

**M e m o r a n d u m****810.1010**

To: Mr. J. W. Cornelius, Supervisor  
Audit Evaluation and Planning Unit

Date: April 14, 1989

From: John Abbott  
Senior Tax Counsel

Subject: U--- – SZ --- XX-XXXXXX  
E--- – SR --- XX-XXXXXX  
Bradley-Burns taxes and district taxes – place of sale for  
fuel sold to aircraft common carriers

In your February 3, 1989 memo to Mr. Gary Jugum, you write:

“Two questions have arisen regarding the local tax exemption as it applies to sales of fuel to aircraft common carriers. First, is the point of sale on a ‘needs’ contract the same for local and state tax purposes, particularly when the seller’s only California location is in a county other than the county in which the fuel is delivered? Secondly, if the point of sale for local tax purposes is different than for state tax, what minimum requirements must the seller meet to establish a presence in a specific county other than the county of delivery?”

Briefly summarized, the facts you relate indicated that E--- is a wholly owned subsidiary of U---. E--- was organized in 1982 for the purpose of purchasing aircraft fuel from fuel suppliers and reselling the fuel to U---. You write:

“. . . Documents filed with the Board, Secretary of State and local agencies and a lease contract for office space appear to support that the subsidiary is a separate entity operating at arms-length from the airline. The seller’s permit held with the Board identifies a business location for the subsidiary in San Francisco County, its only California location. The subsidiary negotiates contracts in Chicago, Illinois to sell fuel to the airline with deliveries of fuel to be made at the San Francisco Airport in San Mateo County.

“As you know, ‘needs’ or ‘requirements’ contracts call for the furnishing of fuel to the airline at a stipulated price. The contract may provide for minimum and maximum amounts of fuel, and all other details except the exact amount of fuel to be placed in a particular aircraft and the particular time of delivery.”

You relate that for purposes of the Section 6385 exemption for fuel sold to air common carriers, the sale of fuel by E--- to U--- occurs when the fuel is delivered to U---'s aircraft, and thus is delivered for immediate shipment outside of this state, rather than for storage in this state. This result is confirmed by Mr. Donald J. Hennessy's letter to Mr. Harve D. Tucker, Tax Department, U---, dated August 13, 1987 (copy enclosed). Mr. Hennessy confirms that the fact that U--- controls E--- as its fuel subsidiary will not affect the Section 6385 exemption as applied under what was then the Board's proposed amendments to Regulation 1621 regarding the requirement for "immediate shipment". But if the sale occurs for purposes of the Section 6385 exemption at the San Francisco airport in San Mateo County, you wish to know whether the sale occurs at the airport for Bradley-Burns sales tax and district transactions tax purposes also, or whether the place of sale is San Francisco County, where E--- asserts that its sole place of business in California is located.

You also write:

"My second question pertains to the establishment of a location in California. As indicated earlier, written documentation appears to support that the subsidiary maintains a location in San Francisco. However, it has been brought to my attention that the only evidence supporting the existence of the San Francisco location is on paper. In other words, there appears to be no functioning physical presence in the San Francisco office (e.g., no personnel, agents, or telephones).

"To present the appearance that the subsidiary's San Francisco office does exist, rental payments for office space is made to the airline from the subsidiary and a management agreement, copy attached, is entered into between the airline and the subsidiary. The agreement provides for the services of various airline personnel to perform the business functions of the subsidiary. However, it is unclear whether the loaned personnel are in San Francisco. Even with a liberal interpretation, I remain unsure that the subsidiary has adequate presence in San Francisco to establish nexus in that county for local tax purposes."

### Opinion

In answer to your first question, Regulations 1802 (for Bradley-Burns taxes) and 1822 (for district transactions and use taxes) establish the place of sale rules for purposes of these two taxes. While you are correct that the sale of fuel takes place when E--- has the fuel delivered to the U--- aircraft at the San Francisco airport in San Mateo County, Regulations 1802 and 1822 disregard the place of delivery as the place of sale, except under circumstances not relevant here.

If a retailer has a single place of business in California, all retail sales are deemed to occur at that place of business regardless of where delivery occurs or where passage of title occurs. If the retailer has no place of business in California, then the place of sale is the location of the stock of goods from which the retailer made the delivery. If E--- had no place of business

in California, then the sales would be considered to have occurred in San Mateo county, since that was the location of the fuel acquired from suppliers which E--- caused to be delivered to U---.

Our view is that for place of sale purposes, it makes no difference whether or not the fuel contracts are requirements contracts. In either case, under Regulation 1621, the sale for sales and use tax purposes occurs when U---, not its fueling subsidiary, takes possession of the fuel. Whether there was a requirements contract or not, this occurs when the suppliers who sold the fuel to E--- for resale to U---, actually delivery the fuel to the aircraft.

Your second question is whether E--- has a sufficient presence in San Francisco to qualify as its place of business. The management services agreement between E--- and U--- dated July 1, 1982, which you enclosed with your memo, does not make any mention of what activities U--- will perform on behalf of E--- in San Francisco (or any other California location). It does provide that U--- will bill E--- for U---'s services, and I assume that E--- marks up the cost of fuel it purchases from suppliers to cover these and other costs of business.

Also related to this issue is a letter from Mr. L. D. Micheli, Local Tax Unit, to Mr. R--- O---, Tax Department, U---, dated September 16, 1983 (copy enclosed). Mr. Micheli states:

“Your request to the Out-of-State District to purchase fuel from E--- exempt from the 1% local tax has been referred to this unit for reply.

“It is our understanding that E--- is a wholly owned subsidiary of U--- and that all fuel contracts are negotiated by the Vice President of E--- and the Contract Administrator for U--- at XXX --- Street in San Francisco.

“Based on the above information, U--- is authorized to purchase aircraft fuel exempt from the 1% Bradley-Burns Uniform Local Sales and Use Tax. This authorization, which will remain in effect only during such time as there is no substantial change in the operating conditions upon which it is based, is only valid for purchases of fuel from the supplier mentioned, and is subject to review by our audit staff.

“A copy of this letter may be furnished your fuel supplier in support of the claimed exemption from 80% of the 1-1/4% local tax.”

Of course, circumstances may have changed since 1983, when U--- represented to the Board's Local Tax Unit that all fuel contracts are negotiated by the Vice President of E--- at the San Francisco office. If circumstances have not changed, then there would appear to be a factual conflict between Mr. Micheli's letter and your memo, which indicates that the fuel contracts are negotiated in Chicago and that it is unclear whether there are any U--- employees loaned to E--- in San Francisco.

Our opinion is that if there are facts which indicate that U--- employees, acting as agents on behalf of E--- in U---'s San Francisco office, take any part in negotiations for the sale of fuel by E--- to U--- (including, for example, taking orders for the quantities of fuel to be delivered at the airport), then those facts would be sufficient to establish that E--- has a place of business in San Francisco for Bradley-Burns and district tax purposes. It would not matter whether the principal negotiations for the sales occurred in Chicago, as long as some activity related to sales is attributable to the San Francisco office. Since that would be its sole place of business in California, all sales for Bradley-Burns and district tax purposes would be considered to have occurred in San Francisco, not in San Mateo County. Thus, E---'s sales of fuel to U--- would qualify for the 80% exemption from Bradley-Burns taxes and the full exemption from district taxes, because the fuel sold would be entirely consumed outside of the county of the place of sale.

JA:jb

cc: Mr. E. L. Sorensen, Jr.  
Mr. Larry Micheli