia Findley, Acting Chief

May 28, 2009

Page 3 of 9

meets the definition of “new or used motor vehicle” (§ 42803.5) must pay the Fee. If the purchaser does not pay the Fee on the new tires to the seller, the purchaser must remit the Fee to the Board.

BACKGROUND

The Legislature enacted the California Tire Recycling Act (Chapter 17 (commencing with section 42860) of Part 3 of Division 30 of the Public Resources Code) (Act) as a result of its findings that California had an existing used tire inventory of at least 100 million tires that was increasing by over 20 million tires every year (§ 42861, subd. (b).) These tires were being stockpiled, disposed of in landfills, or illegally dumped in California, putting the health and safety of all Californians increasingly at risk. (*Ibid.*; § 42870, subd. (b).) The Legislature determined that the recycling of whole used tires would reduce the stockpiling and inadequate disposal of the tires and levied a fee to support such recycling programs. (§§ 42861, subd. (c), 42870.)

A fee was initially imposed on every person who left a tire for disposal with a new or used tire dealer. (§ 42885, subd. (a) [effective 7/1/90 – 12/31/96].) However, imposing a fee on the very activity meant to be encouraged was apparently counterproductive, so effective January 1, 1997, the Legislature amended the imposition of the Fee to require that “[e]very person who purchases a new tire . . . from a retail seller of new tires shall pay a fee . . .” (§ 42885, subd. (a) [effective 1/1/97 – 12/31/00]. Later, at the same time the Legislature expanded the definition of “new tire” to include new tires sold with motor vehicles and equipment (discussed above), the phrase “from a retail seller of new tires” was deleted from the description of a person on whom the Fee was imposed. (§ 42885, subd. (b)(1) [effective 1/1/01 to present].)

As discussed below, the legislative history indicates that the legislature intended the Fee to be collected from all “person[s] who purchase[] a new tire” for its intended use. (§ 42885, subd. (b)(1) [emphasis added].) Accordingly, rather than focus on the administrative process prescribed in subdivision (b)(2) and (3) for collecting the Fee, as did the early opinions on this subject, we should focus instead on the imposition of the fee prescribed in subdivision (b)(1).

EFFECT OF THE SALES AND USE TAX LAW

Section 42885 is both ambiguous with respect to the language it does contain and incomplete with respect to language it should, but does not, contain. For example, no definitions of such terms as “retail seller,” “retail purchaser,” “purchase,” “sale,” and “motorized equipment,” are included in the statute or anywhere else in the Act. As a result, in addition to focusing on collection of the Fee by the “retail seller,” pursuant to section 42885, subdivision (b)(3), the early opinions also relied on provisions of the Sales and Use Tax (SUT) Law (Part 1 (commencing with section 6101) of Division 2 of the Revenue and Taxation Code (RTC)) to fill in the gaps in section 42885.

However, there is nothing in section 42885 or anywhere else in the Act that indicates that the Fee must be administered according to provisions of the SUT Law. The Act is contained in the Public Resources

Code, and the only reference in section 42885 to another code is to the Vehicle Code, not to the Revenue and Taxation Code. Therefore, in order to apply the Fee in a manner consistent with the intent of the Legislature, we may look to provisions of the SUT Law for guidance and for application by analogy where appropriate, but we are not required to follow the SUT Law, and we are not precluded from looking for guidance to provisions in other codes, such as the Vehicle Code and the Civil Code, that deal with sales to consumers, leases, rentals, and motor vehicles.

DISCUSSION

Given the facts presented in the early opinions, for SUT purposes, the motor vehicle lessors were deemed to be retail sellers of the vehicles and each lessee was deemed to be a retail purchaser.⁴ (See RTC, §§ 6006, subd. (b), 6006.1, 6006.3, 6010.1; Cal. Code Regs., tit. 18, § (Reg.) 1660.) This result follows from the concept of generally regarding leases as sales for SUT purposes. (*Ibid.*) Regarding a lease as a sale, regardless of the duration of the lease, makes sense for purposes of administering the SUT Law, but regarding all leases as sales for purposes of administering the Fee leads to unintended and less than optimal consequences.

Based on concepts imported from the SUT Law, it was concluded in the 2001 Letter and confirmed in the 2003 Letter that short-term rental car companies were “retail sellers” for purposes of the Fee who must collect the Fee from the first person who rented the vehicle. This conclusion is at odds with the fact that the first lessee does not actually “purchase” the vehicle and its new tires, as contemplated by section 42885, subdivision (b)(1). For example, in further keeping with Legislative intent, the first lessee does not have the authority to dispose of the tires on the vehicle; that authority is retained by the lessor, or owner, of the vehicle, the rental car company.

At the same time, representatives of the short-term rental car industry have consistently asserted that rental car companies are not permitted to charge any fee that is in addition to the advertised, quoted, and charged rental rate pursuant to section 1936 of the Civil Code:

A rental company shall only advertise, quote, and charge a rental rate that includes the entire amount except taxes, a customer facility charge, if any, and a mileage charge, if any, which a renter must pay to hire or lease the vehicle for the period of time to which the rental rate applies. A rental company may not charge in addition to the rental rate, taxes, a customer facility charge, if any, and a mileage charge, if any, any fee which must be paid by the renter as a condition of hiring or leasing the vehicle (Civ. Code, § 1936, subd. (n)(1) [emphasis added].)

