State of California

Board of Equalization
Legal Department-MIC: 82

Memorandum

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

Date: August 21, 2006

From: Carolee D. Johnstone
Tax Counsel, MIC: 82

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

Subject: Inc./Exempt Bus Operator Application

In a memorandum dated March 8, 2006, you asked that my prior memorandum regarding the above-referenced taxpayer and the application of the Diesel Fuel Tax Law be reissued to reaffirm the analysis therein and to analyze, additionally, the application of the Use Fuel Tax Law. My prior memorandum, dated July 12, 2005, specifically addressed the question of whether (Taxpayer) qualifies as an "exempt bus operator" with regard to any of the transportation services it provides pursuant to the contracts the Taxpayer has submitted in support of its application for exemption.

The legal opinions expressed in the July 12, 2005, memorandum are still applicable: Taxpayer qualifies as an Exempt Bus Operator for two of its five operations under the Diesel Fuel Tax Law, as discussed below. In addition, Taxpayer also qualifies for exemption for two of its five operations under the Use Fuel Tax Law, also discussed below.

Diesel Fuel Tax Law

Section 60039 of the Revenue and Taxation Code[1] defines the types of transportation services that do and do not qualify as an "exempt bus operation." Section 60039 provides, as is relevant to the transportation services provided by the Taxpayer:

> (a) "Exempt bus operation" consists of the following:
>
> [¶] . . . [¶]
>
> (2) Any private entity providing transportation services for the transportation of people under contract or agreement, except general franchise agreements, with a public agency authorized to provide public transportation services, only for diesel fuel consumed while providing services under those contracts or agreements . . . ."
>
> [¶] . . . [¶]

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

(4) Any common carrier of passengers operating exclusively on any line or lines within the limits of a single city between fixed termini or over a regular route, 98 percent of whose operations, as measured by total route mileage operated, are exclusively within the limits of a single city, and who by reason thereof is not a passenger stage corporation subject to the jurisdiction of the Public Utilities Commission.

(5) Any school district . . . owning, leasing, or operating buses for the purpose of transporting pupils to and from school and for other school . . . activities involving pupils, including, but not limited to, field trips and athletic contests.

(6) Any private entity providing transportation services for the purposes specified in paragraph (5) under contract or agreement with a school district . . . , only for diesel fuel consumed while providing services under those contracts or agreements . . . .

(b) "Exempt bus operation" as defined in subdivision (a), shall not be applicable to a charter-party carrier of passengers. The term "charter-party carrier of passengers" has the same meaning as that specified in Section 5360 of the Public Utilities Code and shall further include those transportation services described in subdivisions (a) and (e) of Section 5353 of the Public Utilities Code, if that transportation service is rendered as contract carriage and not as common carriage of passengers." (§ 60039 [emphasis added].)

Further, an "exempt bus operator" is "any person that owns, operates, or controls an exempt bus operation." (§ 60040.)

With regard to transportation services Taxpayer provides under contract or agreement with each of the entities in question:

1. [illegible] Metropolitan Transit District (Transit District), Taxpayer qualifies as an Exempt Bus Operator, pursuant to section 60039, subdivision (a)(2).

2. [illegible] Unified School District (School District), Taxpayer qualifies as an Exempt Bus Operator, pursuant to section 60039, subdivision (a)(5) and (6).

3. City of [illegible] (City), it appears that Taxpayer does not qualify as an Exempt Bus Operator, pursuant to section 60039, subdivision (b), because the service is a charter-party carrier activity rendered as contract carriage and not common carriage.

4. [illegible], Inc. (formerly [illegible], Inc., dba [illegible]) (Broker), Taxpayer does not qualify as an Exempt Bus Operator, pursuant to 60039, subdivision (a)(2).

5. [illegible], Inc. (collectively, Regional Centers), Taxpayer does not qualify as an Exempt Bus Operator, pursuant to 60039, subdivision (a)(2).

Transit District Contract

Transportation services provided by Taxpayer under contract with Transit District qualify as an "exempt bus operation" pursuant to section 60039, subdivision (a)(2). Taxpayer is a "private entity" that is "providing transportation services for the transportation of people" under a Professional Services Contract with Transit District. Transit District is a "public agency" which is "authorized to provide public transportation services."[2] However, it should be noted that this exemption is applicable only to the "diesel fuel consumed while providing services under" this contract. (§ 60039, subd. (a)(2).)

