This document has been retyped from an original copy.
Original copies can be provided electronically by request.

TRANSACTIONS INVOLVING INDIANS

Backup Tax; Imposition of Tax on Indian Retailer and Indian Customer. If an Indian or Indian tribe that operates as an on-reservation retail seller purchases or otherwise obtains diesel fuel on which the fuel tax has not been paid, the obligation to collect the backup tax is imposed when such fuel is sold and delivered into the fuel tank of a diesel-powered highway vehicle. Pursuant to section 60058, liability for the backup tax is imposed on both the retail seller (as end seller or fueler) and the customer (as a highway vehicle operator). However, liability for the backup tax may not be imposed on either the Indian or Indian tribe, as end seller/fueler, or on an Indian who resides on a reservation, as highway vehicle operator, if the diesel fuel is purchased and delivered into the fuel tank of the highway vehicle on the reservation. 9/01/06.

Backup Tax; Imposition of Tax on Indian Retailer and Non-Indian Customer. If an Indian or Indian tribe that operates as an on-reservation retail seller purchases or otherwise obtains diesel fuel on which the fuel tax has not been paid, the obligation to collect the backup tax is imposed when such fuel is sold and delivered into the fuel tank of a diesel-powered highway vehicle. Pursuant to section 60058, liability for the backup tax is imposed on both the retail seller (as end seller or fueler) and the customer (as a highway vehicle operator). Although liability for the backup tax may not be imposed on the Indian or Indian tribe, as an end seller/fueler, if the highway vehicle operator is a non-Indian or an Indian who does not reside on a reservation, the Indian or Indian tribe is required to collect the backup tax from the non-Indian highway vehicle operator, and remit the tax to the Board, when the untaxed diesel fuel is sold and delivered into the fuel tank of the highway vehicle on the reservation. 9/01/06.

Incidence of Tax; Refunds for Off-Highway Use. Under the Diesel Fuel Tax Law, liability for the tax is imposed on the supplier when the fuel is removed from the rack, imported, or sold. An Indian or Indian Tribe operating as an on-reservation retail seller of fuel only pays the tax indirectly, as a part of the cost of the diesel fuel it buys. However, the end user of the fuel, whether Indian or non-Indian, may claim a refund of diesel fuel tax that was included in the price of the fuel when the fuel was purchased, if the fuel was pumped into the fuel tank of a diesel-powered motor vehicle that was not operated on a California public highway. If applicable, a claim for refund of the diesel fuel tax may be directed to the Board, pursuant to section 60501(a)(4)(A). 9/01/06.

Legal Incidence of Tax; Fuel Purchased Directly from Supplier. The legal incidence of the diesel fuel tax is imposed on the supplier of the fuel, when, for example, the fuel is removed from the rack or when the fuel enters the state. If an Indian or Indian tribe elects to purchase the fuel directly from a supplier and, upon authorization from the supplier, the fuel is removed from the rack off the reservation, the supplier is still liable for the diesel fuel tax. The tax may be included in the cost of the fuel when the Indian or Indian tribe purchases the fuel from the supplier. 9/01/06.

Legal Incidence of Tax; Fuel Imported by Indian. The legal incidence of the motor vehicle fuel tax is imposed on the supplier of the fuel, when, for example, the fuel is removed from the rack or when the fuel enters the state. If an Indian or Indian tribe elects to import diesel fuel into the state, the Indian or Indian tribe itself becomes liable to the state for the diesel fuel taxes, where entry into the state occurs off the reservation and is, therefore, a taxable activity and subject to imposition of the diesel fuel tax. The legal incidence of the tax is imposed when and where the fuel enters California. 9/01/06.

