

## Memorandum

To: Mr. Robert Nunes

Date: April 22, 1985

From: Jim Davis

Subject: Amtrak

Your memo of January 28, 1985, addressed to Mr. Jugum, has been referred to me for research and response. The basic issue you present is whether we may hold Amtrak responsible for the collection of use tax on its sales of food, beverages, and cigarettes.

We are of the opinion that the Board may hold Amtrak responsible for the collection of use tax.

Mr. Dotson, in his October 7 1982, memo to the District Administrators stated:

“the Legal staff has reviewed the Amtrak Improvement Act of 1981 and has concluded that all purchases for use either directly or indirectly in the operation of providing rail passenger service are exempt from sales and use tax. Since Amtrak’s only business is the providing of rail passenger service, almost anything that Amtrak purchases would be used directly or indirectly in furnishing rail passenger service. Thus, sales to or purchases by Amtrak are generally exempt from the sales and use tax effective October 1, 1981.”

The portion of the Amtrak Improvement Act of 1981 which grants the exemption from sales and use tax is Section 1178 which amended 45 U.S.C. Section 546 by adding:

“(n) Additional taxes. The Corporation shall not be required to pay any additional taxes as a consequence of its expenditure of funds to acquire or improve real property, equipment, facilities, or right-of-way materials or structures used directly or indirectly in the provision of rail passenger service. For purposes of this subsection, “additional taxes” means taxes or fees (1) on the acquisition, improvement, or ownership of personal property by the Corporation, and (2) on real property other than taxes or fees on the acquisition of real property which is not attributable to improvements made by the Corporation.” (Emphasis added.)

Although sales to or purchases by Amtrak are exempt from sales and use tax, Section 546(n) (see also 45 U.S.C. S5466) does not prevent the Board from holding Amtrak responsible for collection of use tax on its sales to passengers. The use tax is a tax on the purchaser, i.e., the passengers; there is no tax directly on Amtrak. Therefore, the prohibition of Section 546(n), that Amtrak “shall not be required to pay any additional taxes ... “, does not apply. In Bank of America v. SBE, 209 C.A.2d 780, the court required the Bank of America to collect use tax on

its sales of personalized checks even though as a national bank it, like Amtrak, could not be required to pay use tax under the federal statutes on taxation of national banks then in effect. The court stated (at p. 799): "As we have hereinabove discussed the use tax is a tax levied upon the purchaser. It is not a tax on the retailer; nor does it shift to him because he has the duty to collect it from the consumer. The retailer is merely the agent through which the collection is made." (Emphasis in original; see also Colorado National Bank v. Bedford, 84 L.Ed. 1067).

Revenue and Taxation Code §6402 provides an exemption from use tax for property "...purchased from any unincorporated agency or instrumentality of the United States...." Amtrak is a for profit corporation, not an "unincorporated agency or instrumentality of the United States," and, as such, does not qualify for the exemption of Section 6402. In support of this conclusion we note that the Red Cross, which is a congressionally chartered "tax immune instrumentality of the United States" and as such, does not qualify for the exemption of Section 6402. In support of this conclusion we note that the Red Cross, which is a congressionally chartered "tax immune instrumentality of the United States" (Department of Employment v. United States, 17 L.Ed.2d 414), is required to register and collect California Use Tax (anno. 560.0140; see, for example, file number SC REDACTED TEXT and SR REDACTED TEXT).

We have reviewed proposed Regulation 1620.2 (submitted to OAL 4/1/85) and conclude it has no effect on the above expressed opinion. Regulation 1620.2 explains how tax applies to "carriers" who sell or use taxable beverages in this state. Amtrak is expressly excluded from the definition of "carriers" [Regulation 1620.2(a) (1)]. However, Regulation 1620.2 is undoubtedly misleading; it does not put the reader on notice of Amtrak's duty to collect use tax. We recommend the regulation be amended to make Amtrak's duty to collect use tax clear. The regulation is currently being reviewed by OAL; thought should be given as to whether we want to withdraw the regulation before the OAL review is completed.

In summary, we conclude that there is no legal prohibition against the Board requiring Amtrak to collect use tax on its sales of food, beverages, and cigarettes.

JAD:mw