

590.0010

*coin operated air & water vending
machine at service station, NT*

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August 10, 1987

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Coin Operated Air & Water at Service Stations
REDACTED TEXT

This is in response to your memorandum dated June 16, 1987 to Tax Counsel Ron Dick, which has been referred to me for a reply.

Your office is currently auditing REDACTED TEXT and several related companies, hereinafter collectively referred to as REDACTED TEXT. REDACTED TEXT is engaged in the business of self-service gas stations. REDACTED TEXT has on its premises coin operated vending machines, which are hooked up to a compressor and water line to dispense air or water, respectively. The air and water is not purified or filtered in any way, nor are there any storage tanks to hold the water or air. I assume that there is a switch of some sort on the machine so that the customer can choose to receive water or air. As I understand it, approximately one-half of the machines will dispense water, but not air, without the customer having to pay for it. The other machines become operative, and will dispense either air or water for approximately three and a half minutes, when the customer deposits a quartet into the machine. The air is dispensed through a steel reinforced cutproof hose and the water is dispensed through a flexible hose. REDACTED TEXT reports the sales of air and water on their books as air and water income, as there is no segregation of funds made between air and water sales.

You have reviewed Mr. Dick's June 9, 1986 memorandum to Fresno Auditing and attached a copy to your inquiry. Mr. Dick's memorandum concluded that the sale of air and water through a coin operated device is subject to sales tax. The auditor working on REDACTED TEXT's audit, questions whether the sale of air should be taxed as it appears inconsistent with the rationale expressed in the backup letter to Annotations 275.0020 and 275.0021.

Annotation 275.0020 states that tax does not apply to the charge for servicing aqua lungs with compressed air where the customer furnishes the aqua lung and the taxpayer merely furnishes the

services of the compressor. Annotation 275.0021 states that where air is processed and purified before the purified air is compressed into the customer's aqua lung, that the sale of purified compressed air is subject to tax. The auditor believes that the facts in this case are analogous to the situation in Annotation 275.0020. That is, the air should not be subject to tax because the customer is merely bringing in a tire to be inflated by a compressor.

You have asked whether the sale of air through a coin operated vending machine is subject to tax. You believe that the sale of water is taxable because, as in Mr. Dick's memorandum of June 9, 1986, the water is delivered to the customer through a flexible hose.

Revenue and Taxation Code §6353, a general exemption from sales and use tax, provides in pertinent part:

"There are exempted from the taxes imposed by this part the gross receipts from the sales, furnishing, or service of and the storage, use, or other consumption in this state of gas, electricity, and water when delivered to consumers through mains, lines, or pipes..."

Section 6353 was the subject of litigation in REDACTED TEXT. In that case, liquefied petroleum gas was transported by the vendor's tank truck to REDACTED TEXT's storage facility and delivered by passing it from the truck to the storage facility through the flexible hoses attached to the tank truck. A use tax was assessed by the Board which REDACTED TEXT paid water under protest. REDACTED TEXT brought suit for refund of the use tax paid contending that the delivery from the tank truck to the storage facility was through a main, line, or pipe. The trial court ruled in REDACTED TEXT's favor.

The court of Appeal reversed the trial court's decision and upheld the Board's long-standing construction of Section 6353 as not including the sales or use of substances delivered from the vendor's vehicle by means of a hose. The appellate court also found that the terms "mains, lines, or pipes" did not necessarily include hoses, and that a later amendment of the statute indicated that the Legislature, in its use of the words "mains, lines, or pipes" meant fixed mains, lines or pipes as ordinarily service a geographical area with utility service.

However, in an unpublished opinion from the same appellate district that decided REDACTED TEXT, the court held that the sale of water dispensed from a vending machine was exempt under Section 6353.

REDACTED TEXT manufactures "REDACTED TEXT" machines which dispense purified water. The machines are connected directly to a municipal water supply. When a consumer deposits coins into the machine, water flows through the municipal water supply lines and into the machine, where it is purified. The purified water is then dispensed to the consumer through the spout of the machine. The Board in REDACTED TEXT relied on the REDACTED TEXT case for the proposition that the dispensing spout was not a main, line or pipe. The appellate court rejected this argument and stated that the essential mode of delivery of the water was by municipal water lines and that the use of the machine's dispensing spout for the last few inches of delivery was merely incidental. REDACTED TEXT v. REDACTED TEXT

With regard to the water dispensed through vending machines, we are only concerned with the vending machines that require you to pay twenty-five cents since this would constitute a sale of water in exchange for money. (Revenue and Taxation Code S6006(a).) Water which is given away for free is not a sale and is therefore not subject to sales tax.

I assume that the vending machine's water supply is directly connected by pipes or lines to the municipal water supply. The water, when it is delivered to the customer, is dispensed through a flexible hose that is attached to the vending machine. As the appellate court noted in the REDACTED TEXT case, Section 6353 does not exempt the sale of gas, electricity and water when it is delivered to consumers by means of a hose. However, as in the REDACTED TEXT case, the delivery of water by flexible hose is merely incidental to the water's essential mode of delivery by a pipe or line connected directly to the water supply. We believe that the holdings in REDACTED TEXT and REDACTED TEXT are not in conflict, and while REDACTED TEXT is unpublished and, therefore, not binding, it should be followed herein. Having restudied the question, we now believe that the sale of water through coin operated vending machines is exempt from sales and use tax under Section 6353.

"Air" is defined as a "mixture of invisible odorless tasteless compressible elastic sound-transmitting and liquefiable gases" (Webster's Third New International Dictionary (1971) page 45, .

emphasis added.) Although air is a gas, Section 6353 does not apply because there is no sale of tangible personal property in this case.

In determining whether a particular transaction involves a sale of tangible personal property, the transfer of tangible personal property incidental to the performance of a service, is one of the true object of the contract. (Cal. Admin. Code, tit. 18, §1501.) We agree with the auditor's assessment that REDACTED TEXT is merely furnishing the services of a compressor when surrounding air is compressed by the vending machine compressor to inflate tires, and that the conclusion in the June 9, 1986 memo was incorrect. (Annotation 275.0020.) Unlike the situation in Annotation 275.0021, the compressor is not being used in any way to collect, purify and store the air. Any transfer of air in this factual situation is merely incidental to the use of the compressor's services.

Accordingly the sale of compressed air through coin operated vending machines is not subject to sales or use tax.

If you have any questions concerning the above, please contact me at ATSS 485-2242.

JSW: jb

cc: Mr. Donald J. Hennessy
Mr. E. L. Sorensen, Jr.
Mr. Ron Dick