

Memorandum

To : Mr. Ramon J. Hirsig
Executive Director, MIC: 73

Date: June 24, 2010

From : Kristine Cazadd, Chief Counsel
Legal Department, MIC:83

*Robert D. Hirsig
for KC*

Subject : **Board Meeting, July 13-15, 2010**
Item J
Chief Counsel's Rulemaking Calendar
Regulation 1598, *Motor Vehicle and Aircraft Fuels*

Statutes 2010, chapter 11 (Assembly Bill 6 (2009-10 8th Extraordinary Session)), section 4, added Revenue and Taxation Code (RTC) section 6357.7 to provide a partial sales and use tax exemption from the retail sale of, and the storage, use, or other consumption in this state of, motor vehicle fuel, as defined in section 7326. Section 6357.7 provides that the partial exemption applies to the taxes imposed by RTC sections 6051, 6051.3, 6051.7, 6201, 6201.3, and 6201.7 (cumulative statewide 6% sales and use tax rate), but does not apply to the taxes imposed or administered pursuant to RTC sections 6051.2, 6051.5, 6201.2, and 6201.5, the Bradley-Burns Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.¹

To incorporate the new statutory provisions, we request your approval to place proposed revisions to Sales and Use Tax Regulation 1598 on the Chief Counsel's Rulemaking Calendar on July 13-15, 2010, for Board authorization to amend the regulation under California Code of Regulations, title 1, section (Rule) 100, without the normal notice and public hearing process. The revisions add a new subdivision (d), re-number current subdivisions (d) through (i) as subdivisions (e) through (j), respectively, update the internal cross-references to the re-numbered subdivisions, update the price per gallon of gasoline and diesel fuel, state excise tax rates, and sales tax rates used in the examples in re-numbered subdivision (e), and update Regulation 1598's reference note to include RTC section 6357.7. The changes are appropriate for processing under Rule 100 because they make the regulation consistent with a statutory change, update examples, and update the regulation's reference note, and do not materially alter any requirement, right, responsibility, condition, prescription or other regulatory element of any California Code of Regulations provision.

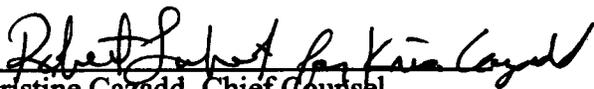
Attached is a strikeout and underlined version of the regulation illustrating the proposed revisions.

¹ For ease of reference, the sales and use tax rates are available at <http://www.boe.ca.gov/news/sp111500att.htm>.

If you have any questions regarding this request, please let me know or contact Mr. Bradley Heller at 916-324-2657.

Recommendation by:

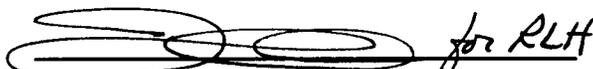
Approved:


Kristine Cazadd, Chief Counsel


Ramon J. Hirsig, Executive Director

Approved:

BOARD APPROVED
At the 7/12/2010 Board Meeting


Randie L. Henry, Deputy Director
Sales and Use Tax Department


Diane Olson, Chief
Board Proceedings Division

Attachments

- cc: Ms. Randie L. Henry (MIC 43)
- Ms. Diane Olson (MIC 80)
- Mr. Randy Ferris (MIC 82)
- Mr. Bradley M. Heller (MIC 82)
- Mr. Jeffrey L. McGuire (MIC 92)
- Mr. Geoffrey E. Lyle (MIC 50)
- Ms. Leila Hellmuth (MIC 50)
- Mr. Bradley Miller (MIC 50)

Regulation 1598. Motor Vehicle and Aircraft Fuels.

Reference: Sections 6011, 6012, 6245.5, 6357, 6357.5, 6357.7, 6385, 6423, Revenue and Taxation Code.

(a) IN GENERAL. Sales tax or use tax applies to the sale or use of fuel for propelling motor vehicles or aircraft or for other purposes, except as stated below.

(b) EXCEPTIONS.

