

M e m o r a n d u m**325.1375**

To : Ms. Kelli Ochoa
Return Review Section - MIC:35

Date: July 7, 1993

From : Donald L. Fillman
Tax Counsel

Subject: *U--- P--- E---*
SR -- XX-XXXXXX

This is in response to your memo of April 16, 1993 concerning the criteria used to determine whether a sales transaction qualifies for the export exclusion.

The U. S. Constitution in Article 1, § 10 cl. 2 prohibits state and local taxation of imports and exports. The U. S. Supreme Court has held that it is acceptable to tax property that may be exported in the future, the same as property not to be exported, so long as the property to be exported has not yet been separated from the "general mass of property in the State." *Empressa Siderurgica, S. A. v. Merced* (1949) 337 U. S. 154, 156. This same case attempted to define when property left the general mass of property, and concluded that it was when it had "been started upon [its] transportation in a continuous route or journey."

This language is the basis for Regulation 1620(a)(3)(C)2.(c):

"Delivery by the retailer of property into a facility furnished by the purchaser constitutes an irrevocable commitment of the property into the exportation process only in those instances where the means of transportation and character of the property shipped provide certainty that the property is headed for its foreign destination and will not be diverted for domestic use."

The case of *Richfield Oil Corp. v. State Board of Equalization* (1946) 329 U.S. 69 is the standard example of when the means of transportation and character of the property allow the export exemption to apply even when the purchaser takes possession within California. The pumping of a large quantity of oil into a tanker berthed in a California port does not lend itself to diversion.

The California Supreme Court has created a four-part test in *Gough Industries v. State Board of Equalization* (1959) 51 Cal.2d 746, 749:

"(a) The agreement of sale contemplated shipment of the goods in export, that is, from a seller in the United States to a buyer in a foreign country; (b) from the beginning of the transaction, the goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed; and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods."

In the recent case of *McDonnell Douglas Corporation v. State Board of Equalization* (1992) 10 Cal.App.4th 1413, the appellate court applied this four-part test to a transaction where the property was shipped by common carrier to a location on the U.S./Mexican border where an independent freight forwarder, with the assistance of the purchaser's employees, processed the property through U.S. and Mexican customs. Here the type of property (aircraft parts) and means of transportation (common carrier and independent freight forwarder) provided the requisite certainty of exportation.

In your fact situation, the Bill of Lading dated September 24, 1991, shows the intended destination to be Mexico, but clearly shows that the transportation is provided by the purchaser. The Shipper's Export Declaration, dated September 26, 1991 (two days later) shows the exporter to be the purchaser. The March 3, 1993 letter from the purchaser states that "the truck arrived on the Mexican border--of Mexicali accompanied by your partner E--- T--- on the--evening of September 26, 1991." However, this date had originally been typed "September 24, 1991" but someone had changed it to "26."

Whether the dates are correct or not is of less concern than the fact that the taxpayer did not commit the property irrevocably to the export process. The property was loaded onto trucks provided by the purchaser, and the purchaser had possession and control from initial delivery until the property got to the forwarding agent two days later. The fact that a partner or employee of the retailer rode in the truck does not affect the fact that the purchaser had exclusive possession and control well before the property reached a forwarding agent. The fact that the purchaser in fact exported the property is insufficient to qualify the taxpayer for the export exemption. See Reg. 1620(a)(3)(C)1.

DLF:cl

cc: Arcadia District Administrator