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**STATE BOARD OF EQUALIZATION**

May 19, 1966

Dear

This is in reply to your letter of March 8, 1966, concerning your claim that certain sales of diesel fuel to Mexican fishing boat owners made at your San Diego Marine Dock are exempt from sales tax under Sales and Use Taxes Ruling 55.

It is our understanding from your letter that you sell and deliver certain fuel oil (which is used to propel the boats) to certain Mexican fishing boat owners at your San Diego dock. The boats operate off a main fuel tank and are compartmentalized in a way so that they can be used for storing fish as well as fuel. The purchased fuel is taken from these compartments and used for propelling the vessel in its fishing operations. After fishing, the same compartments are used for storing the fish. The boats depart from your dock by using diesel fuel already in the main fuel tank.

In order to claim exemption from sales tax upon the ground that the sales are immune from taxation as sales in foreign commerce or as export sales, it is essential that all of the conditions of such exemption be present and adequately supported by proper proof. Ruling 55-A(1)(e) expressly provides as a condition of exemption that the goods shall be delivered to a conveyance furnished by the purchaser for the purpose of carrying the goods abroad and which in fact are actually carried to a foreign destination.

Since your foreign purchaser (i.e., Mexican boat operator) uses the purchased fuel in its fishing operations, it has not brought goods for the express purpose of carrying them to a foreign destination. Thus, it is our opinion that sales of fuel oil to Mexican fishing boat operators for purposes of refueling their vessels while engaged in fishing operations are not to be considered as sales of "export cargo" within the meaning of the aforementioned ruling, notwithstanding the fact that the foreign purchaser transports the goods outside the state and uses them in his fishing operations outside United States territorial waters. Accordingly, we are unable to recommend allowance of the sales in question as being exempt export sales.

In support of our position is a letter opinion from the Attorney General's office stating that the California sales tax applies to the sale of fuel oil to the government of Mexico for use in its naval vessels. The opinion also stated "that such a tax would not be a burden on an act of exportation contrary to the federal Constitution." Thus, if tax applies to the sale of fuel oil to the Mexican government, undoubtedly it should also

apply to the sale of fuel oil to private Mexican fishing boat operators who use the fuel in their fishing operations.

However, our recommendation must be considered in the light of the recent D.C.A. Opinion of Shell Oil Co. v. State Board of Equalization, 237 A.C.A. 310, which held that California cannot constitutionally apply its sales tax to fuel oil sold as ships stores to vessels engaged exclusively in the carriage of export cargo. Our position, of course, on this matter will remain the same pending a final decision before the California Supreme Court. If the Supreme Court holds the same as the D. C. A. Opinion, we will review our position in light of that decision. However, if the Supreme Court holds contrary to the D.C.A. Opinion, our position requiring the application of sales tax to the sale of fuel oil used to propel a vessel to the first foreign port of call will remain the same.

If you have any further questions or arguments to present in connection with this matter, please do not hesitate to forward the same to this office for our reply.

Very truly yours,

E. H. Stetson  
Tax Counsel

By \_\_\_\_\_  
Elliott D. McCarty

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