

Memorandum

To: Sue Blake
Tax Counsel III (Specialist) (MIC:78)
Carolee D. Johnstone, Tax Counsel III (Specialist)

Date: July 8, 2009

From: Tax and Fee Programs Division (MIC:82)

Telephone: (916) 323-7713

Subject: ASSIGNMENT NO. 09-126
RETAILER'S OBLIGATION TO PAY THE COVERED ELECTRONIC WASTE RECYCLING FEE WHEN THE RETAILER IS UNABLE TO COLLECT THE FEE FROM THE CONSUMER

This memorandum is in response to your email inquiry to Randy Ferris, Assistant Chief Counsel, regarding the covered electronic waste recycling (eWaste) fee imposed pursuant to the Electronic Waste Recycling Act of 2003 (Act).¹ You pose the following question:

With respect to the Act, is a retailer of covered electronic devices liable to the Board of Equalization (Board) for the eWaste fee if the consumer (customer) refuses to pay it?

As discussed in more detail below, we conclude that a retailer is liable to the Board for the eWaste fee when it sells a covered electronic device to a consumer, even if the consumer refuses to pay the fee.

DISCUSSION

Statutory Analysis

Under the Act, the eWaste fee is generally imposed on the consumer of a new or refurbished covered electronic device (CED) at the time of purchase of the CED (§ 42464, subd. (a)), and the retailer of the CED is required to collect the eWaste fee from the consumer at the time of the retail sale of the CED. (§ 42464, subd. (b) [“a retailer shall collect from the consumer a covered electronic waste recycling fee at the time of the retail sale of a covered electronic device.” (emphasis added)]). To compensate the retailer for the costs associated with its collection of the eWaste fee, the retailer is permitted to retain three percent of the fee collected before remitting the remainder of the fee collected to the Board. (§§ 42464, subd. (c)(1), 42464.4.)

Contrary to the general rule above, the retailer may, instead, elect to pay the eWaste fee on behalf of its customer, the consumer. (§ 42464, subd. (d)(1).) If the retailer chooses to pay the eWaste fee on behalf of its customer, the retailer must “provide an express statement to that effect on the

¹ Chapter 8.5 (commencing with section 42460) of Part 3 of Division 30 of the Public Resources Code. All statutory references will be to the Public Resources Code unless stated otherwise.

receipt given to the consumer at the time of sale.” (*Ibid.*) Further, “[i]f a retailer elects to pay the [eWaste] fee on behalf of the consumer, the fee is a debt owed by the retailer to the state, and the consumer is not liable for the fee.” (*Ibid.* [emphasis added].)

The Board administers the eWaste fee pursuant to the Fee Collection Procedures Law (FCPL).² (§ 42464.2.) Under the FCPL, “feepayer” is defined as “any person liable for the payment of the fees collected [by the Board] pursuant to this part.” (Rev. & Tax. Code, § 55004.) Under the Act, “the reference in the [FCPL] to ‘feepayer’ shall include a retailer, a consumer, and a vendor.” (§ 42464.2 [emphasis added].)

In other words, a retailer is required, by statute, to collect the eWaste fee from its customers when they purchase CEDs and to remit the fee it collects, minus three percent, to the Board. Just as with any charge (e.g., sales tax reimbursement, service fee) associated with a retail purchase, if a customer refuses to pay the eWaste fee, the retailer can refuse to sell the CED to the customer. However, rather than refusing to sell the CED to the customer, the retailer may choose, instead, to sell the CED to the customer and pay the eWaste fee on behalf of the customer to the Board. When the retailer chooses to pay the eWaste fee on behalf of its customer, the retailer is the “feepayer” who is “liable for the payment of the fee[],” which is a debt the retailer owes to the state.

Under the Act, the retailer is, in effect, given only two options (as is relevant here³) with respect to the eWaste fee that is due to the Board if the retailer sells a CED to a consumer in California: (1) the retailer must collect the fee from the consumer at the time of the retail sale; or (2) the retailer must pay the fee on behalf of the consumer that purchases the CED. Otherwise, the retailer must decline to make the sale. In short, the retailer is liable for paying the eWaste fee to the Board if the consumer (customer) refuses to pay it. The retailer, however, is not obligated to sell a CED to a consumer (customer) who refuses to pay the eWaste fee.

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cc: Kristine Cazadd (MIC:82)
Randy Ferris (MIC:82)
Steve Smith (MIC:82)
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² Part 30 (commencing with section 55001) of Division 2 of the Revenue and Taxation Code.

³ A third option is available if the retailer is a lessor of CEDs; the retailer may, under certain prescribed circumstances, pay the eWaste fee on behalf of the consumer/lessee to its vendor, instead of to the Board. (§ 42464, subd. (d)(2).)