⁴ Under the SUT Law, a lessor who leases property in the same form as acquired may elect to pay tax on the purchase price when the property is acquired or report tax measured by the rentals payable (RTC, § 6006, subd. (g)(5); Cal. Code Regs., tit. 18, § (c)(3).)

The conclusion in the early opinions, that the short-term rental car companies should, as “retail sellers,” charge the Fee for all five new tires on a motor vehicle to the first person who rents the vehicle, in addition to the advertised rental rate and other permitted charges, is clearly contrary to this law. We concur with the short-term rental car industry that imposing the Fee on the first rental car customer creates an inequitable and improper result. We conclude, therefore, that the early focus on subdivision (b)(3), “retail seller,” and reliance on the SUT definitions of “sale” and “lease” resulted in a conclusion that was not only contrary to Civil Code section 1936 but also did not further the Legislature’s intent with respect to the Fee.

On the other hand, provisions in other codes do distinguish short-term rentals from leases based on the period of time involved. Most relevant here are the definitions of “lessor” and “renter” in the Vehicle Code:

A “lessor” is a person who, for a term exceeding four months, leases or offers for lease . . . a motor vehicle; and who receives . . . a commission, money, brokerage fees, profit or any other thing of value from the lessee of said vehicle. “Lessor” includes “bailor” and “lease” includes “bailment.” (Veh. Code, § 372 [emphasis added].) ⁵

A “renter” is a person who is engaged in the business of renting, leasing or bailing vehicles for a term not exceeding four months and for a fixed rate or price. (Veh. Code § 508 [emphasis added].)

The Civil Code also provides guidance that is relevant here. With respect to consumer warranties, “retail seller” is defined to mean “any individual, partnership, corporation, association, or other legal relationships that engages in the business of selling or leasing consumer goods to retail buyers.” (Civ. Code, § 1791, subd. (1) [emphasis added].) “Lease” is defined to mean “any contract for the lease or bailment for the use of consumer goods by an individual, for a term exceeding four months.” (Civ. Code, § 1791, subd. (g) [emphasis added].) With respect to the Vehicle Leasing Act, a “lease contract” is any contract for or in contemplation of the lease or bailment for the use of a motor vehicle . . . by a natural person for a term exceeding four months.” (Civ. Code, § 2985.7, subd. (d) [emphasis added].) ⁶

⁵ The Vehicle Code also considers the lessee of a motor carrier to be the “owner” of the vehicle if the registered owner leases the vehicle to the lessee for a term of more than four months, for purposes of complying with safety regulations. (veh. Code, § 34501.12, subd. (a)(1).)

⁶ With respect to customer warranties and “grey market goods,” “the term ‘sale’ includes a lease of more than four months.” (Civ. Code § 1797.8, sub. (b).) (“Grey market goods” are trademarked consumer goods that are imported into the United States through channels other than the manufacturer’s authorized United States distributor.) (*Id.* at § 1797.8, subd. (a).)

CONCLUSIONS

Although these definitions are not generally applicable to all of the situations at issue here and there is evidence of some gaps in these provisions,⁷ they are consistent in defining a “sale” to include a “lease” and a “lease” to be for a period of more than four months. Therefore, it seems reasonable, in the absence of any guidance from section 42885 or the Act, to resolve this matter as follows.

1. We concur with the short term rental car industry’s assertion that a rental car company is not, with respect to the rental of motor vehicles,⁸ a “retail seller” for purposes of the Fee and section 42885, subdivisions (b)(2) and (3), when the motor vehicle is rented or lease for a period of four months or less.
2. We conclude that short-term rental car companies⁹ are “purchasers” of the “new tires” that are mounted on, or included as a spare with, the motor vehicles they purchase and, as “purchasers,” they are liable for the Fee on those tires, as set forth in section 42885, subdivision (b)(1).¹⁰ If the rental car company does not pay the tire fee to the seller from whom it purchases the vehicles and tires, then the rental car company must, as a purchaser of “new tires,” self-report and pay the applicable Fee to the Board.
3. We further conclude that payment of the Fee by the rental car company does not run afoul of Civil Code section 1936, subdivision (n)(1), because the rental car company will recoup the cost of the Fee by amortizing it over the rental life of the vehicle and including it in its advertised rental rate, just as it does all other cost associated with purchasing the vehicle and other overhead expenses.

⁷ For example, the definition of a “renter” with respect to rental car companies is “any person in any manner obligated under a contract for the lease or hire of a passenger vehicle from a rental company for a period of less than 30 days.” (Civ. Code, § 1936, subd. (a)(2) [emphasis added].) In other words, the Civil Code is ambiguous as to how to characterize contracts for a period between 30 days and four months.

⁸ As opposed to its sale of the motor vehicles as used vehicles when they are removed from the rental fleet.

⁹ The term “rental car company” includes motor vehicle dealers who rent out vehicles to customers for periods of four months or less.

