State of California

Board of Equalization
Legal Division-MIC: 82
Telephone: 445-6450

M e m o r a n d u m

557.0445

To : Mr. Glenn A. Bystrom
Deputy Director
Sales and Use Tax Department
MIC:43

Date: June 12, 1996

From : Ronald L. Dick
Senior Tax Counsel

Subject: Title Passage,
Sales and Use Tax Regulation 1628

The Board has determined that, when there is a question as to when title passes involving transportation charges, the intent and practice of the parties governs.

To clarify Sales and Use Tax Regulation 1628, paragraph (b)(2), if the taxpayer has a statement on the sales invoices that title to the goods passes prior to transportation, we will consider this to be proof that there was an explicit agreement under section 2401 of the Commercial Code that title did pass prior to shipment.

RLD:sr

cc: Mr. Robert Nunes - MIC:40
Mr. David H. Levine

I believe the second paragraph of this memo should be annotated.

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M e m o r a n d u m

557.0445

To : Mr. Glenn A. Bystrom
Deputy Director
Sales and Use Tax Department
MIC:43

Date: June 10, 1996

From : Ronald L. Dick
Senior Tax Counsel

Subject: Title Passage,
When Property is Delivered by the Facilities of the Retailer

This is in reply to your January 19, 1996 memorandum regarding the application of sales tax to transportation charges when the retailer delivers the property its sells by the retailer's own facilities and attempts to pass title to the property before transportation.

As you noted, subdivision (b)(3)(D) of Sales and Use Tax Regulation 1628, Transportation Charges, provides that:

> "When delivery of the property is by facilities of the retailer, title passes when the property is delivered to the purchaser at the destination unless there is an explicit written agreement executed prior to the delivery that title is to pass at some other time."

We understand that the August 13, 1987 memorandum the Principal Tax Auditor sent to the District Principal Auditors with the subject, Regulations 1541 and 1628 - Passage of Title, provided the guidelines for the district offices to follow in this regard. As to transportation charges, the memorandum states:

> "Regulation 1628 - When there is a question as to when title passes involving transportation charges, again the intent and the practice of the parties involved will govern. To clarify Regulation 1628, paragraph (b)(2), if the taxpayer has a

> statement on the sales invoices that title to the goods passes prior to transportation, we will consider this to be proof that there was an explicit agreement under Section 2401 of the Commercial Code that title did pass prior to shipment."

We do not read the memorandum as restricting that consideration solely to situations where the retailer is dealing with "repetitive customers." The audit staff has likely followed that memorandum for close to nine years and has guided taxpayers accordingly. We understand the memorandum resulted from a decision of the Board following a Board hearing. Of course, if we change that policy, the next time this issue arises in an audit, staff will impose tax on transportation charges which, until now, we have told taxpayers were nontaxable charges. I believe we wish to avoid embarrassment to the Board similar to that which resulted from staff's decision to begin imposing tax with no advance notice, upon persons who purchased property while on vacation overseas. I suggest that, if we are going to change the position of the Principal Tax Auditor's memorandum, we do it by regulation. With all that said, we have prepared the attached opinion for annotation.

You noted there is similar confusion on how tax applies to charges for spreading nursery plants, and you cited a recent Decision and Recommendation in the petition of --- --- Centers, a nursery, SY -- XX-XXXXXX. The nursery's customer, a large industrial landscaper, had the nursery not only deliver plants to the jobsite but also delivered each type of plant to its designated site within the jobsite. The Appeals considered the nursery's spreading charges to be taxable on the basis that the sale of the plants did not occur until the delivery and spreading were complete. The Appeals Section attorney considered the two major factors to be: (i) that the nursery had no evidence of an explicit agreement passing title to the plants before delivery, and (ii) since the plants were perishable, the spreading was part of the overall delivery similar to the concrete pumping in the case, Tobi Transport v. State Board of Equalization (1980) 104 Cal.App.3d 730. You asked whether a statement that appeared on the invoice would have been acceptable proof that an explicit agreement existed which passed title to the plants prior to delivery. Yes, we believe the same result should obtain regarding the transportation involving spreading plants at the jobsite as transportation of the plants to the jobsite.

We hope this answers your questions; however, if you need further information, feel free to write again.

RLD:sr