Memorandum

To: Edward W. King, Chief
Fuel Taxes Division, MIC: 33

Date: September 1, 2006

From: Carolee D. Johnstone
Tax Counsel

Telephone: (916) 323-7713
CalNet: 8-473-7713

Subject: Collection and Payment of Taxes by Indian Tribes Who Own and Operate Fuel Stations on Their Reservations

In a memorandum dated March 8, 2006, you asked that the portion of a prior letter pertaining to the above-referenced subject and application of the Diesel Fuel Tax Law and the Motor Vehicle Fuel Tax Law be reissued to reaffirm the analysis therein. The prior letter, dated July 27, 2005, specifically addressed the question of whether there have been any new policies or developments regarding an Indian Tribe's liability, as a retailer of fuel, for collecting and paying taxes related to fuel since the Legal Department (Legal) of the State Board of Equalization (Board) provided information on this topic in letters dated July 15, 1997 and August 19, 1997.[1]

The legal opinions expressed with respect to the Motor Vehicle Fuel Tax Law and the Diesel Fuel Tax Law in the July 27, 2005, letter, as set forth below, are still valid.

1. General statutory scheme for motor vehicle fuel tax

First, substantial changes were made in 2002 to the law governing motor vehicle fuel tax, Revenue and Taxation Code section 7301 et seq.[2] Although some of the terminology relevant to the issues here has changed, substantively the effect is the same.

Most notably, the imposition of tax has been moved from the "distributor" level to the "supplier" level. (§ 7338; see §§ 7308 ("Blender"), 7311 ("Enterer"), 7332 ("Position holder"), 7334 ("Refiner"), 7340 (Terminal operator") & 7341 ("Throughputter") [defining different types of "suppliers"].) Further, all regulations pertaining to "qualified distributor" have been repealed.

Therefore, the liability for the motor vehicle fuel tax is now imposed on the supplier, and the Tribe, as a retail seller, only pays the tax indirectly, as a part of the cost of the motor vehicle fuel it buys.

[1] Copies of the July 15, 1997, letter from Senior Tax Counsel Janet Vining and the August 19, 1997, letter from Senior Tax Counsel Patricia Hart Jorgensen are enclosed herewith for your reference.

[2] All future statutory references will be to the Revenue and Taxation Code unless stated otherwise.

However, the end user of the fuel may claim a refund for motor vehicle fuel taxes that were included in the price of the fuel when the fuel was purchased, if the motor vehicle into which the fuel was pumped was not operated on a public highway of California. As is relevant here:

> The following persons who have paid a tax for motor vehicle fuel, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of the tax to the price of the fuel, shall . . . be reimbursed and repaid the amount of the tax:
>
> (a) Any person who buys and uses the motor vehicle fuel for purposes other than operating motor vehicles upon the public highways of the state . . . .
>
> (§ 8101 [emphasis added].)

As we advised in the July 15, 1997, letter, claims for the refund of motor vehicle fuel tax should still be directed to the State Controller's Office, pursuant to section 8102.

2. General statutory scheme for diesel fuel tax

On the other hand, the statutory provisions pertaining to diesel fuel tax have not changed in any relevant way since they were first added in 1995. (§ 60001 et seq.) Liability for the diesel fuel tax continues to be imposed on the supplier when the fuel is removed from a terminal or refinery rack or enters into this state. (§§ 60051, 60052.) The supplier is required to file a return with the Board showing the amount of the diesel fuel handled during the relevant period and the amount of tax due for that period. (§ 60201 et seq.) Therefore, the liability for the diesel fuel tax continues to be on the supplier, and the Tribe, as a retail seller, only pays the tax indirectly, as a part of the cost of the diesel fuel it buys.

However, as discussed above with regard to motor vehicle fuel tax, the Tribe or its members may claim a refund for diesel fuel taxes that were included in the price of the diesel fuel when it was purchased, if the Tribe or members is the end user of the diesel fuel and the fuel was not used in a vehicle that was operated on public highways in California. As is relevant here:

> Persons who have paid a tax for diesel fuel . . . shall . . . be Reimbursed and repaid the amount of the tax.
>
> (a) A claim for refund with respect to diesel fuel is allowed under this section only if all the following apply:

> paragraph (4) of subdivision (a).
>
> (3) The claimant has filed a timely claim for refund that contains the information required under subdivision (b) [discussed below] and the claim is supported by the Original invoice or original invoice facsimile retained in An alternative storage media showing the purchase. . . .
>
> (4) The diesel fuel was any of the following:
>
> (A) Used for purposes other than operating motor vehicles Upon the public highways of the state. . . .
>
> (§ 60501, subd. (a) [emphasis added].)