¹⁰ This conclusion is also consistent with the definition of “used vehicle” in the Vehicle Code, which is “a vehicle that has been sold, or has been registered with the [DMV], or has been sold and operated on the highways, or has been registered with the appropriate agency of authority, of any other state . . .” (Veh. Code, § 665 [emphasis added].) It is clear that, once a vehicle is sold to a rental car company, registered with the DMV in the name of the rental car company, and operated on the highways by customers of the rental car company, the vehicle becomes a “used vehicle” that is owned by the rental car company and its tires are no longer “new tires.” Hence, rental car companies are liable not only for the Fee on the new tires that are mounted on the vehicles they purchase, but they are also liable for the Fee on the spare tires that come with these vehicles when the vehicles are registered with DMV and become part of their rental fleets. The rental car company is the purchaser of the vehicle and is required to pay the Fee on all of the tires that come with the vehicle, just as is any other person or business that purchases a vehicle exclusively for its own personal or business use. All such purchasers are liable for the Fee on all of the tires that come with the vehicle, including the spare. In short, the rental car company is the purchaser of the vehicle and all of its tires.

4. Although some of the statutes cited above do not necessarily pertain to construction equipment, farm equipment, and motorized equipment that comes within the definition of “new or used motor vehicle,” the legal analysis should be the same. Accordingly, for the sake of consistency and to accomplish the objectives of Legislature in enacting the Fee, we conclude that construction, farm, and certain motorized equipment dealers who rent or lease their equipment for periods of four months or less are “purchasers” of the “new tires” that are mounted on the equipment they purchase (and any spares) and, as “purchasers,” they are liable for the Fee on those tires, as set forth in section 42885, subdivision (b)(1). If the equipment dealer does not pay the tire fee to the seller from whom it purchases the equipment, then the equipment dealer must, as a purchaser of “new tires,” self-report and pay the applicable Fee to the Board.¹¹

5. Since a lease for a period of time exceeding four months constitutes a “sale” under all of the statutes cited above, the lessor of “new tires” mounted on a motor vehicle, construction equipment, farm equipment, and motorized equipment that meets the definition of New or used” motor vehicle” that is leased for more than four months must register with the Board as a “retail seller” and collect the Fee from the lessee as part of the lease cost and remit it to the Board. This conclusion does not represent a change in the Board’s position, which has been the same regarding “leases” since 2001. (See Excise Taxes Division’s letter of January 3, 2001, Attachment 4, addressing the Fee with respect to leased vehicles.)

6. On the other hand, the determination that short-term rental car companies and dealers of construction, farm and specified motorized equipment who rent or lease vehicles and equipment for periods of four months or less are “purchasers” pursuant to section 42885, subdivision (b)(1), and therefore liable as purchasers for the Fee on “new tires” mounted on these vehicles and equipment (and related spares), is a change from earlier Board opinions. Accordingly, the Board will implement and enforce this determination only on a prospective basis, beginning October 1, 2009, to allow for adequate notification and to permit the Environmental Fees Division staff and the rental car companies and motor vehicle and equipment dealers that rent or lease vehicles and equipment for four months or less to make appropriate adjustments in the way they account for the Fee and report and remit the Fee to the Board. However, for purposes of auditing the Fee for periods prior to the fourth quarter of 2009 (4Q09), if a motor vehicle or equipment dealer has been adhering to the direction provided by the 2001 letter with respect to its short-term rentals and leases, the Environmental Fees Division will continue to follow the approach set forth in the 2001 Letter for those prior periods.

7. Finally, motor vehicles and equipment purchased by motor vehicle and equipment dealers for resale may be destined for any of a dealer’s several business operations, including retail sales as part of the dealer’s sales inventory; lease for more than four months; rental or lease for four months or less; or use by dealer as, e.g., a demonstrator vehicle (See Reg. 1669.5.) Since a dealer’s vendor (e.g., a

¹¹ Of course, any equipment dealer that also sells equipment to retail customers must also register with the Board as a “retail seller” and collect and remit the Fee to the Board on the new tires mounted on the equipment the dealer sells

Julia Findley, Acting Chief

May 28, 2009

Page 8 of 9

manufacturer) generally does not know, at the time the dealer purchases the motor vehicle or equipment, where a particular vehicle or piece of equipment may end up, if the vendor timely takes a valid resale certificate in good faith from the dealer, the vendor from whom the dealer purchases the vehicle or equipment (inclusive of its "new tires") is relieved from liability for collecting and remitting the Fee on those tires to the Board. A dealer that issues a resale certificate when purchasing equipment or a vehicle that subsequently uses itself, e.g., in short-term rentals, must pay the Fee to the Board.

Similarly, when a short-term rental company purchases motor vehicles from a dealer, the vehicles may become part of the rental company's rental fleet, they may be used in the business or by employees of the rental companies, or they may be leased on a long term lease where the Fee is collected from the lessee. Since the dealer likely will not know, at the time the short-term rental company purchases the motor vehicle, how a particular vehicle will be used, if the dealer timely takes a valid resale certificate in good faith from the rental company, the dealer from whom the rental company purchases the vehicle (inclusive of "new tires") is relieved from liability for collecting and remitting the Fee on those tires to the Board. Just as with the vehicles purchased for its short-term rental fleet, a short-term rental company that issues a resale certificate when purchasing vehicles that it subsequently uses itself must pay the Fee to the Board.

