State of California

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M e m o r a n d u m

To: Aimee Olhiser, Chief
Tax Policy Bureau (MIC:92)

Date: June 12, 2024

From: Jennifer Barry, Attorney III JB
Tax and Fee Programs Bureau (MIC:82)

Subject: Firearm, Firearm Precursor Part, and Ammunition Excise Tax: Reimbursement
Assignment No. 24-317

This is in response to your memorandum dated May 17, 2024, in which you asked the following three questions:

(1) May a licensed firearms dealer, firearms manufacturer, or ammunition vendor (retailer) and a purchaser, at the time of a retail sale, make an agreement of sale whereby the retailer separately states and collects from the purchaser reimbursement in an amount equal to the amount of the firearm and ammunition excise tax that the retailer will owe on the transaction?

(2) If the answer to question 1 is yes, should the amount that a retailer separately states and collects as firearm and ammunition excise tax reimbursement from its purchaser(s) be included in the calculation of that retailer's gross receipts for purposes of determining the amount of firearm and ammunition excise tax that the retailer owes?

(3) If the answer to question 1 is yes, should the amount that a retailer separately states and collects as firearm and ammunition excise tax reimbursement from its purchaser(s) be included in the calculation of that retailer's gross receipts for purposes of determining the amount of sales tax that the retailer owes?

For the reasons explained in the discussion below:

(1) A retailer and a purchaser may agree to the collection and payment of firearm and ammunition excise tax reimbursement.

(2) Firearm and ammunition excise tax reimbursement should not be included in gross receipts for purposes of determining the amount of firearm and ammunition excise tax that the retailer owes.

(3) Firearm and ammunition excise tax reimbursement should not be included in gross receipts for purposes of determining the amount of sales tax that the retailer owes.

Discussion

As you know, the Gun Violence Prevention and School Safety Act (Chapter 231 of the Statute of 2023), which added Part 16 (commencing with § 36001) to Division 2 (Part 16) of the Revenue and Taxation Code, on and after July 1, 2024, imposes upon licensed firearms dealers, ammunition vendors, and firearm manufacturers (retailers), an excise tax of eleven (11) percent of the gross receipts of the retail sale of any firearm, firearm precursor part, or ammunition sold in this state (FET), subject to certain exceptions. (See Rev. & Tax. Code, §§ 36011, 36021.) The FET is specifically imposed upon the retailer and not the purchaser. (Rev. & Tax. Code, § 36011.) A retailer is required to file a return and remit the FET due to the California Department of Tax and Fee Administration (the Department) on a quarterly basis. (Rev. & Tax. Code, §§ 36032, 36033.) The Department is required to administer the FET pursuant to the Fee Collection Procedures Law. (Rev. & Tax. Code, § 36031.)

For purposes of the FET, the term "gross receipts" has the same meaning as that term is defined in Revenue and Taxation Code section (section) 6012. (Rev. & Tax. Code, § 36001, subd. (e).) As relevant here, for purposes of section 6012, gross receipts include all amounts received with respect to a sale, with no deduction for the cost of the materials, service, or expenses of the retailer passed on to the purchaser, unless there is a specific statutory exclusion. (Rev. & Tax. Code, § 6012.)

Regarding your first question, as a general matter, parties are free to make an agreement of sale on terms that are satisfactory to both parties, including terms that add a charge for reimbursement to the retailer for an amount due to the state by the retailer, so long as the contract is for a lawful purpose. (See generally Part 2 (commencing with § 1549) of Division 3 of the Civil Code (Civ. Code); see also, for example, Civ. Code, § 1656.1, subd. (a).) Moreover, an agreement of sale must be interpreted to give effect to the mutual intention of the parties at the time of the agreement. (See Civ. Code, § 1636.) In this regard, there is no provision in the Fee Collection Procedures Law or Part 16 that prohibits a retailer from entering into an agreement of sale with a purchaser to collect from the purchaser reimbursement in an amount equal to the amount of the firearm and ammunition excise tax due to the state by the retailer for the transaction. Nor is there any general statutory prohibition against such an agreement of sale.

Additionally, the Fee Collection Procedures Law directly addresses a retailer's collection of reimbursement by requiring a retailer to return to its purchaser or remit to the state, any reimbursement it has collected in an amount greater than required by law[1] where the retailer has represented to its purchaser that the amount collected was attributable to an obligation due to the state by the retailer. (Rev. & Tax. Code, § 55221.5.) This provision presumes that a retailer may collect reimbursement from a purchaser for a fee or tax administered pursuant to its provisions. Section 55221.5 and comparable statutory provisions applicable to other tax and fee programs that the Department administers[2] generally mirror section 6901.5, which similarly requires a

[1] While the FET is an excise tax and not a fee, references to the terms "fee" and "feepayer" within the Fee Collection Procedures Law are expressly applicable to the administration of the FET. (See Rev. & Tax. Code, §§ 36031, 55004.)

[2] See, for example, sections 8127.5 (the Motor Vehicle Fuel Tax Law), 9151.5 (the Use Fuel Tax Law), 30361.5 (the Cigarette Tax Law), 60521.6 (the Diesel Fuel Tax Law) 43451.5 (the Hazardous Substances Tax Law), 45651.5 (the Integrated Waste Management Fee Law), 46501.5 (the Oil Spill Response, Prevention, and Administration Fees Law), and 50139.5 (the Underground Storage Tank Maintenance Fee Law); and Public Resources Code section 48650.5 (the California Oil Recycling Enhancement Act).

retailer that has collected reimbursement from a purchaser for sales tax due to the state by the retailer in an amount greater than required by law to return the excess amount to the purchaser or pay the excess amount to the state. Common to each of these provisions is the premise that a retailer may collect from its purchaser an amount represented as reimbursement for a tax or fee that is an imposed upon the retailer.

