

M e m o r a n d u m**325.1780**To: Mr. Randy Pace
Petition Unit

December 1, 1988

From: David H. Levine
Tax CounselSubject: Section 6009.1 Exclusion after
Stockton Kenworth

This is in response to your memorandum dated October 4, 1988 regarding the interpretation of the Section 6009.1 exclusion from the definition of use in light of Stockton Kenworth v. State Board of Equalization, (1985) 157 C.A.3d 334. You have included a copy of a memorandum dated April 18, 1986 by Donald Hennessy regarding a meeting he attended with Gary Jugum and Glenn Bystrom on this issue. The participants of that meeting concluded that the Section 6009.1 exclusion from the definition of use would apply to the active transportation of planes, vehicles, and vessels out of California if that transportation was the sole use of the item in California. Thus, if a vehicle purchaser comes into California only for the purpose of picking up the vehicle and driving it directly out of California for use solely thereafter outside California, no use tax would be applicable. On the other hand, if the purchaser were in California for some independent reason other than taking delivery of the vehicle, the purchaser's driving of the vehicle in California would be regarded as a taxable use.

The exclusion from use provided by Section 6009.1 is only relevant in circumstances when the use would otherwise be subject to use tax. The exclusion is not relevant when the sales tax is applicable because under such circumstances it is the sale that is being tax and not the use. Thus, if a sale occurs in California which is subject to sales tax and no other exclusion or exemption applicable, that sale is subject to sales tax without regard to whether the purchaser thereafter directly transports the vehicle or vessel outside California. This means that when a vehicle or vessel is sold in California by a person required to hold a seller's permit by virtue of the number of vehicles or vessels that person sells, that sale is subject to sales tax unless otherwise exempted without regard to the purchaser's use or direct removal of the vehicle or vessel from the state. (Rev. & Tax. Code §§ 6009.1, 6051, 6282, 6283.) Section 6366 sets forth a relevant exemption with respect to aircraft. The discussion below applies only in circumstances that use tax, and not sales tax, would be applicable.

You have cited two specific examples. You have orally indicated to me that you wish our opinion on these two examples based on the facts you have stated, and not on the facts that may actually be involved in those cases. You believe both examples are taxable based not only on the length of time the vessels remained in California, but also based on the use made of the

vessels before leaving California. The critical question is one of fact: is the vessel used in California in any way other than as described in Section 6009.1. If so, that use is taxable. If not, tax does not apply. As discussed in Mr. Hennessy's memorandum, a purchaser's independent business reason for being in California was evidence that the purchaser actually used the vehicle in California other than merely to transport it directly out of California. That is, it is not the purchaser's independent business reason for being in California that is determinative; rather, the significance of that fact is what it tells us about the purchaser's use of the vehicle in California. Similarly, the only significance to the length of time an item is in California after purchase before it is removed from California is how that length of time clarifies the use to which the purchaser put the item. The inference is that the longer that length of time is, the more likely the purchaser used the item in some manner other than in a manner entitled to the exclusion provided by Section 6009.1. However, we note that the exclusion includes "storage" for the purpose of subsequently transporting the item outside the state. Thus, the length of time is merely an indicator.

In your first example, a purported nonresident purchased a vessel in California for use outside California. For the year and one-half following the purchase, the vessel remained in California undergoing extensive repairs. The vessel was then sailed to the West Indies. It took approximately six weeks from the time the vessel departed from San Francisco sailing south until it reached Mexican waters. During the six weeks, the purchaser lived aboard the vessel.

The initial one and one-half years during which the vessel was repaired does not subject the purchaser's use to use tax. As set forth in your memorandum, the only use for which the purchaser could arguably be subjected to use tax would be the transporting it outside California. It is a question of fact whether the six weeks taken to remove the vessel from California territorial waters constitutes direct removal.

We do not require for Section 6009.1 that the purchaser take the fastest route out of California waters (e.g., due west). Rather, the question is whether six weeks is an appropriate time period for direct removal south. Six weeks appears to be a longer period than necessary to effect direct removal and indicates that the purchaser may have used the vessel in California for some additional purpose. For example, the purchaser may have stopped along the way for sport fishing or may have docked at California ports on its route outside California. If so, this would support the conclusion that the purchaser made taxable use of the vessel. On the other hand, if the purchaser could show that all stops were merely for refueling and restocking and not for tourist or other purposes, and that there was no interruption in departing from California waters for purposes such as fishing, Section 6009.1 would remain applicable and no tax would be due.

In your other example, a California resident purchased a vessel in California arguing that the vessel was purchased for use in Mexico. The vessel remained in California for a period of over three years during which the vessel was given to the purchaser's son. The vessel may now be located in Mexico.

The period of three years the vessel remained in California is certainly evidence that the vessel was purchased for use in California. When coupled with the fact that the purchaser was a California resident, we must presume that the vessel was purchased for use in California and use tax would be assessed unless the purchaser supplies evidence that establishes that the vessel was not used in California except in the manner described by Section 6009.1. However, we need not reach this analysis under the facts you present. A California resident purchased the vessel in California, kept it in California, and then gave it to the purchaser's son. The gift of the vessel to the son while the vessel was in California is an exercise of power in California that is not described in Section 6009.1 and is therefore a use which is subject to tax.

In asking for additional guidelines in matters such as these, you have set forth several questions. I have not analyzed the examples you presented in the context of these questions since the questions do not seem to relate to the actual examples you set forth. Rather, I deal with those questions separately. They involve the purchase of a vehicle, vessel, or aircraft from a person not required to hold a seller's permit by virtue of that sale. In one scenario the purchaser would be a California resident while in another scenario the purchaser would be a nonresident. However, in each scenario you present, the purchaser would register the item at a California address. If we conclude under either scenario that the transaction is not subject to tax, you ask how long the property may remain in California before it becomes taxable.

When a person purchases a vehicle, vessel, or aircraft in California and then registers that property in California showing a California address, we may infer from that registration that the purchaser will use the property in a manner not excluded from the definition thereof by Section 6009.1. Use tax would apply unless the purchaser could establish that the property would be used in California only in a manner described by Section 6009.1. We reach this conclusion without regard to whether the purchaser is a California resident or not. If the purchaser is a resident, his burden of showing use within the description of Section 6009.1 will be greater. The question you ask regarding the time property may remain in California before Section 6009.1 ceases to apply is discussed above. There is no set time period for property to remain in California before Section 6009.1 ceases to apply. Rather, although time remaining in California may be evidence of tangible use, we must look to the reason for the item's presence in California and to the actual use of that item in California. If the reason the item remains in California is described by Section 6009.1, tax does not apply. If the reason is not described by Section 6009.1, tax does apply.

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

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bc: Mr. D. J. Hennessy