In sum, it was the Legislature's intent that the Fee must be paid by every person who purchases a new tire and uses the tire as it is intended to be used. Accordingly, a person who purchases "new tires" along with a motor vehicle or piece of equipment that is subsequently rented or leased to another for a period of four months or less, has put those tires to their intended use and must report and pay the Fee on those tires to the Board, if the Fee was not paid previously.

Please let me know if you have any questions or need any additional information.

CDJ:ef

Attachment 1: Letter from Dennis P. Maciel, Chief, Excise Taxes Division, to Feepayer Association, January 30, 2001 (redacted).

Attachment 2: Letter from Monica Gonzalez Brisbane, Senior Tax Counsel, to Feepayers' Representative, June 16, 2003 (redacted).

Attachment 3: Letter from Carolee D. Johnstone, Tax Counsel, to Feepayer, April 18, 2007 (redacted)

Attachment 4: Letter from Dennis P. Maciel, Chief, Excise Taxes Division, to Feepayer Association, January 3, 2001 (redacted).

Julia Findley, Acting Chief

May 28, 2009

Page 9 of 9

cc: (without attachments)

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January 30, 2001

(Redacted)
(Redacted)
(Redacted)

JAMES E. SPEED
Executive Director

Re: Follow-up Letters – California Tire Recycling Fee

Dear (Redacted):

I am in receipt of your additional letters of January 4, 10 and 15, 2001 requesting written clarification and enforcement opinions concerning whether franchised new motor vehicle dealer members will be required to collect and remit the California Tire Recycling Fee (fee) relative to various types of transactions. The following are our responses to the various transactions you set forth in your letters:

- The sale of demonstrator vehicles** As described in your January 4th letter, motor vehicle manufacturers, distributors, and franchised new motor vehicle dealers often place new and previously unregistered vehicles in demonstrator service and the vehicles are then driven for several thousand miles prior to being sold as used vehicles. You assume that the fee is due on the first retail sale of the vehicle for all new tires.

Response: Section 42885(b)(1)(A) of the Public Resources Code states that “[o]n or before December 31, 2006, every person who purchases a new tire, as defined in subdivision (g), shall pay a California tire fee of one dollar (\$1.00) per tire.” Further, Section 42885 (b)(3) states that “[t]he retail seller shall collect the California tire fee from the retail purchaser.” In the fact pattern you set forth involving demonstrator vehicles, the vehicle is first sold at retail as a used car after its demonstrator service. Your letter is correct in that the fee is due on the first retail sale of this vehicle for all new tires. Therefore, assuming no new tires have been placed on the vehicle, four tires are used and not subject to the fee. However, since the spare tire is presumably new, and the fee has not previously been paid on it, the fee is due on the new spare tire.

- The sale of new motor vehicles to rental car companies** Your January 4th letter states, “Rental car companies (such as Hertz, Avis, Enterprise, etc.) annually purchase thousands of new motor vehicles from our dealer members as wholesale fleet sales and the rental car companies (most

of which are licensed by DMV as motor vehicle dealers) typically present resale certificates to our dealer members as part of the transaction. If the BOE does not require collection of the tire fee in such a wholesale transaction, will it require rental car companies to collect the tire fee from daily rental car customers (some of our dealer members operate small rental car companies for the purpose of providing their service customers with transportation)?”

Response: The Public Resources Code states in section 42885(b)(3) “The retail seller shall collect the California tire fee from the retail purchaser at the time of sale. . . .” If rental car companies (such as Hertz, Avis, Enterprise, etc.) purchase motor vehicles from vehicle dealers as wholesale fleet transactions, the fee is not due from the vehicle dealer. The fee is due from the rental car company on the first retail sale of the new vehicle. In this case, it would be the first lease/rental of the new vehicle.

3. **The sale of new motor vehicles at wholesale** Your January 4th letter sets forth the following fact pattern:

“In addition to rental car company transactions, there are numerous other types of transactions in which our franchised new motor vehicle dealers sell new motor vehicles at wholesale. Such transactions include “dealer trades” (a franchised Toyota dealer wholesales a new Toyota to another franchised Toyota dealer) and the sale of new motor vehicles to a leasing company or a converter”.

Response: Section 42885(b)(3) of the Public Resources Code states that the *retail* seller shall collect the fee from the *retail* purchaser at the time of the sale. There is no requirement for the collection of the fee at the time of a wholesale transaction.

4. **The sale of new motor vehicles to government entities** Your January 4th letter further states that your franchised new motor vehicle members annually sell thousands of new motor vehicles to police departments and other municipal, county, and state government entities. You ask whether the fee applies to such sales.

Response: There is no provision for exemption of the fee on tires sold to government entities. The fee is due on all new tires sold to such entities.

5. **Courtesy deliveries for out-of-state-dealers** Your January 10th letter sets forth the following fact pattern:

“An out-of-state dealer may contract to sell new vehicles to a customer in California (often a corporate account) and will direct the vehicle manufacturer to “drop ship” the vehicles to a California dealer, who then makes a “courtesy delivery” to the customer. In such a transaction the California dealer usually charges the manufacturer for new car preparation, but the California dealer does not enter the vehicle into its inventory, it never takes an ownership interest in the vehicle, and it does not have a contractual relationship with the customer

(it is not the retail seller of the vehicle). If the BOE takes the position that the California dealer is considered to have made the retail sale in such a transaction and requires the California dealer to collect the fee from the consumer, on what document is the California dealer supposed to disclose the tire fee (because the California dealer is not the actual seller of the vehicle – it does not issue the customer an “invoice” or other contract documents)?”

