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March 28, 2012

[A], Esq.
[B] Association

Re: Tax Opinion Request 12-103
Application of Sales or Use Tax to Separately-Stated Electronic Filing Charges

Dear Mr. [A]:

This is in response to your letter of February 24, 2012, to Acting Chief Counsel Randy Ferris in which you request a legal opinion addressing whether newly-enacted legislation that goes into effect July 1, 2012, changes the applicability of sales or use tax to separately-stated charges for electronic registration of vehicles made by new motor vehicle (car) dealers on the sale or lease of new or used vehicles. You note that, in 2002, the [B] Association (Association) requested and received from the Board of Equalization (BOE) a legal opinion that concluded that, as the law read at that time, such charges were not subject to sales or use tax.

As discussed in detail below, it is our opinion that the newly-enacted legislation does not change the applicability of sales and use taxes to separately-stated charges for electronic registration or transfer of vehicles and that, just as in 2002, these charges are not subject to sales or use tax.

BACKGROUND

Assembly Bill No. 1215 (Stats. 2011, ch. 329) (AB 1215), which becomes operative July 1, 2012, requires, among other things, a new car dealer to register electronically all new and used motor vehicles it sells or leases. Motor vehicle dealers have long been generally required to submit registration documents and fees to the Department of Motor Vehicles (DMV) with respect to the vehicles they sell or lease. (See, e.g., Veh. Code, § 4456; id. at § 5901, subd. (a) [(e)very dealer or lessor-retailer, upon transferring by sale, lease, or otherwise any vehicle, whether new or used, of a type subject to registration under this code, shall . . . give written

1 We understand that new car dealers sell and lease both new and used cars. (See Veh. Code, §§ 285, 426.)

notice of the transfer to the [DMV] . . .”). In addition, since 2001, Vehicle Code section 1685 (Section 1685) and California Code of Regulations, title 13, sections (Regulation) 225.45 and 225.48, which pertain to what is known as the Business Partner Automation Program (BPA Program), have authorized, but not required, dealers to operate as or through qualified private industry partners to electronically submit vehicle registration and titling data and payments to the DMV. In addition, the dealer is permitted, but not required, to charge a fee for providing these services. (Section 1685, subd. (c).)

At the same time, Vehicle Code section 5753 (Section 5753) provides, in relevant part, that: “Except when the certificate of ownership is demanded in writing by a purchaser, a vehicle dealer licensed under this code shall satisfy the delivery requirement of this section by submitting appropriate documents and fees to the [DMV] for transfer of registration in accordance with Section[] . . . 4456” (Section 5753, subd. (b) [emphasis added].) In other words, Section 5753 affords purchasers the option of obtaining a vehicle’s certificate of ownership and thereby registering the vehicles themselves with DMV, rather than having the dealer file the registration documents with DMV.

Based on these provisions, the BOE Legal Department has previously opined, as noted above, that a dealer’s electronic transmission of registration documents and payments to the DMV was an optional service that was not “a part of the sale” of the vehicle, since the purchaser has the option to register the vehicle him or herself. Accordingly, none of the fees dealers have been charging for providing this service were includable in their gross receipts from, or the sales price of, the sale or lease of the vehicle and were not, therefore, subject to sales or use tax pursuant to the Sales and Use Tax Law (part 1 (commencing with section 6001) of division 2 of the Revenue and Taxation Code).²

However, as a result of the enactment of AB 1215, new Vehicle Code section 4456.4 (Section 4456.4) becomes operative July 1, 2012, and provides in relevant part:

(a) A motor vehicle sold or leased by a new motor vehicle dealer shall be registered by the dealer using electronic programs provided by a qualified private industry partner pursuant to Section 1685 if the [DMV] permits the transaction to be processed electronically. (Emphasis added.)

