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September 19, 1995

Re: Unidentified Taxpayer;
Interstate Commerce Issues

Dear _____,

Your June 29, 1995 letter to the Audit Evaluation and Planning Section was referred to the Legal Division for a response. You ask two questions regarding the application of tax on certain hypothetical transactions. For purposes of clarity, we have separately responded to each of your questions below.

"[1.] The first question deals with 'Regulation #1621, Sales To Common Carriers', letter (b) 'Application of Tax' My understanding is that if the seller ships the tangible personal property via the facilities of the purchasing carrier under a bill of lading to an out-of-state point, and if the common carrier meets test (B), (C), and (D) then sales tax would be exempt. My question is if the carrier chooses to not follow steps (b)(1)(A) through (D), but instead **takes delivery of the tangible personal property out-of-state** would California sales tax be exempt?"

California imposes a sales tax on a retailer's gross receipts from the retail sale of tangible personal property inside this state unless the sale is specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.) When sales tax does not apply, use tax is imposed on the sales price of property purchased from a retailer for storage, use, or other consumption of that property in California. (Rev. and Tax. Code §§ 6201, 6401.)

The exemption regarding sales to common carriers is set forth in Revenue and Taxation Code section 6385 and is interpreted by Regulation 1621. Subdivision (b) of Regulation 1621 states:

"(1) The sale of tangible personal property, other than fuel and petroleum products, to common carriers, including foreign air carriers, is exempt from sales tax pursuant to Section 6385(a) of the Revenue and Taxation Code when such property is:

"(A) Shipped by the seller via the facilities of the purchasing carrier under a bill of lading, to an out-of-state point, and

"(B) Actually transported by the common carrier to the out-of-state destination, pursuant to the bill of lading, over a route the California portion of which the purchasing carrier is authorized to transport cargo under common carrier rights, and

"(C) Not put to use until after the transportation by the purchasing carrier to the out-of-state destination, and

"(D) Used by the carrier in the conduct of its business as a common carrier."

Where the foregoing conditions are not met, the sale to the common carrier is not exempt from sales tax pursuant to Revenue and Taxation Code section 6385(a) or Regulation 1621(b). That is, if the common carrier does not follow subdivisions (b)(1)(A) through (b)(1)(D) of Regulation 1621, the sale of tangible personal property to that common carrier is not an exempt sale pursuant to Revenue and Taxation Code section 6385(a). Thus, if a common carrier takes delivery of purchased property in this state without satisfying the requirements of Regulation 1621(b), the sale is subject to sales tax. This does not mean, however, that the sale of tangible personal property under different facts to a common carrier (or any other person for that matter) may not qualify for exempt treatment under another statutory provision.

The other relevant exemption to your hypothetical is the one set forth in Revenue and Taxation Code section 6396. That provision exempts sales in this state from sales tax when goods are shipped outside the state to a specific location under certain conditions. These conditions are explained in subdivision (a)(3)(B) of Regulation 1620 (copy enclosed) as follows:

"Sales tax does not apply when the property pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer, by means of:

"1. Facilities operated by the retailer, or

"2. Delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point. As used herein the term 'carrier' means a person or firm regularly engaged in the business of transporting for compensation tangible personal property owned by other persons, and includes both common and contract carriers. The term 'forwarding agent' means a person or firm regularly engaged in the business of preparing property for shipment or arranging for its shipment. An individual not otherwise so engaged does not become a 'carrier' or 'forwarding agent' within the meaning of this regulation

simply by being designated by a purchaser to receive and ship goods to a point outside this state "

Thus, when a sale does not qualify for the exemption under section 6385, the sale of tangible personal property to a common carrier inside this state is subject to sales tax unless, pursuant to the contract of sale with that carrier, the seller actually ships the property outside the state by facilities other than those of the purchasing carrier and neither the purchasing carrier nor its agent obtains possession of the property inside California. That is, the sale is not exempt from sales tax pursuant to Regulation 1620(a)(3)(B) if the purchasing carrier receives possession of the property inside this state and then immediately transports and uses that property outside the state. For the transaction to qualify under Regulation 1620(a)(3)(B), the seller must actually deliver the property outside this state by its own facilities or deliver it to another carrier (i.e., one other than the purchasing carrier) for shipment outside the state.

You should note that tax may still apply to your hypothetical transaction even if it qualifies for the section 6396 exemption. As set forth above, use tax applies to the storage, use, or other consumption of property purchased from a retailer for use inside this state. (Rev. & Tax. Code §§ 6201, 6401.) This tax is imposed on the person actually storing, using, or otherwise consuming the property within the state. (Rev. & Tax. Code § 6202.) A retailer engaged in business in this state is required to collect the applicable use tax from the purchaser at the time of the sale of property to be used inside the state. (Rev. & Tax. Code § 6203.)

Even if the sale is exempt from sales tax under section 6396, the purchasing common carrier will owe use tax if it brings the purchased property into California and is regarded as having purchased it for use in this state, unless that use is exempt from tax. (Reg. 1620(b).) The property will be regarded as having been purchased for use in this state if it is first functionally used inside this state and tax will apply. (Reg. 1620(b)(3).) The property will also be regarded as purchased for use in this state if it enters California within 90 days after purchase, unless the property is used or stored outside California one-half or more of the time during the six-month period immediately following the property's entry into this state. (*Id.*) If such property is not used or stored outside California one-half or more of the time during the six-month period immediately following that property's entry into this state and that property entered California within 90 days after purchase, tax will apply unless the property meets the requirements of Regulation 1620(b)(2)(B) as discussed below.

"[2.] The next question deals with ... '[Annotation] 570.0430 Vehicles Purchased For Use In Interstate Commerce' My question is if the vehicle is first functionally used in interstate commerce outside of California, and enters California and is used **exclusively in interstate commerce within the State of California** for six month is use tax exempt[?] An example would be where a vehicle routinely picks up cargo in San Jose and delivers it to the Port of Oakland where the cargo is then transported by ship to an out-of-state point. The vehicle will never physically leave California but will be always be engaged in interstate commerce.... "

Regulation 1620(b)(2)(B) provides:

Use tax does not apply to property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce both within and without California and **not exclusively in California.**" (Emphasis added.)

Where property is purchased outside the state and is thereafter used continuously in interstate commerce exclusively inside this state, use tax applies to that property if it is deemed to have been purchased for use inside this state. That is, use tax applies if the property purchased outside the state is brought into this state within 90 days after its purchase, unless that property is used or stored outside California one-half or more of the time during the six-month period immediately following its entry into this state. (Reg. 1620(b)(3).)

We assume in your example that the vehicle entered California within 90 days after its purchase from outside this state while it was being used in interstate commerce. Thereafter, this vehicle did not leave California during the next six months while it was used for interstate commerce purposes. Under these facts, use tax applies to the use of this vehicle since it is regarded as having been purchased for use inside this state. The use of the vehicle does not qualify for the exemption set forth in Regulation 1620(b)(2)(B) since that use was exclusively in California.

If you have any further questions, please write again.

Sincerely,

Warren L. Astleford
Staff Counsel