

M e m o r a n d u m**465.0138**

To: Mr. Jerry Cornelius
Audit Evaluation and Planning Unit

Date: October 4, 1988

From: David H Levine
Tax Counsel

Subject: Lemon Law – AB 2057

This is in response to your memorandum dated August 26, 1988. AB 2057 was originally interpreted to require that the manufacturer and customer go through a third party dispute resolution process before the Board was authorized to reimburse the manufacturer for sales tax restitution paid to the customer. You now question whether the arbitration process is actually required before the sales tax can be refunded. Upon review of AB 2057, we agree that arbitration is not required.

Civil Code Section 1793.2(d)(1) provides that if the manufacturer does not repair goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity. Civil Code Section 1793.2(d)(2)(B) now provides that in the case of restitution for a motor vehicle, the manufacturer shall include the amount of sales tax in its calculation of restitution. The mandatory requirement for restitution of the appropriate amount of sales tax reimbursement paid by the customer is a mandatory provision. We note that in a letter to Glenn Bystrom dated July 27, 1988, [company] indicated it needed some assurance that we would refund that tax to them before they paid it to the customer. The mandatory requirement for restitution of the sales tax cited above is not conditioned on the Board's refunding the amount to the manufacturer.

Civil Code Section 1793.25 is the provision added to authorize the Board to reimburse the manufacturer for sales tax which the manufacturer includes in making restitution to the buyer pursuant to Civil Code Section 1793.2(d)(2)(B). There is no requirement in this provision that the manufacturer and customer resolve their dispute pursuant to a third party arbitration before the Board is authorized to make the refund. The critical requirement to be satisfied before the Board is authorized to make the refund is that the amount paid by the manufacturer be pursuant to Section 1793.2(d)(2)(B). Arbitration is not required before the Board is authorized to make a refund as long as the specified requirements in the statute are satisfied (e.g., proper prorating for use by the buyer prior to notification and satisfactory proof provided to the Board that the retailer of the motor vehicle reported and paid the sales tax.) We also note that a car returned by the buyer pursuant to Section 1793.2(d)(2)(B) may not be sold or leased unless the requirements of Section 1793.2(e)(5) are satisfied. Thus, if a returned car is not treated as subject to Section 1793.2(e)(5), the return is being treated as not pursuant to Section 1793.2(d)(2)(B). This

means that the manufacturer is not entitled to reimbursement by the Board of sales tax pursuant to Section 1793.25.

You also ask how the statute of limitation applies to our reimbursements pursuant to the provisions of AB 2057. Civil Code Section 1793.25(c) provides that the manufacturer's claim for reimbursement is subject to the provisions of Revenue and Taxation Code 6901 et seq. insofar as those provisions are not inconsistent with Section 1793.25 (and except for sections not relevant here). Civil Code Section 1793.25(b) provides that nothing in that section in any way changes the application of sales and use tax to the gross receipts and the sales price from the sale, and the storage, use, or other consumption of tangible personal property. This means that the retailer's gross receipts or sales price from the "lemon" vehicle remains properly subject to tax. It is only by virtue of Section 1793.25 that entitles the manufacturer, who was not the party paying any tax on the sale, to reimbursement from the Board of certain amounts. For this reason, and because of the remedial nature of Section 1793.25, we conclude that the overpayment for purposes of the limitation period provided by Revenue and Taxation Code Section 6902 is the payment by the manufacturer pursuant to Civil Code Section 1793.2. The statute of limitations pursuant to Revenue and Taxation Code 6902 begins to run upon that overpayment, and no refund should be approved by the Board unless a claim therefore is filed within three years from the last date of the month following the close of the quarterly period for which that payment was made.

Your final question is whether a new claim for refund can be accepted by the Board if a claim for refund had previously been filed and denied before AB 2057 was effective. It is only by virtue of Civil Code Section 1793.25, effective January 1, 1988, that the Board is authorized to reimburse a manufacturer for sales tax the manufacturer includes in its restitution to the customer. Furthermore, it is only sales tax which the manufacturer includes in making restitution to the buyer pursuant to Civil Code Section 1793.2(d)(2)(B) that the Board is authorized to refund, and that provision was also amended effective January 1, 1988 to include the requirement that the sales tax be included in the manufacturer's restitution. Based on these provisions, we conclude that the manufacturer was required to include sales tax in the amount of its restitution when that restitution was made after January 1, 1988, and is only these amounts which the Board is authorized to reimburse the manufacturer. A claim for refund filed before AB 2057 was effective would have been with respect to restitution made before January 1, 1988. This means that the Board would not be authorized under Civil Code Section 1793.25 to refund the amount of the sales tax paid by the retailer since the restitution was not made on or after January 1, 1988, and a new claim for refund cannot be accepted by the Board for those amounts.

DHL:ss

cc: Mr. Donald J. Hennessy
Mr. E. Leslie Sorensen, Jr.
Mr. Robert Stipe
Mr. Geoffrey Lyle