In addition, new Vehicle Code section 4456.5 (Section 4456.5) also becomes effective July 1, 2012, and provides in relevant part:

(a) A dealer may charge the purchaser or lessee of a vehicle the following charges:

(1) A document processing charge for the preparation and processing of documents, disclosures, and titling, registration, and information security obligations imposed by state and federal law. The dealer document processing charge shall not be represented as a governmental fee.

² All future statutory references will be to the Revenue and Taxation Code unless otherwise indicated and except for specifically designated Vehicle Code statutes: Section 1685, Section 4456.4, Section 4456.5, and Section 5753.

(A) If a dealer has a contractual agreement with the [DMV] to be a private industry partner pursuant to Section 1685, the document processing charge shall not exceed eighty dollars (\$80).

(B) If a dealer does not have a contractual agreement with the [DMV] to be a private industry partner pursuant to Section 1685, the document processing charge shall not exceed sixty-five dollars (\$65).

(2) An electronic filing charge, not to exceed the actual amount the dealer is charged by a first-line service provider for providing license plate processing, postage, and the fees and services authorized pursuant to subdivisions (a) and (d) of Section 1685. The director may establish, through the adoption of regulations,^[3] the maximum amount that a first-line service provider may charge a dealer. The electronic filing charge shall not be represented as a governmental fee. (Emphasis added.)

As noted above, the fees previously charged by new and used car dealers for providing electronic registration services were not subject to sales or use tax because it was determined that the service for which the fees were charged was optional with respect to the sale or lease of the vehicle. Now, as a result of the passage of AB 1215, two questions are presented: (1) is the electronic registration service that new vehicle dealers are required to provide pursuant to Section 4456.4 optional or mandatory, and, consequently, (2) are the charges set forth in Section 4456.5 subject to sales and use taxes.

DISCUSSION

California imposes sales tax on a retailer's gross receipts from the retail sale or lease of tangible personal property in California unless the sale or lease is specifically exempt from taxation by statute.⁴ (§ 6051.) "Gross receipts" means, with respect to sales tax and as is relevant here, "the total amount of the sale or lease or rental price of the retail sales of retailers," without deduction for such costs as the cost of the property sold, materials used, labor or service, or any other expense, and includes, among other things, "[a]ny services that are a part of the sale." (§ 6012, subds. (a) & (b) [emphasis added].) However, "gross receipts" does not include "[t]he amount of any motor vehicle . . . fee or tax imposed by and paid to the State of California that has been added to . . . the sales or purchase price of a motor vehicle . . ." (§ 6012, subd. (c)(9) [emphasis added].) Although sales tax is imposed on the retailer, the retailer may collect sales tax reimbursement from the purchaser, generally itemized on the sales invoice as "sales tax," if the contract of sale so provides. (Civ. Code, § 1656.1.) When sales tax does not apply, use tax applies to the storage, use, or other consumption of tangible personal property purchased from any retailer for storage, use, or other consumption in this state, measured as a percentage of the sales price, unless that use is specifically exempt by statute.⁵ (§ 6201.)

³ Amendments to existing regulations have been promulgated; the comment period closes on April 2, 2012. (See DMV Web site, at www.dmv.ca.gov/about/lad/regactions.htm [DMV proposed regulations, Business Partner Automation Program, OAL file no. 2012-0203-01].)

⁴ A "sale" includes "[a]ny lease of tangible personal property in any manner or by any means whatsoever, for a consideration," except under certain specified circumstances not relevant here. (§ 6006, subd. (g); see § 6006.3 [definition of "lease"].)

⁵ "Sales price" means, with respect to use tax and as is relevant here, "the total amount for which tangible personal property is sold or leased," without deduction for such costs as the cost of the property sold, materials used, labor or service, or any other expense, and includes, among other things, "[a]ny services that are a part of the sale." (§ 6011,

When a new or used car dealer sells or leases a car, the total amount paid by the customer includes numerous charges for goods and services, in addition to the vehicle itself. Civil Code section 2982, requires, as of July 1, 2012, and as is relevant here, that:

A conditional sale contract subject to this chapter shall contain the disclosures required by Regulation Z^[6] In addition, to the extent applicable, the contract shall contain the other disclosures and notices required by, and shall satisfy the requirements and limitations of, this section. The disclosures required by subdivision (a) may be itemized or subtotaled to a greater extent than as required by that subdivision and shall be made together and in the sequence set forth in that subdivision. . . .