A claim for refund must be submitted to the Board, on a form prescribed by the Board, and include the required information for all of the diesel fuel covered by the claim. (See § 60501, subd. (b) [providing a list of the information required] and § 60501, subd. (c).) A claim for refund will generally be for a calendar year and must be submitted to the Board withing three years from the date of the diesel fuel was purchased. (§§ 60501, subd. (c), 60507.)

3. Motor Vehicle Fuel (License) Tax Law and Diesel Fuel Tax Law

In our letter of July 15, 1997, we addressed, under the above-named headings, a statement, apparently made by the person requesting the legal opinion, to the effect that "if the Tribe becomes a distributor of these fuels, as defined under state law, no state gasoline or diesel excise taxes apply to any purchases the Tribe makes as a distributor." (As quoted in 7/15/97 letter from Vining (Legal) at p. 2) First, as noted above, the statutory scheme pertaining to motor vehicle fuel tax was completely reworked, effective January 1, 2002. Due to the changes in relevant provisions that resulted, the discussion pertaining to "Motor Vehicle Fuel License Tax Law" in the July 15, 1997, letter is no longer valid.

Although changes were also made to the Diesel Fuel Tax Law at the same time as were the changes to the law pertaining to motor vehicle fuel, the discussion in our July 15, 1997 letter, pertaining to "backup tax" under the "Diesel Fuel Tax Law," continues to be substantively valid. (See footnote 4, *post.*) However, that discussion does not speak to the issue as to whether or how state motor vehicle and diesel fuel taxes apply to a Tribe that elects to become a distributor, i.e., to purchase fuel directly from a "supplier."[3]

[3] For guidance with respect to California fuel taxes and Indians, we look to Sales and Use Tax Regulation 1616, which provides: "For purposes of this regulation 'Indian' means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." (Cal. Code Regs., tit. 18, § 1616, subd. (d)(2).) "Indian organizations," which include "Indian tribes and tribal organizations," are exempt to the same extent that Indians are. (*Ibid.*) Regulation 1616 further provides: "'Reservation' includes reservations, rancherias, and any land held by the Untied States in trust for any Indian Tribe or individual Indian." (*Ibid.*) These definitions have not changed since 1997.

Generally, when a Tribe purchases fuel that will be resold at an on-reservation retail sales outlet, the fuel taxes are included as an expense in the price the Tribe pays for the fuel, in the same way as are the other business expenses that the supplier incurred in providing the fuel. In other words, no motor vehicle or diesel fuel taxes are imposed on the Tribe who will resell the fuel at retail, because the taxes have already been imposed on the supplier, farther up the chain of distribution, and the supplier passes that business expense on, as do subsequent purchasers, as one component of the price for which they sell the fuel.

On the other hand, under existing law, state excise taxes (such as motor vehicle and diesel fuel taxes) are not applicable to on-reservation Indians, except where authorized by Congress. (See *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 458-459 [holding that, without clear congressional authorization, states are without power to tax reservation lands and reservation Indians].)

However, as noted above, the legal incidence of the motor vehicle and diesel fuel taxes is imposed on the supplier of the fuel, when, for example, the fuel is removed from the rack or when the fuel enters the state. Thus, if the Tribe elects to purchase the fuel directly from a "supplier" and, upon authorization from the "supplier," the fuel is removed from the rack, and if removal occurs off the reservation, the Tribe must still pay the "cost" of the state excise taxes to the "supplier," who is liable for those taxes to the state. If the Tribe elects to import fuel into the state, the Tribe itself becomes liable to the state for the excise taxes, where "entry" into the state occurs off the reservation and is, therefore, a taxable activity and subject to imposition of the tax.[4]