School District Agreement

Transportation services provided by Taxpayer under contract with School District qualify as an "exempt bus operation" pursuant to section 60039, subdivision (a)(6). Again, Taxpayer is a "private entity providing transportation services"; it provides these services under agreement with a school district, pursuant to the terms and conditions set out in a Purchase Order issued by School District. Pursuant to section 60039, subdivision (a)(5), the purpose of the services is to provide transportation for special education students to and from home and school (i.e., "door-to-door"). As noted above, this exemption is also applicable only to the "diesel fuel consumed while providing services under" this agreement. (§ 60039, subd. (a)(6).)

City Agreement

While transportation services provided by Taxpayer under agreement with City might otherwise qualify as an "exempt bus operation" under section 60039, pursuant to one or more of the definitions included in subdivision (a), Taxpayer does not qualify as an "exempt bus operation" under section 60039, based on the facts as we understand them, because it is a "charter-party carrier of passengers," rendering service as contract carriage and not as common carriage, pursuant to subdivision (b).

Under an agreement with City, Taxpayer is providing shuttle service between local Bay Area Rapid Transit (BART) and Caltrain stations and specific locations in City, according to a

[2] Whether Transit District is a "public agency" for purposes of section 60039 is not specifically addressed in the codes. However, where "public agency" is defined with respect to other public utility matters, the definition includes "a district." (See, e.g., Gov. Code, § 54999.1, subd. (c), and Pub. Util. Code, § 16871.) Therefore, it is reasonable to conclude that Transit District is a "public agency" for purposes of section 60039.

shuttle schedule and route map which are incorporated as part of the agreement.[3] (Vendor Agreement, ¶¶ A. & 2.) It is our understanding that only persons who are employed by a designated group of employers, whose businesses are located in [illegible] in City, are served in accordance with Taxpayer's agreement with City. (Thus, it appears that the services are rendered as contract carriage, not common carriage.) According to this agreement, these employers have executed a consortium agreement to financially and otherwise support the "employer-based BART and Caltrain shuttle program." (See Vendor Agreement, ¶¶ B. & E. [designating these employers as "Participating Employers"].)

Section 60039, subdivision (b), quoted above, excludes from the definition of "exempt bus operation" any operation construed to be a "charter-party carrier of passengers," as defined by the Public Utilities Code, plus some operations that the Public Utilities Code excludes from the definition.

Section 5360 of the Public Utilities Code defines a "charter-party carrier of passengers" as "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in [California]." Section 5353 of the Public Utilities Code excludes from the definition of "charter-party carrier of passengers" specific types of transportation services. As is relevant here, under most circumstances, "[t]ransportation service rendered wholly within the corporate limits of a single city or city and county and licensed or regulated by ordinance" would be excluded from the definition. (Pub. Util. Code, § 5353, subd. (a).)

However, for purposes of section 60039, subdivision (b), such a transportation service is declared to be a "charter-party carrier of passengers" that is not eligible as an exempt bus operation "<u>if that transportation service is rendered as contract carriage and not a common carriage of passengers</u>." (§ 60039, subd. (b) [emphasis added].) "Common carrier" is defined in the Public Utilities Code to mean "every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided" and includes "'[e]very passenger stage corporation' operating within this state." (Pub. Util. Code §§ 211 & 211, subd. (c).) There is no definition of "contract carriage" in the Public Utilities Code, but, in the Civil Code, "contract of carriage" is defined as "a contract for the conveyance of property, persons, or messages, from one place to another." (Civ. Code, § 2085.)

The transportation service provided by Taxpayer, pursuant to its agreement with City, appears to be "wholly within the corporate limits" of City and "licensed or regulated by ordinance" by City, which would normally not constitute a "charter-party carrier of passengers," pursuant to Public Utility Code section 5353, subdivision (a). However, this service is rendered as contract carriage, not common carriage, and, therefore, constitutes a "charter-party carrier of passengers" for purposes of section 60039, subdivision (b). Accordingly, the transportation services Taxpayer provides pursuant to its agreement with City do not qualify as an "exempt bus operation" under section 60039.