Response: The Board recognizes a courtesy delivery as an out-of-state dealer who contracts to sell a vehicle to a customer in California and will direct the manufacturer to make delivery to the customer at a specified location in California. The manufacturer may then deliver the vehicle to a dealer in California, who will deliver it to the customer in California. If the out-of-state dealer is not engaged in business in California, or does not have a California seller’s permit and a dealer’s license from the California Department of Motor Vehicles, the fee and the applicable sales tax must be reported by the California dealer. In this instance, the California dealer is considered to have made the retail sale of the tires. Therefore, the tire fee is due from the California dealer.

6. **Delivery of vehicles sold in 2000, but delivered in 2001** Your January 10th letter further states that a number of your dealer members entered into binding contracts to sell new vehicles prior to January 1, 2001, but did not physically deliver the vehicles to the purchasers until after January 1, 2001. You ask whether the fee applies to those vehicles with new tires.

Response: In order to determine the tax application of this transaction the definition of a “sale” must be considered. The Public Resources Code does not define a sale for purposes of the California Tire Recycling Fee. However, the Sales and Use Tax Law, Revenue and Taxation Code Section 6006 define a sale as “[a] transfer for a consideration of the title or possession of tangible personal property” Given this definition, and given the brief facts set forth in your question, the fee would be due on the date of delivery assuming both consideration and title or possession of the vehicle was not made prior to January 1, 2001.

7. **Factual Situation** Your letter dated January 15th sets forth the following factual situation:

“A licensed new motor vehicle dealer takes a used vehicle in trade in conjunction with the sale of a new motor vehicle. The dealer is desirous of retailing the trade-in vehicle on its used car lot but the vehicle has two tires that fail to meet the tire tread requirements of Division 12 of the Vehicle Code. As part of reconditioning the vehicle for resale by this dealer, the dealer sublets the replacement of two worn-out tires with a local tire dealer who charges the dealer \$1 per new tire for the California tire fee.”

“We are advised that most tire dealers do not differentiate between retail and wholesale transactions for purposes of charging the California tire fee. We assume that the tire fee should only be collected and remitted one time for each new tire sold and that the new motor vehicle dealer in the above factual situation would not be required to charge the purchaser of the used

January 30, 2001

Page 4

vehicle an additional \$1 per new tire for the California tire fee. If you agree with our assumption, what type of documentation, if any, will your auditors require our dealer members to maintain in order to demonstrate that the fee was collected by the tire dealer?"

Response: If the local tire dealer sold the two new tires to the automobile dealer in a retail transaction, the tire dealer is responsible for collecting the fee from the automobile dealer. The automobile dealer is not subsequently required to collect the fee upon the sale of the used vehicle. However, if the local tire dealer sold the tires to the automobile dealer in a wholesale transaction (i.e. accompanied by a resale certificate) then the automobile dealer is responsible for the collection of the fee when the vehicle with new tires is subsequently sold at retail. If the local tire dealer collects the \$1 per tire from the automobile dealer in a wholesale transaction (i.e., accompanied by a resale certificate), it would be considered excess fee reimbursement and the local tire dealer would be required to either refund the \$1 per tire directly to the person who purchased the tire or remit it to the Board of Equalization. The automobile dealer is required to collect and remit the fee on the retail sale of the new tires on a new or used car.

Please let me know if you have any further questions.

Sincerely,

Dennis P. Maciel, Chief
Excise Taxes Division
Special Taxes Department

cc: Honorable Claude Parrish
Honorable John Chiang
Honorable Johan Klehs
Honorable Dean Andal
Honorable Kathleen Connell
Ms. Marcy Jo Mandel
Mr. Marcus Frishman
Mr. Paul Steinberg
Ms. Ardith Flyr
Mr. James E. Speed
Mr. Timothy Boyer
Ms. Janice Thurston
Mr. Allan K. Stuckey
Ms. Terry L. Jordan – Integrated Waste Management Board



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State Controller, Sacramento

June 16, 2003

VIA FACSIMILE & U.S. MAIL

(Redacted)
(Redacted)
(Redacted)

TIMOTHY W. BOYER
Interim Executive Director

Re: (Redacted)

Dear (Redacted):

Your letter dated March 17, 2003 to Ms. Judy Nelson was referred to me for reply. Specifically, your letter requests clarification of previous Board of Equalization ("BOE") correspondence interpreting section 42885 of the Public Resources Code. As you state, that section requires "retail sellers" of new tires to collect the California Tire Fee ("the tire fee") from retail purchasers at the time of sale.

According to your letter, you believe that car rental companies are not "retail sellers" under California law for short-term car rentals. BOE staff has stated in previous correspondence on the issue as follows:

"If rental car companies (such as Hertz, Avis, Enterprise, etc.) purchase motor vehicles from vehicle dealers as wholesale fleet transactions, the fee is not due from the vehicle dealer. The fee is due from the rental company on the first retail sale of the new vehicle. In this case, it would be the first lease/rental of the new vehicle."