(a) The contract shall contain the following disclosures, as applicable, which shall be labeled “itemization of the amount financed”:

(1)(A) The cash price, exclusive of [certain charges listed below].

(B) The charge to be retained by the seller for document processing authorized pursuant to Section 4456.5 of the Vehicle Code.^[7]

(C) The fee charged by the seller for certifying that the motor vehicle complies with applicable pollution control requirements.

(D) A charge for a theft deterrent device.

(E) A charge for a surface protection product.

(F) Taxes imposed on the sale.

(G) The charge to electronically register or transfer the vehicle authorized pursuant to Section 4456.5 of the Vehicle Code.^[8]

(H) The amount charged for a service contract.

. . . .

(L) The total cash price, which is the sum of subparagraphs (A) to (K), inclusive.

. . . .

(n) If the seller imposes a charge for document processing or to electronically register or transfer the vehicle, the contract shall contain a disclosure that the charge is not a governmental fee.^[9]

subds. (a) & (b) [emphasis added].) However, “sales price” does not include “[t]he amount of any motor vehicle . . . fee or tax imposed by and paid [to] the State of California that has been added to . . . the sales or purchase price of a motor vehicle” (§ 6011, subd. (c)(9) [emphasis added].)

⁶ Part 226 (commencing with section 226.1) of subchapter A of chapter II of title 12 of the Code of Federal Regulations, also known as the federal “Truth in Lending” law.

⁷ Prior to July 1, 2012, this subparagraph read: “The fee to be retained by the seller for document preparation.” (Civ. Code, § 2982, subd. (a)(1)(B) [“inoperative on July 1, 2012, and, as of January 1, 2013, is repealed” unless otherwise extended by statute prior to that date (*id.* at subd. (s))] [emphasis added].)

⁸ Prior to July 1, 2012, this subparagraph read: “The amount of any optional business partnership automation fee to register or transfer the vehicle, which shall be labeled ‘Optional DMV Electronic Filing Fee.’” (Civ. Code, § 2982, subd. (a)(1)(G) [“inoperative on July 1, 2012, and, as of January 1, 2013, is repealed” unless otherwise extended by statute prior to that date (*id.* at subd. (s))] [emphasis added].)

⁹ Prior to July 1, 2012, this subdivision read: “If the seller imposes a fee for document preparation, the contract shall contain a disclosure that the fee is not a governmental fee.” (Civ. Code, § 2982, subd. (n) [“inoperative on July 1, 2012, and, as of January 1, 2013, is repealed” unless otherwise extended by statute prior to that date (*id.* at subd. (s))] [emphasis added].)

. . . . (Civ. Code, § 2982 [operative as of 7/1/2012] [emphasis added]; see *id.* at § 2981, subd. (b) [for purposes of section 2982, a “seller” is “a person engaged in the business of selling or leasing motor vehicles under conditional sale contracts” (emphasis added)].)

Based on the language of Section 4456.5, subdivision (a), and Civil Code section 2982, subdivision (a)(1)(B) and (G), quoted above, it is clear that, both before and after July 1, 2012, there are two types of processing charges that a new or used car dealer may impose, and must disclose if it chooses to impose, on the customer. The first is, as it will be referred to on and after July 1, 2012, the “document processing charge.” The second is, as it will be referred to on and after July 1, 2012, the “electronic filing charge.”¹⁰