---

[3] Exhibit "A," the "shuttle schedule and route map," is not included in the documents received from Taxpayer.

Broker Contract

Taxpayer has provided copies or partial copies of contracts between itself and Broker, both with Broker's current owner and with Broker's prior owner, and between Broker's prior owner and the contracting municipal corporation. Taxpayer has not provided a copy of any contract or agreement between Taxpayer and the contracting municipal corporation or of any other document evidencing contractual privity[4] between Taxpayer and the contracting municipal corporation.

Section 60039, subdivision (a)(2), specifies that, to qualify as an "exempt bus operation," a "private entity" must provide transportation services "under contract or agreement . . . with a public agency." Nothing in the documents Taxpayer provided supports the contention that Taxpayer is in contractual privity with the contracting municipal corporation, the "public agency." Taxpayer has a contractual relationship only with Broker, and Broker is "wholly responsible for the manner in which it performs the services and work requested by" the contracting municipal corporation. (Agreement Between the [contracting municipal corporation and Broker's prior owner], ¶ 14.a.)

California courts have consistently held that "statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed."[5] Further, "[t]he party claiming tax exemption has the burden of showing that it comes clearly within the terms authorizing exemption."[6]

Section 60039, subdivision (a)(2), clearly states that the private entity must be providing transportation services under contract or agreement with a public agency. To conclude that Taxpayer qualifies for an exemption as an "exempt bus operation," because it provides transportation services pursuant to a contract with Broker, who has entered into a contract with the contracting municipal corporation, the public agency, to provide transportation services, would be to enlarge or extend the exemption "beyond the plain meaning of the language employed."

---

[4] "Privity of contract" means, "[t]hat connection or relationship which exists between two or more contracting parties" that "was traditionally essential to the maintenance of an action on any contract." (Black's Law Dict. (6th ed. 1990) p. 1199, col. 2.)

[5] *Cedars of Lebanon Hospital v. County of Los* Angeles (1950) 35 C.2d 729, 734; *Honeywell Information Systems, Inc. v. County of Sonoma* (1974) 44 Cal.App.3d 23, 27; *Parfums-Corday, Inc. v. State Bd. of Equalization* (1986) 187 Cal.App.3d 630, 637 (*Parfums-Corday*); *Associated Beverage Co., Inc. v. Bd. of Equalization* (1990) 224 Cal.App.3d 192, 211 (*Associated Beverage*); *McDonnell Douglas Corp. v. State Bd. of Equalization* (1992) 10 Cal.App.4th 1413, 1420 (*McDonnell Douglas*).

[6] *H.J. Heinz Co. v. State Bd. of Equalization* (1962) 209 Cal.App.2d 1, 4 [25 Cal.Rptr. 685]; *Parfums-Corday, supra*, 187 Cal.App.3d at p. 637; *Associated Beverage, supra*, 224 Cal.App.3d at p. 211; *McDonnell Douglas, supra*, 10 Cal.App.4th at p. 1420.

It does not appear, from the documentation provided by Taxpayer, that the transportation services it provides under contract with Broker qualify for exemption as an "exempt bus operation" under section 60039, subdivision (a)(2). Further, it does not appear that any of the other definitions of "exempt bus operation" included in section 60039 apply to these transportation services. Taxpayer has the burden of showing that these services do fall within one of the section 60039 definitions, and it has not done so.

Regional Centers Contracts

Transportation services provided by Taxpayer under contracts with Regional Centers do not qualify as "exempt bus operations" under section 60039. As noted above, section 60039, subdivision (a)(2), requires that Taxpayer, as a private entity, provide transportation services under contract or agreement with a "public agency." However, regional centers are operated by "private nonprofit corporations," not public agencies. (See, e.g., Welf. & Inst. Code, § 4621, [stating "the [State Department of Developmental Services] . . . shall contract with appropriate private nonprofit corporations for the establishment of regional centers" (emphasis added)]; *Assn. for Retarded Citizens – California v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 389 [noting that regional centers are operated by "private nonprofit community agencies"].) The sample contract provided by Taxpayer identifies the parties to the contract as Taxpayer and a Regional Center, "a California nonprofit public benefit corporation." Therefore, the transportation services Taxpayer provides to Regional Centers do not qualify as an "exempt bus operation" under section 60039, subdivision (a)(2), or any other subdivision of section 60039.[7]