(1) Neither the sales tax nor the use tax applies to the sale or use of motor vehicle fuel used in propelling aircraft, the distribution of which in this state is subject to the tax imposed by Part 2 (commencing with Section 7301) of Division 2 of the Revenue and Taxation Code. This type of fuel includes gasoline and similar fuels but does not include aircraft jet fuel. (See subdivision ~~(h)~~(g) for requirements for supporting aircraft fuel exemptions.)

(2) Neither the sales tax nor the use tax applies to the sale or use of aircraft fuel sold to an air common carrier for immediate consumption or shipment in its business as an air common carrier on a flight whose final destination is a foreign destination (see Regulation 1621, Sales to Common Carriers).

(c) MEASURE OF TAX.

(1) The measure of tax includes:

(A) The tax imposed by the United States upon importers or producers of gasoline, diesel, and jet fuel, except as provided in (c)(2)(D) and (c)(2)(E),

(B) The tax imposed upon distributors of gasoline and similar fuels by the State of California pursuant to Part 2 of Division 2 of the Revenue and Taxation Code, and which has not been refunded, and

(C) The tax imposed by the State of California on aircraft jet fuel pursuant to Chapter 2.5 of Part 2 of Division 2 of the Revenue and Taxation Code.

(2) The measure of tax does not include:

(A) The use fuel tax, including the annual flat rate fuel tax, imposed by the State of California pursuant to Part 3 of Division 2 of the Revenue and Taxation Code on the following fuels:

1. Compressed natural gas.
2. Liquid natural gas.
3. Liquefied petroleum gas.

Regulation 1598. Motor Vehicle and Aircraft Fuels.

4. Ethanol or methanol containing not more than 15 percent gasoline or diesel fuel.

5. All other fuels not taxed under Parts 2 or 31 of Division 2 of the Revenue and Taxation Code.

(B) The diesel fuel tax, imposed by the State of California pursuant to Part 31 of Division 2 of the Revenue and Taxation Code.

(C) The federal retailer's excise taxes on:

1. Gasoline used as a fuel in noncommercial aircraft.
2. Jet fuel used as a fuel in noncommercial aircraft.
3. Diesel fuel.
4. Special motor fuels.

(D) Prior to July 1, 1995, the federal excise tax imposed pursuant to Section 4091 of the Internal Revenue Code with respect to diesel fuel and jet fuel for which the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for the federal excise tax paid. (See subdivision (i)(h) for requirements for supporting claimed exclusions.)

(E) Beginning July 1, 1995, the federal excise tax imposed pursuant to Sections 4081 or 4091 of the Internal Revenue Code with respect to gasoline, diesel, and jet fuels for which the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for the federal excise tax paid. (See subdivision (i)(h) for requirements for supporting claimed exclusions.)

(F) Beginning January 1, 2001, the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code with respect to gasoline, diesel, and jet fuels for which the purchaser provides a valid certificate pursuant to subdivision (j)(i).

(d) PARTIAL EXEMPTION FOR MOTOR VEHICLE FUEL. Operative July 1, 2010, section 6357.7 of the Revenue and Taxation Code provides a partial exemption from sales and use tax for the sale of, and the storage, use, or other consumption in this state of motor vehicle fuel. "Motor vehicle fuel" means gasoline and aviation gasoline and does not include jet fuel, diesel fuel, kerosene, liquefied petroleum gas, natural gas in liquid or gaseous form, alcohol, or racing fuel, as defined in the Motor Vehicle Fuel Tax Law.

The partial exemption applies to the taxes imposed by sections 6051, 6051.3, 6051.7, 6201, 6201.3, and 6201.7 of the Revenue and Taxation Code (cumulative statewide 6% sales and use tax rate), but does not apply to the taxes imposed or administered pursuant to sections 6051.2, 6051.5, 6201.2, and 6201.5 of the Revenue and Taxation Code, the Bradley-Burns

Uniform Local Sales and Use Tax Law, the Transactions and Use Tax Law, or section 35 of article XIII of the California Constitution.