Document Processing Charge

Civil Code section 2982 requires that a “charge to be retained by the seller for document processing authorized pursuant to Section 4456.5[, subdivision (a)(1),] of the Vehicle Code” (previously, “[t]he fee to be retained by the seller for document preparation”) must be disclosed and itemized in the sequence set forth in subdivision (a). (Civ. Code, § 2982, 1st ¶ & subd. (a)(1)(B).) As you note, the Civil Code requires that the document processing charge/document preparation fee must be set forth in the sequence of charges above the application of “[t]axes imposed on the sale” (i.e., sales or use tax). (Civ. Code, § 2982, subd. (a)(1)(F).) You explain that the Legislature has consistently required disclosure of charges for goods and services, and charges for those goods and services that are to be included in the measure of tax are to be itemized above the disclosure for tax reimbursement charged on the transaction. You further explain that, conversely, charges for goods and services that are not included in the measure of tax are itemized below the charge for tax reimbursement.

In corroboration of this explanation, the BOE Audit Manual addresses charges for document processing or preparation as follows:

A dealer may charge a document preparation service fee . . . for the preparation of documents in connection with the sale of a vehicle, such as transfer papers required by the DMV. This fee is charged at the dealer’s discretion and is neither required nor collected by the DMV. . . . These charges are taxable as part of the selling price of the vehicle on which tax is computed and it is unlawful to represent this charge as a governmental fee. (BOE Audit Manual, § 0607.82 [available at www.boe.ca.gov/sutax/manuals/am-06.pdf] [emphasis added]; see § 0617.30, subd. (h) [pertaining to document preparation charges and leases].)

In sum, document processing charges are for services that are part of the sale or lease of the vehicle, and, therefore, charges for document processing are subject to tax. (§§ 6011, subd. (b)(1), 6012, subd. (b)(1).) Consequently, as of July 1, 2012, pursuant to Section 4456.5 and Civil Code section 2982 (operative July 1, 2012), the document processing charge retained by the dealer will continue to be subject to sales or use tax, as applicable.

¹⁰ This opinion will address only those parts of the laws cited above that pertain to licensed vehicle dealers and the sale of new and used motor vehicles. Other parts, pertaining to, e.g., licensed dismantlers, licensed registration services, and licensed salvage pools, will not be discussed.

Electronic Filing Charge

As a result of the enactment of AB 1215, some aspects of the law pertaining to electronic registration services provided by new car dealers will change as of July 1, 2012, as will some aspects of the law pertaining to the charges for electronic registration services provided by both new and used car dealers. Whereas under Section 1685 a dealer (new or used) could choose whether to register and transfer vehicles it sold electronically or manually, Section 4456.4 requires that, as of July 1, 2012, all new car dealers must register motor vehicles they sell or lease electronically. (Section 4456.4, subd. (a).) The question is whether the “electronic filing charge” for this, apparently now mandatory, service (electronic registration) is subject to sales or use tax.

The BOE Legal Department’s previous opinions were based on whether the electronic vehicle registration service offered by a dealer was mandatory or optional and on whether the charge that the purchaser paid for this service was a condition of the purchase (i.e., mandatory) or optional. (§§ 6011, subd. (b), 6012, subd. (b).) The analysis here of whether the fees at issue are subject to sales or use tax is also based on whether the services and charges are mandatory or optional. As opined previously:

“Services that are a part of the sale” include any the seller must perform in order to produce and sell the property, or for which the purchaser must pay as a condition of the purchase and/or functional use of the property, even where such service might not appear to directly relate to production or sale costs. (Sales and Use Tax (SUT) Annot. 295.1690, 8/16/78 [emphasis added].)¹¹

As explained in the back-up letter to this annotation, charges that are part of the sales price include, unless otherwise specifically excluded, first, charges for “any services performed or costs incurred by the seller which are connected in any realistic sense with things he must do to complete the sale.” (Backup letter to SUT Annot. 295.1690, at p. 5 [emphasis added].) Second, such charges include charges for “any services or costs for which the purchaser must pay the seller as a condition of being allowed to purchase and/or use the property sold.” (*Ibid.* [emphasis added].) Those charges for “services that are part of the sale,” whether they are charges for services the seller must perform to complete the sale or lease or that the customer must pay to the seller in order to purchase the property, are “mandatory” charges and are subject to sales or use tax.