We continue to agree with this statement:

You state in your letter that this interpretation creates a "conundrum" for rental car companies. Specifically, you state, "On the one hand, the tire fee legislation requires that the fee 'be separately stated by the retailer [here, the rental company] on the invoice given to the customer at the time of sale.' Pub. Res. Code, § 42885(d). At the same time, however, section 1936 of the California Civil Code bars rental car companies from passing along this charge at all when renting vehicles." We disagree with this statement. As long as the fee is presented to the individual as part of the "rental fee" there does not appear to be a conflict.

Additionally, you have provided numerous definitions for “retail seller.” We have review the definitions, but are not persuaded that they should be applied to the California tire fee. Therefore, at this time we continue to agree with BOE staff’s previous correspondence on the issue. Our opinion is consistent with the Sales and Use Tax Law and also in keeping with the intent of the legislation to collect a fee from all persons purchasing a new tire in order to create a fund that can be used to address environmental and health concerns associated with the eventual disposal of those tires. This is particularly true in light of the legislative findings and the stated intent to address the waste tire problem in the state. Under the framework you propose there would undoubtedly be many tires for which a fee would not be collected. If in fact there continues to be a perceived problem for rental car companies it may be worthwhile to contact the Integrated Waste Management Board to discuss a potential remedy. As I am sure you are aware, the Board administers the fee for the Integrated Waste Management Board.

Sincerely,

Monica Gonzalez Brisbane
Senior Tax Counsel

MGB/ef

cc: Suzanne Blihovde – CIWMB
Wendy Breckon – CIWMB
Elliott Block – CIWMB
Dennis Maciel – MIC: 56



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Fourth District, Los Angeles
JOHN CHIANG
State Controller

April 18, 2007

(Redacted)
(Redacted)
(Redacted)

RAMON J. HIRSIG
Executive Director

Re: **CALIFORNIA TIRE RECYCLING FEE ACCOUNT NO.: (REDACTED)**
REQUEST FOR LEGAL OPINION REGARDING DEMONSTRATOR
VEHICLES AND THE CALIFORNIA TIRE FEE

Dear (Redacted):

This letter is in response to your letter to me requesting a legal opinion, regarding the California Tire Recycling Act (Act), as to who should pay the California Tire Fee (fee) on demonstrator vehicles, and when. In your letter you reference an earlier letter, dated January 30, 2001, from the Excise Taxes Division of the Board of Equalization (Board), to the California Motor Car Dealers Association (2001 letter), which addressed this issue. You request that the position stated in that letter be revisited and revised, due to “evolving industry and retail practices,” in order “to provide clear guidance to motor vehicle dealers in collecting the appropriate tire fee” and to ensure that the Legislature’s intent, that the fee be collected on every tire when it is first sold at retail, be realized. I appreciate the thoroughness of your analysis of this matter and your initiative in asking that the Board reconsider the guidance given in the 2001 letter.

You have asked for a “single, simple rule” for applying the fee to new tires that are installed on motor vehicles when they are purchased. As discussed in more detail below, after considering your discussion of the several questions at issue here, previous Board legal and staff opinions regarding imposition of the tire fee, and relevant provisions of the Public Resources Code (PRC) and Vehicle Code (VC), it is our opinion that the guidance of the 2001 letter should be revised. The following summarizes the more detailed discussion set forth in the remainder of this letter:

The California Tire Fee must be paid by every person who purchases a new tire for use as it is intended to be used with motor vehicles and specified equipment. Thus, the fee must be paid by every person who purchases new tires with a new or used motor vehicle for use as the tires are intended to be used with the new or used motor vehicle or equipment, and, where relevant, who registers the new or used motor vehicle with

April 18, 2007

Page 2 of 5

California Department of Motor Vehicles (DMV). In the terms used by the Act, the “retail seller” must collect the fee from the “retail purchaser.”

The terms “retail purchaser” and “retail seller” are not defined in the Act or in any other law that may be construed to be related to the Act. Therefore, based on the provisions of the Act and for purposes of the Act, a “retail purchaser” is determined to be a person who purchases a new tire for use as it is intended to be used, and a “retail seller” is the person who sells the new tire to the retail purchaser. A “new tire” is any tire that is not retreaded, reused, or recycled.

In those situations where a seller timely accepts in good faith a valid resale certificate stating that a purchaser is purchasing the vehicle (inclusive of any new tires) for resale, the seller is not required to collect the fee from the purchaser or remit the fee to the Board. Instead, the purchaser who, pursuant to the issuance of a resale certificate, purchased the new tires without paying the fee is required to self-report and pay to the Board the fee on any new tires mounted on vehicles that are put to any personal or business use besides demonstration or display (i.e., when the purchaser, for purposes of the Act, becomes a “retail purchaser”).

As applied to so-called demonstrator vehicles, the specific subject of your inquiry, the fee would be due from the auto dealer as the person to whom the new tires and the new or used motor vehicle have been sold and who uses the tires as they are intended to be used on the vehicle. The auto dealer purchases the new tires, along with the vehicle, and an employee of the auto dealer uses the tires as they are intended to be used on the vehicle while it is being used as a demonstrator vehicle. The sale of the new tires occurred when the auto dealer purchased the new or used motor vehicle on which the new tires were mounted.