(c)(d) SALES OF MOTOR VEHICLE FUEL ON SALES TAX-INCLUDED BASIS.

Sales tax reimbursement will be deemed included in the total price per gallon of gasoline dispensed through an apparatus on which there is a price per gallon display including all taxes as required by Business and Professions Code Section 13470. Sales tax reimbursement will be deemed included in the total price per gallon of other motor vehicle fuel if the retailer posts on the premises a notice reading substantially as follows:

"The price per gallon of all motor vehicle fuel includes reimbursement for applicable sales taxes computed to the nearest mill."

Following are examples of prices computed on a tax-included basis:

(A)	Sales price per gallon of gasoline net of all taxes.....	\$2.4351 153
	Federal excise tax *.....	.184
	State excise tax*.....	.3531 80
	Total	\$2.9721 517
	* Sales tax reimbursement computed at $7\frac{1}{4}\%$ * of \$2.9721 517... ..	.0671 10
	Total tax-included price per gallon.....	\$3.0391 627

(B)	Sales price per gallon of diesel fuel net of all taxes.....	\$2.3551 103
	Federal excise tax*.....	.244
	Total	\$2.5991 347
	* Sales tax reimbursement computed at $9\frac{1}{4}\%$ * of \$2.5991 347.. ..	.2340 98
	State excise tax *.....	.1361 80
	Total tax-included price per gallon.....	\$2.9691 625

* The rates used are for purposes of this example only. The rates in effect at the time of the sale and at the place where the business is located must be used in computing the tax-included selling price of fuel.

(f)(e) APPLICATION OF SALES OR USE TAX TO FUEL FURNISHED WITH LEASED VEHICLES OR AIRCRAFT.

The lessor is the retailer of fuel furnished to a lessee of a vehicle or an aircraft if the sales price of the fuel is separately stated from the rental charge for the vehicle or aircraft. The lessor is also the retailer of fuel furnished to a lessee under a lease which is a "sale" or "purchase" (see Regulations 1660 and 1661) and under which the rental charge includes fuel for the operation of the vehicle or aircraft (such arrangements are sometimes called "wet rentals"). The lessor may purchase such fuel for resale.

The lessor is the consumer of fuel furnished to a lessee of a vehicle or an aircraft under a lease which is not a "sale" or "purchase" (see Regulations 1660 and 1661) and under which the rental charge includes fuel for the operation of the vehicle or aircraft. If a lessor of mobile transportation equipment elects under Regulation 1661 to report and pay use tax measured by the "fair rental value" of the mobile transportation equipment leased, the "fair rental value"

does not include the sale price to the lessor of fuel which is furnished under the lease to the lessee.

~~(g)(f)~~ REFUNDS OF EXCISE TAX

(1) FEDERAL EXCISE TAXES.

The refund of the federal excise tax on gasoline, diesel, or jet fuel (either by direct refund or as a credit against income tax) is an adjustment to the sales price of the gasoline, diesel, or jet fuel. Accordingly, the retailer who paid the sales tax or the purchaser who paid use tax measured by the sales price of the gasoline, diesel, or jet fuel which included that federal excise tax may file with the Board a claim for refund of tax measured by the amount of the federal excise tax so refunded or credited. The claim must be supported by proof of the exempt use of the gasoline, diesel, or jet fuel and of the refund or credit of the federal excise tax to the purchaser.

(2) SALES OR USE TAX REFUNDS. If the sales or use tax refund is made to a person other than the consumer, the person receiving the refund must pay it to the consumer.

~~(h)(g)~~ SUPPORTING DATA FOR AIRCRAFT FUEL EXEMPTIONS. Sellers of motor vehicle fuel which, at the time of sale, is exempt from sales and use tax under subdivision (b)(1), shall secure and retain documentary evidence to support their exempt sales.

