State of California

Board of Equalization
Legal Division-MIC: 82

M e m o r a n d u m

335.0800

Date: May 7, 1997

To : Mr. Robert Nunes
Chief, Annotations Project

From : David H. Levine
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Subject: Annotations 335.0016 and 570.1130

These annotations and the backup are incorrect. The sale of MTE to a person for the purpose of leasing is always a retail sale. (Rev. & Tax. Code §§ 6006(g)(4), 6010(e)(4).) A California MTE dealer who makes a sale to such a lessor is always making a retail sale, and that sale is *always* taxable when delivered in California unless the retailer takes a timely resale certificate. Such a lessor of MTC can *only* issue such a resale certificate for the limited purpose of reporting [its] use tax liability based on fair rental value ....” (Rev. & Tax. Code § 6092.1). That lessor *cannot* issue such a resale certificate in order to try to qualify for the section 6009.1 exclusion as the backup to this annotation has implicitly allowed. (Cf. *Yamaha v. State Bd. of Equalization* (2/21/97) Cal. Court of Appeal, 2d App.Dist; BTLG Annot. 570.0435 (5/19/95).) If a lessor issues such a certificate to avoid the payment of sales tax reimbursement, it owes tax on cost unless it makes a timely election to pay tax on fair rental value, which would have to be paid without regard to the location of the MTE during the lease. Under such circumstances, we never reach the *Stockton Kenworth* issue because section 6009.1 cannot apply.

The *Stockton Kenworth* issue is reached only if the lessor legitimately holds the MTE extax in California by means other than the issuance of resale certificates to avoid the application of sales tax (owed by the seller and collected from the lessor as reimbursement). That is, the applicable tax must be use tax owed by the lessor, and cannot be a situation where the applicable sales tax owed by the retailer was converted to a use tax situation by the issuance of a resale certificate. For example: a seller of MTE who purchases MTE for outright resale, and thereafter decides remove MTE from its legitimate resale inventory for lease; a lessor purchases MTE in California, but from a private party and not a dealer of MTE; or the lessor purchases the MTE outside California.

Please delete both these annotations. In addition, the backup also includes a reference on top to annotation 325.0065. I cannot find that in the book, but if there is any other annotation based on this backup, please delete it.

DHL/cmm

cc: Mr. John G. Abbott (MIC:85)
Ms. Rachel Aragon (MIC:85)
Ms. Leila Khabbaz (MIC:40)
Annotation Backup