[4] With respect to "backup tax," the Motor Vehicle Fuel Tax Law ad the Diesel Fuel Tax Law now contain essentially the same provisions. (See § 7364 and § 60058, respectively.) Should the Tribe somehow purchase or otherwise obtain motor vehicle or diesel fuel on which the fuel tax has not been paid (e.g., fuel is imported into California from a neighboring state through the reservation, where the reservation sits astride the state boundary between the two states), the obligation to collect a "backup tax" is imposed when such fuel is sold and delivered into the fuel tank of a motor vehicle fuel-powered or diesel-powered highway vehicle. Both the motor vehicle fuel tax law and diesel fuel tax law impose liability for the backup tax both on the end-seller/fueler and on the customer, as the highway vehicle operator. (See §§ 7320, 7367, 60034, 60057.) However, liability for the backup tax may not be imposed on either the Tribe as end-seller/fueler or on an Indian who resides on a reservation, either of whom purchases and delivers the fuel into the fuel tank of his highway vehicle on the reservation. (See *Oklahoma Tax Commission v. Chickasaw Nation, supra*, 515 U.S. at 458-459.) However, if the purchaser of the fuel is a non-Indian or an Indian who does not reside on a reservation, there is no legal bar to prevent the state from enforcing collection, by the Tribe, of the backup tax from a non-Indian. (*Id.*at p. 459.) Therefore, if the tax has not already been paid on the fuel, the Tribe would be obligated to collect the backup tax from non-Indian and non-reservation Indian purchasers. (See *California State Bd. of Equalization v. Chemehuevi Indian Tribe* (1985) 474 U.S. 9, 12 [holding that, where, under the California statutory scheme, the legal incidence of the cigarette tax fell on the non-Indian purchasers of cigarettes purchased from the Tribe's smoke shops, California had the right to require the Tribe to collect the cigarette tax on its behalf].)

If you have any questions regarding the information provided above or would like further assistance regarding any of these matters, please contact me at (916) 323-7713.

Enclosures:

- Letter of July 15, 1997, from Senior Tax Counsel Janet Vining.
- Letter of August 19, 1997, from Senior Tax Counsel Patricia Hart Jorgensen.

Cc: Louie Feletto (MIC: 33)
Doug Shepherd (MIC: 65)
Arlo Gilbert (MIC: 33)
Todd Keefe (MIC: 56)
Randy Ferris (MIC: 82)

July 15, 1997

Mr. (Redacted)
(Redacted)
(Redacted)

Re: State Taxation Within California Indian Country

Dear Mr. (Redacted)

I am writing in response to your [redacted] letter to the State Board of Equalization (the "Board") concerning the application of California's Motor Vehicle Fuel License Tax, Diesel Fuel Tax, Oil Spill Prevention, Administration and Response Fees and Childhood Lead Poisoning Prevention Fee to a gasoline and diesel station operated by the (redacted) Indians on its reservation in [redacted]. Your letter also requests information concerning California's Sales and Use Tax. The Legal Division's Sales and Use Tax Unit will respond to you separately concerning that request.

General Statutory Scheme for Taxing Fuel

The Motor Vehicle Fuel License Tax (Rev. & Tax. Code Section 7301, et seq.[1]) is imposed on each gallon of gasoline distributed or redistributed. The distributor, as a person who refines, blends or imports gasoline, is liable for the tax, which is then included in the cost of the product as it passes through the chain of distribution to the ultimate customer. The Diesel Fuel Tax (Section 60001, et seq.) is imposed on the diesel fuel supplier at the point that the diesel fuel is removed from the refinery or terminal rack or imported into the state. Like the tax on gasoline, the tax on diesel will be included in the cost of the fuel as it changes hands. When the Tribe is the retailer of the fuel sold at a filling station located on its reservation, the taxes on gasoline and diesel are imposed further up the chain of distribution and are not imposed on the Tribe, but rather are included in the cost of the fuel in the same way as other business expenses of the distributor or supplier.