However, it is our understanding that the seller generally does not know, at the time the auto dealer purchases a particular motor vehicle, if the vehicle will be put to use exclusively for demonstration and display as part of the dealer’s inventory until it is resold., or if it will also be put to taxable use as a demonstrator vehicle. (See Cal. Code Regs., tit. 18, § 1669.5.) Therefore, when a timely, valid resale certificate is taken, the person from whom the auto dealer purchases the vehicle is relieved from liability for collecting and remitting the fee to the Board, and the auto dealer must self-report and pay to the Board the fee on new tires that are mounted on motor vehicles when those vehicles are put to taxable use as demonstrator vehicles.

DISCUSSION

Background

As amended, effective January 1, 1997, the Act mandates that a fee, known as the California Tire Fee, be

collected from all persons purchasing a new tire. The fee is collected to create a fund that is used to address, through a program for recycling throughout the State, the environmental and health concerns associated with the eventual disposal of those tires in landfills and stockpiles and through illegal dumping. (PRC, §§ 42861 & 42870 et seq.) In order to carry out the Legislature's intent, the fee must be collected on every new tire when it is sold to the person who uses the tire as it is intended to be used. To that end, the Act provides: "A person who purchases a new tire, as defined in subdivision (g), shall pay a California tire fee of one dollar and seventy-five cents (\$1.75) per tire." (PRC, § 42885, subd. (b)(1) [as amended effective 7/18/06] [emphasis added].) The Act also provides: "the retail seller shall collect the California tire fee from the retail purchaser at the time of sale . . ." (*Id.* at § 42885, subd. (b)(3) [emphasis added].)

However, with respect to demonstrator vehicles and the fee, the 2001 letter states:

[T]he vehicle is first sold at retail as a used car after its demonstrator service. . . . [T]he fee is due on the first retail sale of this vehicle for all new tires. Therefore, assuming no new tires have been placed on the vehicle, four tires are used and not subject to the fee. However, since the spare tire is presumably new, and the fee has not previously been paid on it, the fee is due on the new spare tire (2001 letter, at p. 1)

In other words, under the guidance of the 2001 letter, the four tires that are mounted on and sold with the demonstrator vehicle will eventually be discarded without the fee ever being paid on them. As you point out, this result does not seem to be consistent with the Legislature's intent that the fee be collected whenever a new tire is sold.

Analysis

As it is used in the Act, the term "new tire" means a pneumatic or solid tire intended for use with on-road or off-road motor vehicles, motorized equipment, construction equipment, or farm equipment that is sold separately from the motorized equipment, or a new tire sold with a new or used motor vehicle, as defined in Section 42803.5, including the spare tire, construction equipment, or farm equipment." (PRC, § 42885, subd. (g) [emphasis added].) Further, "'new tire' does not include retreaded, reused, or recycled tires." (*Ibid.*)

As stated in this provision, one or more new tires may be sold with both new and used motor vehicles, so when new tires mounted on a new or used motor vehicle are sold for use as they were intended to be used, such as when an auto dealer purchases new tires with a new or used motor vehicle that the dealer chooses to use as a demonstrator vehicle, the fee is due.

A motor vehicle is "new" until it becomes "used." Under the Vehicle Code, a "used vehicle" is one that, among other things, "has been sold, or has been registered with the [DMV], or has been sold and operated upon the highways." (VC, § 665 [emphasis added].) "Used vehicles" are also vehicles that are "unregistered [and] regularly used or operated as demonstrators in the sales work of a dealer." (*Ibid.*)

[emphasis added].) In other words, under the Vehicle Code, a vehicle is “used” if it is “sold” or “registered,” or “sold and operated upon the highways,” or is a “demonstrator.” Therefore, once a motor vehicle has been put to use as a demonstrator vehicle, it becomes a “used vehicle,” and the new tires that were mounted on the vehicle were sold to the auto dealer with the vehicle and used as they were intended to be used. ¹

PRC section 42885, subdivision (b)(3), requires the “retail seller” to collect the “fee from the retail purchaser at the time of sale.” However, when an auto dealer purchases a new or used vehicle on which new tires are mounted, the seller may not know if the auto dealer is a “retail purchaser,” as defined above (i.e., a person who is purchasing the new tires for use as they are intended to be used). Therefore, if the seller timely accepts in good faith a valid resale certificate stating that the auto dealer is purchasing the vehicle (inclusive of any new tires) for resale, for purposes of the Act, the auto dealer is not a “retail purchaser” and the seller is not a “retail seller” as to that wholesale transaction, and the seller is not required to collect the fee from the purchaser and remit it to the Board. However, in those situations where the auto dealer subsequently puts the tires to their intended use, by putting the vehicle to taxable use as a demonstrator vehicle or otherwise, the auto dealer becomes a “retail purchaser” who purchased the new tires to be used for their intended use and must self-report and pay the fee to the Board. ²

In sum, it was the Legislature’s intent that the fee must be paid when a person purchases a new tire and uses the tire as it is intended to be used. Accordingly, with respect to demonstrator vehicles, an auto dealer who purchases a new or used motor vehicle on which new tires are mounted and who uses the tires as they are intended to be used when the vehicle is placed in demonstrator status, must report and pay the fee on those new tires to the Board, if the fee was not paid previously.