As the Legal Department previously concluded, the charges for electronic vehicle registration services were nontaxable because a purchaser may demand that the dealer transfer the certificate of ownership to the purchaser and not the DMV, pursuant to Section 5753, subdivision (b). Accordingly, the dealer could not require the purchaser to use the dealer’s electronic registration services, so the services were optional to the purchaser.

¹¹ Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the Sales and Use Tax Law with respect to specific factual situations. (Cal. Code Regs., tit. 18, § 5700, subs. (a)(1), (c)(2).)

Although Section 4456.4, subdivision (a), appears to require new car dealers to, as of July 1, 2012, electronically submit registration documents to the DMV, Section 5753, subdivision (b), continues to permit a purchaser to demand the certificate of ownership from the dealer. Sources at the DMV have confirmed that, despite what appears to be the mandatory nature of Section 4456.4, subdivision (a), purchasers will continue to be able, on and after July 1, 2012, to demand the title documents from the new car dealers and register the vehicles themselves.

To harmonize Section 4456.4 with Section 5753, we conclude that, rather than requiring new car dealers to electronically register all vehicles they sell or lease, Section 4456.4, subdivision (a), merely requires that, if the new car dealer registers the vehicle with the DMV, it must do so electronically, pursuant to Section 1685. In other words, what is mandatory is that any registration that is processed by the new car dealer must be processed electronically. Thus, the registration services provided by the new car dealer are still optional to both the dealer and the customer and are not “a part of the sale.” In addition, as required by Civil Code section 2982, the electronic filing charge is set forth in the disclosure sequence after the taxes imposed on the sale (*id.* at subd. (a)(1)(F)), corroborating that the Legislature understood that the electronic filing charge is not subject to sales or use tax. (*Id.* at subd. (a)(1)(G).)

Consequently, amounts charged by new car dealers, pursuant to Sections 1685 and 4456.5, for providing electronic registration services on and after July 1, 2012, pursuant to Section 4456.4, are not subject to sales or use taxes.

DMV Transaction Fee

There is a third type of fee that is related to the electronic filing charge discussed above. The DMV imposes a transaction fee (currently \$4.00 [Reg. 423.00, subd. (a)(5)(A)]), for the information and services it provides pursuant to Section 1685, and the dealer may pass on the amount of this fee to the customer. (Section 1685, subd. (d).) This fee is included as one component of the electronic filing charge discussed above. (Civ. Code, § 2982, subd. (a)(1)(G); Section 4456.5, subd. (a)(2) [“the fees and services authorized pursuant to subdivisions (a) and (d) of Section 1685” (emphasis added)].) Not only are these fees not subject to sales or use tax based on the analysis provided above, but they are also not subject to tax because the dealers are required to pay the transaction fee to the DMV, and “gross receipts” and “sales price” do not include “[t]he amount of any motor vehicle . . . fee or tax imposed by and paid to the State . . . that has been added to . . . the sales or purchase price of a motor vehicle.” (§ 6011, subd. (c)(9); § 6012, subd. (c)(9) [emphasis added].)

In sum, with respect to new and used vehicles sold or leased by new and used car dealers:

- Any document processing charge that a dealer charges its customers for preparation and processing of documents, disclosures, and titling, registration, and information security obligations is subject to sales or use tax.
- Any electronic filing charge, including the DMV transaction fee, that a dealer passes on to its customers for providing electronic registration or titling services is not subject to sales or use tax.

Please let me know if you have any additional questions regarding this matter.

Sincerely,

Carolee D. Johnstone
Tax Counsel III (Specialist)

CDJ/mcb

cc: Ms. Susanne Buehler (MIC:92)
Sacramento District Administrator (KH)