However, if fuel is used by the Tribe or its members for purposes other than operating motor vehicles upon the public highways of the state, then it is our opinion that the Tribe or its members would be entitled to a refund of the Motor Vehicle Fuel License Tax and Diesel Fuel Tax paid for fuel used in this manner. The Tribe and its members would be required to maintain adequate documentation of the off-highway exempt usage in support of a claim for refund. Claims for refund of the Motor Vehicle Fuel License Tax are processed by the State Controller's Office, while claims for refund of the Diesel Fuel Tax are handled by the Board.

[1] Unless otherwise noted, all references are to the Revenue and Taxation Code.

Motor Vehicle Fuel License Tax Law

In your letter, you state that "if the Tribe becomes a distributor of these fuels, as defined under state law, no state gasoline or diesel excise taxes apply to any purchases the Tribe makes as a distributor."

The concept of a "distributor" is applicable only in the Motor Vehicle Fuel License Tax Law, which imposes a tax on gasoline. "Distributor" is defined in Section 7306 as every person who distributes motor vehicle fuel within the meaning of the term "distribution". "Distribution" is defined in Section 7305. (A copy of the Motor Vehicle Fuel License Tax Law is enclosed.) Generally, gasoline is sold by refineries for delivery in the state on a tax-paid basis, since the refinery has to report and pay the tax to the Board on the sale of the gasoline. Only "qualified distributors" can purchase or sell gasoline tax-free (see Title 18, Cal. Code of Regs., Section 1133). In order to become a qualified distributor, a distributor must own a refinery in the state (see Sections 7305, 7401, and 7451). Thus, any gasoline the Tribe obtains in the state will likely be purchased on a tax-paid basis.

If the Tribe obtains gasoline from out-of-state tax-free and sells it to non-Indian customers at wholesale or retail, such sale would be a distribution pursuant to Section 7305(d), and the purchaser would be required to report and pay the Motor Vehicle Fuel License Tax to the Board. Based on the analysis set forth by the U.S. Supreme Court in California State Board of Equalization et al v. Chemehuevi Indian Tribe (1985) 474 U.S. 9, the Board could require the Tribe to collect the tax from its customers and remit the tax to the Board.

We also note that any gasoline imported into California for use in the state must meet the formulation standards established by the California Air Resources Board.

Diesel Fuel Tax Law

Like the tax on gasoline, the Diesel Fuel Tax is imposed at a high level in the distribution chain. Thus, any diesel fuel the Tribe purchases in the state will most likely be purchased on a tax-paid basis, since the tax will have become due when the diesel fuel was removed from the refinery or terminal rack, and any subsequent purchasers will be required to reimburse their suppliers for the tax. (A copy of the Diesel Fuel Tax Law is enclosed.)

If the Tribe obtains diesel fuel tax-free and sells it at a retail gas station, the delivery of the tax free diesel fuel into the fuel tank of a diesel-powered highway vehicle is subject to the diesel "backup tax" (see Section 60058). Both the highway vehicle operator (defined in Section 60027) and the end seller (defined in Section 60034) are liable for the backup tax. The backup tax could not be imposed directly on the Tribe operating as an end seller. However, based on the analysis in the Chemehuevi decision, the Board could impose on the Tribe the obligation to collect the backup tax from highway vehicle operator and remit it to the Board.

As with gasoline, any diesel imported into California for use in the state must meet the formulation standards established by the California Air Resources Board.

Oil Spill Prevention and Administration Fee and Oil Spill Response Fee

The Oil Spill Prevention and Administration Fee is imposed on persons who own crude oil or petroleum products which are received at a marine terminal, and is collected by the marine terminal operator from the owner of the crude oil or petroleum products. The fee is also imposed on pipeline operators (see Government Code Section 8670.40.) The Oil Spill Response Fee is imposed on persons who own petroleum products which are received at a marine terminal, and is collected by the marine terminal operator from the owner and remitted to the Board. The Oil Spill Response Fee is also imposed on the operators of pipelines and refineries (see Government Code Section 8670.48). (A copy of the relevant statutes is enclosed.)

