State of California

Board of Equalization
Legal Department-MIC: 82

Memorandum

To : Debbie Kalfsbeek, Principal Auditor
Fuel Taxes Division (MIC:30)

Date: February 25, 2009

From : Carolee Johnstone, Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Telephone: (916) 323-7713

Subject: **ASSIGNMENT NO. 09-037**
REGIONAL CENTERS AND EXEMPT BUS OPERATIONS

A Decision and Recommendation issued by the Appeals Division in the case of Inc., dba , on (D&R), concluded that the transportation services provided by to regional centers in this state do not qualify for exemption as exempt bus operations under Revenue and Taxation Code section (Section) 60039, subdivision (a)(2), of the Diesel Fuel Tax Law.[1] (D&R, at pp. 8, 15, 18.) This memorandum is in response to your request for a reevaluation as to whether transportation services provided by a bus company to regional centers qualify for exemption from the diesel fuel tax as exempt bus operations under Section 60039.

Section 60039 defines the types of transportation services that do and do not qualify as "exempt bus operations" for purposes of determining what types of operations are exempt from paying the diesel fuel tax of 18 cents per gallon. In relevant part, subdivision (a)(2) of Section 60039 provides:

> (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, <u>with a public agency authorized to provide public transportation services</u>, only for diesel fuel consumed while providing services under those contracts or agreements . . . ." (Emphasis added.)

An "exempt bus operator" is "any person that owns, operates, or controls an exempt bus operation." (Rev. & Tax. Code, § 60040.)

Section 60039, subdivision (a)(2), requires that, where the bus operator is a private entity, the bus operator must provide transportation services under contract or agreement with a "public agency" in order to qualify as an exempt bus operation. As was noted in the D&R, regional centers are operated by "private nonprofit corporations," not public agencies. (D&R, at p. 15; see, e.g., Welf. & Inst. Code, § 4621, [stating "the [State Department of Developmental Services] . . . shall contract with appropriate <u>private nonprofit corporations</u> for the establishment of regional centers"

[1] Part 31 (commencing with section 60001) of Division 2 of the Revenue and Taxation Code.

(emphasis added)]; *Assn. for Retarded Citizens – California v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 389 (*Assn. for Retarded Citizens*) [noting that regional centers are operated by "private nonprofit community agencies"].) Based on this language, the D&R concluded, as noted above, that, since the regional centers were not public agencies, the transportation services at issue did not qualify as exempt bus operations. (D&R, at p. 15.)

Generally, the fact that a private entity providing transportation services has not contracted directly with a "public agency" would preclude the private entity from qualifying for exemption from the diesel fuel tax as an exempt bus operation. However, in *Appeal of MV Transportation, Inc.* (Case IDs. 136040, 136141, and 136097) (*MV Transportation*), the Board, itself, decided unanimously (5/0) on August 6, 2003, that, for purposes of providing transportation services to regional centers, MV Transportation qualified for exemption from the diesel fuel tax as an exempt bus operation and granted MV Transportation's petition. The Board did not explicitly discuss the legal basis for its decision in *MV Transportation*, but it may be inferred that the Board found the regional centers to be "public agencies authorized to provide public transportation services" with which MV Transportation contracted to provide transportation services.

The regional centers provide services and supports to developmentally disabled persons, under contract with the State Department of Developmental Services (DDS), pursuant to the Lanterman Developmental Disabilities Services Act.[2] The regional centers in California stand in a unique position vis-à-vis the DDS, the public agency that regulates them, to the extent that, at least with respect to the transportation services a regional center purchases for its clients, the regional centers may be considered to be an alter ego of the DDS.[3] (See, e.g., *People v. Genovese* (2008) 168 Cal.App.4th 817, 830 ["alter ego" is when a person steps into the shoes of another person]; *Country Eggs, Inc. v. Kawamura* (2005) 129 Cal.App.4th 589, 597 and *Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 534, 536 [an entity may be labeled as a "state agency" in one context even if it is not so labeled in other contexts; it depends on the relationship between the entity and the state].) The DDS provides virtually all of the funding for the regional centers and is thoroughly involved with the regional centers in the purchase of transportation services for the regional center clients. Therefore, it may be concluded that the regional centers are effectively "public agencies" for purposes of purchasing transportation services for their clients.

Further, both the DDS and the regional centers are charged by the Legislature with providing services and supports to developmentally disabled persons that would allow them to live and function in the least restrictive environment possible,[4] which includes, and requires, the provision

---

[2] Division 4.5 (commencing with section 4500) of the Welfare and Institutions Code.

[3] The Legislature found that "the service provided to individuals and their families by regional centers is of such a special and unique nature that it cannot be satisfactorily provided by state agencies. Therefore, private nonprofit community agencies shall be utilized by the state for the purpose of operating regional centers." (Welf. & Inst. Code, § 4620, subd. (b).)

[4] Developmentally disabled persons must be provided with "those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as

of transportation services. Accordingly, the DDS and the regional centers are "authorized to provide public transportation services."

Finally, the regional centers may be construed to be providing public transportation services, in that they are charged with providing, and do provide, services to all of the developmentally disabled persons in the communities they serve, i.e., the "public," albeit a narrow segment of the public.

Based on this analysis of Section 60039 and the facts specific to regional centers, should be determined to be, within these limited parameters, an exempt bus operator that is exempt from paying the diesel fuel tax on diesel fuel consumed while providing transportation services for the transportation of developmentally disabled persons and their support persons under contract with a regional center, which is deemed to be a public agency authorized to provide public transportation services.

Accordingly, the Department should inform the Appeals Division of this change in our position, with copies to and its representative.

Moreover, the Diesel Fuel Tax annotation entitled "Private Entity Bus Operator Under Contract to Regional Center" should be deleted as it is inconsistent with the legal analysis provided herein.

Please let me know if you have any questions regarding analysis or would like further assistance in this matter.

CDJ/ef
J:/Bus/Special/Final/Johnstone/DieselFuel/09-037.doc

cc:	Kristine Cazadd	(MIC:83)
	Randy Ferris	(MIC:82)
	Steve Smith	(MIC:82)
	Peter Gaffney	(MIC:63)
	Ed King	(MIC:33)
	Phil Bishop	(MIC:33)
	Lou Feletto	(MIC:31)

---

independently as possible in the community, and that allow all [such persons] to interact with persons without disabilities in positive, meaningful ways." (Welf. & Inst. Code, § 4648, subd. (a)(1).)