(1) The exemption with respect to motor vehicle fuel sold and delivered directly into the fuel supply tank of aircraft may be supported either by a properly completed sales invoice or an aircraft fuel exemption certificate in the form prescribed in subdivision ~~(h)(g)~~(2). If a sales invoice is used, it must show the purchaser's name and address, the aircraft identification number, the number of gallons sold, the price per gallon, the amount of sale, the date of sale, and the name and address of the seller.

(2) The exemption with respect to retail sales of motor vehicle fuel delivered into the purchaser's storage facilities or receptacles other than the fuel tanks of aircraft, for use in propelling aircraft shall be supported by an aircraft fuel exemption certificate and an invoice. An exemption certificate in substantially the following form and signed by the purchaser shall be retained by the seller as evidence to support such exempt sales. The exemption certificate will be valid until revoked in writing by the purchaser.

Exemption Certificate for Motor Vehicle Fuel for Propelling Aircraft

This certificate may be issued by a purchaser for purchases of motor vehicle fuel (other than aircraft jet fuel) for use in propelling aircraft.

I HEREBY CERTIFY: That I am the owner or operator of the aircraft identified below; that the motor vehicle fuel which I shall purchase from _____

_____ will be used in propelling aircraft; and that the distribution of this fuel is subject to the tax imposed by the Motor Vehicle Fuel License Tax Law (Revenue and Taxation Code section 7301 et seq.) and not subject to refund.

In the event that any of this motor vehicle fuel is used for purposes other than propelling aircraft, it is understood that I am required by the Sales and Use Tax Law to report and pay tax measured by the purchase price of such fuel. This certificate is valid until revoked in writing by the purchaser.

Purchaser: _____
(Company Name)

Address: _____

Phone Number: _____

Signature: _____ Date: _____
(Signature of Authorized Agent)

Title: _____
(Owner, Partner, Purchasing Agent, etc.)

Seller's Permit No. (if any): _____

Identification Numbers of Aircraft Owned or Operated

_____	_____
_____	_____
_____	_____
_____	_____

(i)(h) CERTIFICATE FOR EXCLUSION OF FEDERAL EXCISE TAXES FROM MEASURE OF TAX. Sellers of gasoline, diesel, or jet fuel for which the purchaser claims exclusion from the measure of tax under subdivision (c)(2)(D) or (c)(2)(E) shall secure from the purchaser and retain a certificate in substantially the form prescribed in subdivision (i)(h)(1).

(1) The certificate prescribed below shall relieve the seller from liability for any tax due only if it is timely taken in good faith. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of property to the purchaser. The certificate will be valid until revoked in writing by the purchaser.

Certificate for the Exclusion of Sales and Use Tax on Federal Excise Taxes

This certificate may be issued by a purchaser whose entire fuel purchase is entitled to a direct refund or credit for the federal excise taxes for income tax purposes. This certificate entitles the seller to exclude the amount of federal excise taxes imposed on fuel purchases from the measure of sales and use tax.

I HEREBY CERTIFY: That I am entitled to either a direct refund or credit against my income tax for the federal excise tax paid pursuant to Internal Revenue Code Section 4081 or 4091 for the gasoline/diesel/jet fuel I shall purchase from

In the event the fuel is not used in a manner which entitles me to a direct refund or credit against my income tax or if I do not receive such refund or credit, it is understood I am required by the Sales and Use Tax Law to report and pay tax measured by the amount of federal excise tax paid to the extent the seller has not remitted sales or use tax measured by that amount. This certificate is valid until revoked in writing by the purchaser.

Purchaser: _____
(Company Name)

Address: _____

Phone Number: _____

Signature: _____ Date: _____
(Signature of Authorized Agent)

Title: _____
(Owner, Partner, Purchasing Agent, etc.)

Seller's Permit No. (if any): _____

(2) Any person, including any officer or employee of a corporation who gives the certificate described in subdivision ~~(i)(h)~~(1) and who knows at the time of purchase that he or she is not entitled to either a direct refund or credit against his or her income tax is liable to the state for the amount of sales or use tax that would be due had he or she not given the certificate. In addition to the tax, interest, and other penalties, the person is liable for a penalty of 10 percent of the tax or five hundred dollars (\$500), whichever is greater, for purchases made for personal gain or to evade payment of taxes.