The Oil Spill Prevention and Administration Fee and Oil Spill Response Fee are imposed on the operators of marine terminals, pipelines, and refineries. These fees are not imposed on the Tribe, but rather are included in the cost of the fuel in the same manner as other business expenses of the fuel supplier or distributor.

Childhood Lead Poisoning Prevention Fee

The Childhood Lead Poisoning Prevention Fee is imposed on manufacturers and other persons that engage in or have engaged in the stream of commerce of lead or products containing lead or who are otherwise responsible for identifiable sources of lead which have contributed to environmental lead contamination (see Health and Safety Code Section 105310). The fee is paid by gasoline distributors, paint companies, and certain facilities that report releases of lead into ambient air in the state (see Title 18, Cal. Code of Regulations, Sections 33001-33040). (A copy of the relevant statutes and regulations is enclosed.) Generally, the Childhood Lead Poisoning Prevention Fee will not be imposed on the Tribe, but instead will be imposed higher in the distribution chain and included in the cost of the fuel in the same manner as other business expenses of the fuel supplier or distributor.

If you have any additional questions, please feel free to contact me at the above number.

Very truly yours,

Janet Vining
Senior Tax Counsel

Enclosures

JV:lm

Cc: Mr. Ed. King, Chief-Fuel Taxes Division MIC: 33
Ms. Mary C. Armstrong, Assistant Chief Counsel

August 19, 1997

Mr. (Redacted)
(Redacted)
(Redacted)

Re: State Taxation Within California Indian Country
Collection of Sales and Use Taxes By The Tribe

Dear Mr. (Redacted)

First, I wish to apologize for the delay in our response to your inquiry of [redacted]. Your inquiry was addressed to the wrong mailing unit and was not routed to the Legal Division's Sales and Use Tax Unit until the middle of July.

You explain that your client, the (redacted) Indians, located in the northern portion of (redacted) County, recently opened a gasoline and diesel station on its reservation and is currently paying all state diesel, gasoline and sales taxes as requested by the distributor. You specifically inquire about the application of California's Sales and Use Tax, Motor Vehicle Fuel License Tax, Diesel Fuel Tax, Oil Spill Prevention Administration and Response Fees, and Childhood Lead Poisoning Prevention Fees. In a letter dated July 15, 1997, Janet Vining, Senior Tax Counsel of the Legal Division's Special and Administration Section, responded to your inquiries relative to the Motor Vehicle Fuel License Tax, Oil Spill Prevention Administration and Response Fees, and Childhood Lead Poisoning Prevention Fees.

This letter is in response to your inquiries regarding the collection of sales and use tax. You have first inquired whether the exemption from sales and use tax, as explained in Regulation 1616(d)(3)(A)1., applies to purchases made on your client's reservation by members of another tribe who reside on other reservation or trust land. You next inquire about documentation needed to support requests for refund for sales and use taxes for purchases make by Indians residing on reservations. In addition, you inquire whether gasoline and fuel distributors are required to collect sales tax pursuant to collect sales tax prepayment on their products, since the tax imposed on sales to non-Indians and Indians who do not reside on reservations is considered to be a use tax. Your last two inquiries are whether the Tribe needs to register with the Board and whether it is possible to develop and arrangement whereby the state makes periodic refunds of pre-collected sales and use tax attributable to purchases made by Indians residing on reservations.

As you know, the general rule is that retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempted by statute. (Rev. & Tax. Code § 6051.)

A retail sale is a sale for any purpose other than resale in the regular course of business. (Rev. & Tax.

Code § 6007.) However, Indians living on Indian reservations enjoy a special status by federal treaty. For example, Regulation 1616(d)(3)(A)1., provides that:

> "Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation."

Regulation 1616(d)(3) defines an "Indian" as "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of Interior." This subdivision also defines "reservation" as including reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian."