¹ In the same way, when a short-term rental car company purchases, and registers with the DMV, new motor vehicles with new tires, the short-term rental car company becomes the consumer and user of the motor vehicles and new tires “at the time of sale.” The short-term rental car companies purchase new tires for their intended use when they purchase new motor vehicles. The fact, that, under other laws (see, e.g., Revenue and Taxation Code section 6006, subdivision (g), 6006.3, and 6007 of the Sales and Use Tax Law), a rental car company’s purchase of a new motor vehicle may be considered to be a purchase for resale, is immaterial with respect to the Act. The rental car companies have put the new tires to their intended use. If the short-term rental car company purchases vehicles with new tires pursuant to issuing a resale certificate, the company must self-report and pay the fee to the Board just like auto dealers who must self-report and pay the fee with respect to their demonstrator vehicles.

² This same situation arises where a retail tire dealer purchases new tires for resale but subsequently removes those tires from inventory and puts them to their intended use on motor vehicles or equipment the dealer owns, leases, operates, or otherwise controls. Here, again, the tire dealer becomes a “retail purchaser” who has purchased the tires for their intended use and must report and pay the fee on those tires to the Board.

April 18, 2007

Page 5 of 5

In the near future, the Excise Taxes Division will be sending a new letter to the California Motor Car Dealers Association, revising the guidance previously given in the 2001 letter so that it confirms to the opinion provided herein. Again, thank you for bringing this important issue to our attention.

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

Sincerely,

Carolee D. Johnstone
Tax Counsel

CDJ/

cc: Mickie Stuckey (MIC: 57)
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Susan Sinetos (MIC: 88)
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State Controller, Sacramento

January 3, 2001

(Redacted)
(Redacted)
(Redacted)

JAMES E. SPEED
Executive Director

California Tire Fee, Chapter 838, (SB 876)

Dear (Redacted):

The Excise Taxes Division of the Board of Equalization has received your letter dated December 1, 2000 requesting a written response to two questions you have about the California Recycling Fee (SB 876). Specifically, you asked for our written "clarification and enforcement opinion concerning whether new and used car dealers will be required to collect and remit the California tire fee relative to the lease of a vehicle and if the fee will apply on the sale of a used vehicle containing a spare tire that has never been used."

Your letter stated that "you do not believe that the new law requires lessors to charge lessees the California tire fee when leasing a vehicle equipped with new tires because lessees are not "retail purchasers" of a leased vehicle or tires contained thereon." Your letter also stated "it does appear that a previously unused spare tire sold with a used vehicle would require the fee to be charged."

Your questions are involved ones, which required a legal opinion concerning the application of SB 876 on leases and on spare tires. Following is the response from the Legal Division:

"Public Resources Code Section 42885, as amended by SB 876 (Ch. 838, Stats. Of 2000) imposes the California Tire Fee (the "fee") on every person who purchases a new tire, and defines "new tire" to include a new tire sold with a new or used motor vehicle, construction equipment, or farm equipment. The retail seller must collect the fee from the retail purchaser at the time of the sale and remit the fee to the Board, and may retain 3 percent of the fee as reimbursement for any costs associated with the collection.

The Legislature imposed the fee based on its finding that, each year, over 30 million waste tires were generated in the state and over 3 million tires are imported into the state. Millions of these tires are illegally dumped or stockpiled, posing a serious threat

to the public health and safety, and the environment, particularly when they are improperly maintained or catch fire. The fee will be used to expand existing markets for waste tires in order to reduce their environmental threat, to clean up existing waste tire piles, and to enforce waste and used tire laws.

It is clear from the statutory framework that the Legislature intended that the fee be collected from all persons purchasing new tires in order to create a fund that can be used to address environmental and health concerns associated with the eventual disposal of those tires. This is particularly true in light of the Legislative findings and the stated intent to address the waste tire problem in the state.

Given the Legislature's findings, it is clear that the Legislature intended that the fee be paid with respect to new tires on vehicles that are leased, since those tires may contribute to the environmental threat addressed by SB 876. However, the Legislature did not specify whether the sale to a lessor or the sale to the lessee should be regarded as the sale that is subject to the fee. The general rule under California's Sales and Use Tax Law has long been that a lease is a continuing sale and purchase. Accordingly, unless and until the Legislature provides additional guidance, we believe that the first lease of a new tire on a new or used motor vehicle, construction equipment or farm equipment is the retail sale that is subject to the fee.

Additionally, it is clear that the Legislature did not intend to collect the fee twice on any tire. Therefore, although a spare tire may never be put to use, it can only be new once for purposes of the fee. Accordingly, we believe that the first retail sale (including a lease) of a new tire is subject to the fee and no additional fee on that tire is due, even if the tire is never actually put to use.

Please let me know if you have any further questions regarding the California Tire Recycling Fee.

Sincerely,

Dennis P. Maciel, Chief
Excise Taxes Division
Special Taxes Department

cc: Honorable Claude Parrish
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Honorable Johan Klehs
Honorable Dean Andal
Honorable Kathleen Connell
Ms. Marcy Jo Mandel
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Mr. Allan K. Stuckey
Ms. Terry L. Jordon – Integrated Waste Management Board