~~(j)(i)~~ **ALTERNATE CERTIFICATE FOR EXCLUSION OF FEDERAL EXCISE TAXES FROM MEASURE OF TAX.** On and after January 1, 2001, a purchaser of gasoline, diesel, or jet fuel who is qualified under subdivision ~~(j)(i)~~(1) may issue a certificate in substantially the form set forth in subdivision ~~(j)(i)~~(3) to the seller of that fuel. A seller who takes and retains such certificate shall be relieved of liability for tax due measured by the federal excise taxes imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code on the fuel sold under the certificate, provided the certificate is timely taken in good faith. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of property to the purchaser. The certificate will be valid until revoked in writing by the purchaser.

(1) A purchaser is qualified and may issue a certificate under subdivision ~~(j)(i)~~ if satisfying all the following requirements:

(A) The purchaser was entitled to either a direct refund or credit against his or her income tax for the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for more than 50 percent of all the purchaser's purchases of gasoline, diesel, and jet fuel during the prior calendar year on an aggregate basis. A purchaser who was entitled to a direct refund or credit against his or her income tax for the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for more than 50 percent of that purchaser's purchases of one type of fuel, e.g., diesel, but not more than 50 percent of all that purchaser's purchases of gasoline, diesel, and jet fuel on an aggregate basis is not a qualified purchaser, and may not issue a certificate under this subdivision, for any of that purchaser's purchases of fuel.

(B) The purchaser's business remains substantially the same as during the prior calendar year whereby the purchaser reasonably expects to be entitled to either a direct refund or credit against his or her income tax for the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for more than 50 percent of the purchaser's purchases of gasoline, diesel, and jet fuel on an aggregate basis.

(C) The purchaser holds a valid California seller's permit.

(2) With respect to any fuel purchased under the certificate which is used in a manner whereby the purchaser is not entitled to a direct refund or credit against his or her income tax of the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue

Code, the purchaser is liable for use tax on the amount of that federal excise tax. The purchaser must report and pay such use tax with the purchaser's return for the period in which the fuel was used. A certificate may not be issued under this subdivision when the purchaser knows that all of the fuel that would be purchased under the certificate will be used in a manner whereby the purchaser is not entitled to a direct refund or credit against his or her income tax of the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code.

(3) A certificate issued under this subdivision shall be in substantially the following form:

**Revenue and Taxation Code Section 6245.5 Certificate for the
Exclusion of Sales and Use Tax on Federal Excise Taxes**

This certificate may be issued for purchases of gasoline, diesel, or jet fuel by a purchaser who meets all the required conditions. This certificate entitles the seller to exclude the amount of federal excise taxes imposed on such fuel purchases from the measure of sales and use tax.

I HEREBY CERTIFY that I satisfy all of the following conditions:

1. I was entitled to either a direct refund or credit against my income tax for the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for more than 50 percent of my purchases of gasoline, diesel, and jet fuel on an aggregate basis during the prior calendar year.
2. My business remains substantially the same as during the prior calendar year such that I reasonably expect to be entitled to either a direct refund or credit against my income tax for the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for more than 50 percent of my purchases of gasoline, diesel, or jet fuel on an aggregate basis.
3. I hold a valid California seller's permit, the number for which is set forth below.

With respect to any fuel that is not used in a manner which entitles me to a direct refund or credit against my income tax of the federal excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code, or if I do not receive such refund or credit, I will report and pay tax, measured by the amount of the federal excise tax that had been paid in connection with that fuel, with my return for the period in which the fuel is used. This certificate is valid until revoked in writing by the purchaser.

Purchaser: _____
(Company Name)

Address: _____

Signature: _____ Date: _____
(Signature of Authorized Agent)

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Phone Number: _____

Title: _____
(Owner, Partner, Purchasing Agent, etc.)

Seller's Permit No.: _____