Use Fuel Tax Law

Specified entities that provide certain transportation services are partially[8] exempted from paying the Use Fuel Tax, pursuant to the Miller-Hayes Act, codified as section 8655 in the Use Fuel Tax Law. (§ 8655, subd. (a).) As is relevant here, subdivision (b) of section 8655 provides that no tax shall be imposed on the following:

> [¶] . . . [¶]
> (2) Any private entity providing transportation services for the transportation of people under contract or agreement, except general franchise agreements, with a public agency authorized to provide public transportation services, only for fuels consumed while providing services under such contracts or agreements . . . .
> [¶] . . . [¶]
> (4) Any common carrier of passengers operating exclusively on any line or lines within the limits of a single city between fixed termini or over a regular route,

[7] It appears, pursuant to its Vice President/General Manager's letter of January 15, 2005, that Taxpayer may no longer be claiming that the transportation services it provides under contract with the Regional Centers should be determined to be exempt bus operations.

[8] Entities that are exempted from the tax under section 8655, subdivision (b) must, "for the privilege of operating vehicles on state highways and freeways," pay to the Board one cent for each gallon or each 100 cubic feet of fuel used. (§ 8655, subd. (c).)

98 percent of whose operations, as measured by total route mileage operated, are exclusively within the limits of a single city, and who by reason thereof is not a passenger stage corporation subject to the jurisdiction of the Public Utilities Commission.

(5) Any school district . . . owning, leasing, or operating buses for the purpose of transporting pupils to and from school and for other school . . . activities involving pupils, including, but not limited to, field trips and athletic contests.
(6) Any private entity providing transportation services for the purposes specified in paragraph (5) under contract or agreement with a school district . . . , only for fuels consumed while providing services under those contacts [sic] or agreements . . . . (§ 8655, subd. (b).)

Further, subdivision (d) of section 8655 provides that:

The exemption provided for in subdivision (b) . . . shall not be applicable to fuel used by a charter-party carrier of passengers. The term "charter-party carrier of passengers" has the same meaning as that specified in Section 5360 of the Public Utilities Code and shall further include those transportation services described in subdivisions (a) and (e) of Section 5353 of the Public Utilities Code, if such transportation service is rendered as contract carriage and not as common carriage of passengers. (§ 8655, subd. (d).)

A comparison between language of the Use Fuel Tax Law exemption provisions and the language of the Diesel Fuel Tax Law "exempt bus operation" provisions clearly demonstrates that, for all intents and purposes, they are virtually the same. Subparagraphs (2), (4), (5), and (6) of subdivision (b) of section 60039 are comparable to subparagraphs (2), (4), (5), and (6), respectively, of subdivision (b) of section 8655. Further, the language of subdivision (b) of section 60039 is comparable to the language of subdivision (d) of section 8655. Therefore, the analysis provided above with respect to whether Taxpayer qualifies as an Exempt Bus Operator under the Diesel Fuel Tax Law also applies to whether the Taxpayer qualifies for exemption under the Use Fuel Tax Law.

Accordingly, with respect to the Use Fuel Tax and:

1. Transit District, Taxpayer <u>qualifies</u> for exemption, pursuant to section 8655, subdivision (b)(2).

2. School District, Taxpayer for exemption, pursuant to section 8655, subdivision (b)(5) and (6).

3. City, it appears that Taxpayer does <u>not</u> qualify for exemption, pursuant to section 8655, subdivision (d), because the service is a charter-party carrier activity rendered as contract carriage and not common carriage.

4. Broker, Taxpayer does not qualify for exemption, pursuant to section 8655, subdivision (b)(2).

5. Regional Centers, Taxpayer does not qualify for exemption, pursuant to section 8655, subdivision (b)(2).

If you have any questions regarding any of the above information or would like to discuss these matters further, please give me a call.

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