Based on the foregoing, and absent any statutory provision to the contrary, it is our opinion that a retailer and a purchaser, at the time of a retail sale, may make an agreement of sale whereby the purchaser reimburses the retailer for the amount of the FET due to the state by the retailer on the transaction.[3] Because the terms of the agreement of sale determines whether the parties have agreed to the addition of tax reimbursement, the parties should be as clear as possible as to their intentions. The clearest way the parties can indicate to the satisfaction of the Department that the seller has agreed to collect, and the purchaser has agreed to pay, an additional amount for FET reimbursement is for the sales invoice to state a separate line item for the amount of FET reimbursement charged.

As to your second question, as discussed above, for purposes of the FET, the term gross receipts is defined as having the same meaning as set forth in section 6012. (Rev. & Tax. Code, § 36001, subd. (e).) Section 6012 specifically measures the amount of sales tax due to the state by the retailer on any given retail sale of tangible personal property. As noted above, for purposes of section 6012, gross receipts include all amounts received with respect to a sale unless there is a specific statutory exclusion. (Rev. & Tax. Code, § 6012.) There is no statutory exclusion from gross receipts that is applicable to sales tax reimbursement that a retailer collects from its customer.

Prior to the enactment of Part 16 imposing the FET, sales tax was the only tax that the Department administered that is both imposed upon the retailer's retail transactions *and* determined on the basis of the retailer's gross receipts.[4] For purposes of sales tax, where a retailer avails itself of the rebuttable presumptions set forth in Civil Code section 1656.1 by, for example, separately stating reimbursement collected, the Department does not include the amount collected as tax reimbursement in the retailer's gross receipts for purposes of determining the amount of sales tax due to the state by that retailer. This is because, in part, when a retailer collects an amount that the retailer represents to the purchaser as reimbursement for sales tax due to the state by the retailer on the transaction, to the satisfaction of the Department, the retailer is thereby required to remit the amount collected to the state. (See, e.g., Rev. & Tax. Code, § 6597.) Thus, the amount of reimbursement collected by the retailer from its purchaser for sales tax is understood to be excluded from the retailer's gross receipts for purposes of determining sales tax due to the state by the retailer because the reimbursement collected is not part of the total amount of the retail sale. (See Rev. & Tax. Code, §§ 6012, 6007; see also Civ. Code, § 1656.1.) In other words, since the retailer is obligated to remit to the state the reimbursement it collects from its purchaser for sales tax due, the amount collected as

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[3] Certain exemptions apply for purposes of determining the amount of FET due to the state by a retailer. (Rev. & Tax. Code, § 36021.) Thus, a retailer that choses to collect reimbursement in the manner discussed above must also take precautions to only collect reimbursement for the FET on transactions and amounts subject to the FET, or as discussed above, the retailer would be required to return excess amounts collected to its purchaser(s) or pay the excess amount collected to the state. (Rev. & Tax. Code, § 55221.5.)

[4] The Cannabis Tax Law also defines the term "gross receipts" for purposes of the cannabis excise tax as having the same meaning as set forth in section 6012. However, the cannabis excise tax is imposed upon the purchaser rather than the retailer. (Rev. & Tax. Code, §§ 34011, 34011.2.)

reimbursement is not part of the total amount of the retail sale for purposes of section 6012. Consistent with this interpretation, the Department has, historically, excluded sales tax reimbursement collected by a retailer from that retailer's gross receipts for purposes of determining the sales tax due to the state by the retailer, despite there being no specific statutory exemption from gross receipts, as defined by section 6012, for sales tax reimbursement collected.

Turning now to the FET, the Legislature, in enacting Part 16, used the same definition of the term "gross receipts" for purposes of the FET as is applicable to sales tax, and like sales tax, imposed the FET upon the retailer. For the same reasons discussed above regarding sales tax, and to be consistent between two similarly structured tax programs where the retailer's retail sale is subject to tax and where the measure of tax is gross receipts, it is our opinion that gross receipts for purposes of the FET should be measured in the same manner as gross receipts are measured for purposes of determining the sales tax due to the state by the retailer.[5] Thus, where a retailer collects reimbursement from its purchaser for the amount of FET due to the state by the retailer on the transaction, and the retailer communicates to the purchaser that the amount charged as reimbursement is for the FET due to the state by the retailer, such as by separately stating the charge on the receipt or other invoice as "reimbursement," the amount the retailer collects from its purchaser for FET should be excluded from the retailer's gross receipts for purposes of determining the amount of FET due.

Finally, with regard to your third question, for the same reasons described above, it is our opinion that amounts that a retailer separately states and collects from its purchaser as reimbursement for FET pursuant to an agreement of sale should not be included in gross receipts for purposes of determining the sales tax due to the state by the retailer for the transaction.

JB:yw

cc: Sandy Barrow (MIC:31)
Tracie West (MIC:31)

[5] We note that a retailer's quarterly gross receipts for purposes of sales tax may be different than its quarterly gross receipts for purposes of the FET. This is because sales tax is imposed upon all of a retailer's gross receipts from the sale of tangible personal property, and the FET is only imposed upon the retail sale of firearms, firearm precursor parts, and ammunition. (Rev. & Tax. Code, §§ 6051, 6091, 36011).