As written, there is nothing in subdivision (d)(3)(A)1., which requires that the Indian purchasing property from an Indian retailer on an Indian reservation must either be a member of the same tribe as the Indian retailer or reside on the reservation where the purchase is made. All that is required is for the purchasing Indian to reside on a reservation and for the purchased property to be used on reservation property more than 50 percent of the time within the first year that the property is purchased. Accordingly, in response to your first inquiry, sales to Indians which live on other reservations and are not members of the (redacted) Tribe qualify for the exemption provided under Regulation 1616(d)(3)(A)1. As explained in the last sentence of this subdivision of Regulation 1616, if the property purchased is used by the purchasing Indian off reservation premises more than 50 percent during the first twelve month after the purchase, the purchasing Indian is required to pay use tax.

You inquire as to what type of information or documentation is required by your client to verify a purchaser's Indian heritage and residency to support a claim for refund of pre-paid sales and use taxes attributable to purchases made on reservations by Indians who reside on reservations. You need to obtain information that documents that the purchaser is an Indian who resides on a reservation. It is my understanding that the Bureau of Indian Affairs issues an identification card to all Indians plus a letter documenting that the identified Indian resides on a reservation. Accordingly, a copy of the purchaser's identification card, plus the date of the purchase, the purchase amount and the amount of the applicable sales and use tax should be retained to support a claim for refund. The process for filing a claim for refund will be explained below.

Your next inquiry is whether it is appropriate for the distributors of the gasoline and diesel to pre-collect the sales tax since, as explained in Regulation 1616(d)(3)(A)2., the tax collected by Indian retailers on Indian reservations on purchases made by non-Indians and Indians who do not reside on a reservation is a use tax. As Ms. Vining explained in her letter of July 15, 1997, the distributors of gasoline and diesel

are liable for the collection of taxes imposed under The Motor Vehicle Fuel Tax (Rev. & Tax. Code §7301, et seq.) and under The Diesel Fuel Tax (Rev. & Tax. Code § 60001. et seq.). In addition, under The Sales and Use Code (Rev. & Tax Code § 6480 et seq. for Motor Vehicle Fuel and Rev. & Tax. Code § 6480.10 et seq. for Diesel Fuel.) distributors are also liable for the collection of a portion of the sales tax attributable to the retail sales of gasoline and diesel. As further explained by Ms. Vining, these pre-paid taxes are not imposed upon the Indian retailer but rather are imposed on the distributors, who pass this cost, as well as other costs of doing business, on to the Indian retailer.

You next question whether the Tribe is still required to register with Board for the collection of use taxes as provided under Regulation 1616(d)(3)(A)2.. This regulation provides that, in the case of sales by Indian retailers to non-Indians and Indians who do not reside on reservations, the Indian retailer is required to "collect use tax from such purchasers and must register with the Board for that purpose." There have been no changes to this regulation, accordingly this requirement is still, in effect.

Lastly, you inquire whether it is possible to develop a reciprocal arrangement with the state that allows for the periodic refund of all pre-paid sales and use taxes attributable to fuel purchased by qualified Indians. There is no mechanism in place at this time for periodic refunds of pre-paid taxes, thus, claims for refund must be filed in accordance with Revenue and Taxation Code section 6902. This section provides that, in the case of persons who are required to file on a yearly basis, claims for refund must be filed within three years following the last day of the calendar month following the one year period in which the overpayment was made. (Rev. & Tax. Code §6902(a)(2).) In the case of persons who file on other than an annual basis, their claims for refund must be filed within three years from the last day of the month following the close of the quarterly period in which the overpayment was made. (Rev. & Tax. Code §6902(a)(1).) In addition, refunds of pre-paid sales and use tax, the cost of which has been passed on to Indians residing on reservations, must be returned to each of the qualified Indians who made purchases which included the pre-paid tax. (See Rev. & Tax. Code § 6901.5.) If the pre-paid taxes attributable to fuel purchased by a qualified Indian, is deducted from the price of the fuel at the time of the sale, then the refund may be retained by the Indian retailer.

If you have any further questions, please feel free to contact this office again.

Sincerely,

Patricia Hart Jorgensen
Senior Tax Counsel

PHJ:cl

Cc: San Diego District Administrator (FH)