

Memorandum

305.0028.600

To: Ms. Kay Lucas (MIC:82)
Audit and Information Section

Date: February 16, 2005

From: Carla J. Caruso
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Subject: **K--- F--- Chevrolet and Pontiac
SR -- XXX-XXXXXX
Sales of Vehicles to Indians**

This letter responds to your e-mail dated September 20, 2004, regarding the application of tax to certain vehicle sales made to Indians by K--- F--- Chevrolet and Pontiac ("F---"). You state that Mark Noack, Principal Auditor of the --- --- District Office, sent an inquiry to Jeffrey McGuire, Tax Policy Manager. Mr. Noack asked whether F---, an off-reservation vehicle dealer, is required to collect use tax from an Indian purchaser who either (1) does not reside on a reservation, or (2) works for an employer located off a reservation, when F--- personnel deliver the vehicle to the Indian purchaser on a reservation. Mr. Noack also asks whether, under these circumstances, this Agency should instead pursue use tax collection from the Indian customer. You attach a copy of your draft memorandum responding to Mr. Noack for our review.¹ You state that in preparing this draft memorandum, you referred to Sales and Use Tax Annotation 305.0360 (6/2/89) and Sales and Use Tax Annotation 305.0024 (10/21/96). You believe that these annotations are in conflict. In our discussion below, we analyze the applicable law and the annotations to which you refer, to assist you with your response to Mr. Noack's questions.

Preliminarily, we assume that the vehicle purchasers are Indians as defined in Regulation 1616(d)(2).² We also assume that any reservation to which you refer is a reservation as defined

¹ Based upon your e-mail message and draft memorandum, we understand that F--- documented a number of sales made to Indians, in which F--- personnel delivered the vehicle to the Indian purchaser on a reservation. This Agency's auditor, in examining F---'s "dealer jackets" relating to vehicle sales to Indians, noted that in some instances, based on the Indian customer's driver's license showing an address that was not on the reservation, the Indian customer (apparently) did not reside on the reservation. In other instances, the Indian customer's credit application indicated that the customer worked for an employer not located on the reservation.

² Regulation 1616(d)(2) defines an "Indian" as "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior."

in Regulation 1616(d)(2).³ We further assume that any reservation to which you refer is within the external territorial limits of California. Additionally, we understand and assume that F--- and the Indian purchaser did not agree that title was to transfer to the purchaser prior to delivery of the vehicle on the reservation.

As you know, sales tax is imposed on a retailer's sale of tangible personal property at retail in this state, measured by gross receipts, unless the sale is specifically exempted or excluded by statute. (Rev. & Tax. Code, § 6051.) 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 by a percentage of the sales price, unless that use is specifically exempted or excluded by statute. (Rev. & Tax. Code, §§ 6201, 6401.) "In this State" or "in the State" means within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States of America. (Rev. & Tax. Code, § 6017.)

As you also know, Regulation 1616(d) explains the application of tax to sales made on and off Indian reservations to Indians. With regard to sales by off-reservation retailers, Regulation 1616(d)(4)(A) provides that when an off-reservation retailer makes a sale of tangible personal property to an Indian negotiated at a place of business off a reservation, that sale is not subject to *sales* tax if the delivery is made to an Indian purchaser on a reservation and title (ownership) transfers to the purchaser on a reservation, i.e., the sale occurs on a reservation. That subdivision also explains that generally ownership to the property transfers, i.e., the sale occurs, upon delivery if delivery is made by facilities of the retailer. (*Ibid.*) As explained by Regulation 1628(b)(3)(D), unless explicitly agreed that title is to pass at a prior time, a sale occurs at the time and place at which the retailer completes his or her performance with reference to the physical delivery of the property. Therefore, when the off-reservation retailer and Indian purchaser do not agree that title is to pass at a prior time, and delivery is by the facilities of the retailer, ownership passes, and the sale occurs, upon delivery of the property by the retailer to the Indian purchaser on the reservation. (Reg. 1628(b)(3)(D).)

With regard to the application of *use* tax to on-reservation vehicle purchases by Indians, Regulation 1616(d)(4)(D) explains that, unless otherwise exempt, "use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state." Regulation 1616(d)(4)(E) further explains that "[u]se tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation."

³ Regulation 1616(d)(2) defines "reservation" to include "reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian."

Regulation 1616(d)(4) does not explicitly state that the Indian purchaser must live on a reservation in order that the on-reservation sale to the Indian by an off-reservation retailer is subject to use tax. However, this Agency has long concluded that a sale of property by an off-reservation retailer, negotiated off a reservation but with the sale to the Indian occurring on a reservation, is subject to use tax if the Indian purchaser does not reside on a reservation. (Sales and Use Tax Annot. 305.0024 (10/21/96).)⁴ Thus, under Regulation 1616(d)(4)(D) and (E), use tax applies to a vehicle purchased from an off-reservation retailer who delivers the vehicle on the reservation to an Indian purchaser who does not reside on a reservation.

When the off-reservation vehicle dealer makes an on-reservation sale to an Indian purchaser who does not reside on a reservation, the dealer must collect and remit use tax to this Board. This interpretation is consistent with Revenue and Taxation Code section 6203, which requires that all retailers engaged in business in this state collect and report use tax on all transactions subject to use tax. However, if the Indian purchaser residing off a reservation can establish subsequently that he or she used the vehicle on a reservation half or more of the time during the first 12 months following delivery, the Indian purchaser may apply to this Agency for a refund of the use tax.

Mr. Noack also asks whether F--- is required to collect use tax from an Indian purchaser who resides on a reservation but works at a job located off the reservation, when F--- delivers the vehicle on the reservation to the Indian purchaser. We interpret Revenue and Taxation Code section 6203, together with Regulation 1616(d)(4)(E), to mean that when the vehicle so purchased is for private use (such as a passenger car), the retailer is not required to collect and remit use tax from an Indian purchaser residing on a reservation but working off the reservation. Under these circumstances, it is the responsibility of the Indian purchaser to remit use tax if he or she uses the vehicle off the reservation more than on the reservation during the first 12 months of ownership. (Reg. 1616(d)(4)(E).) However, if the vehicle purchased and delivered on the reservation is a commercial vehicle (such as a semi-trailer truck⁵) purchased for business purposes, which cannot reasonably be used on a reservation more than off a reservation during the first 12 months after delivery on the reservation, the off-reservation retailer is required to collect use tax from the Indian purchaser who lives on the reservation, and remit the use tax to this Board.⁶ Under these circumstances, if the Indian purchaser can establish later that he or she

⁴ Any other conclusion would result in the anomalous situation that tax is imposed on a transaction negotiated and completed on a reservation between an Indian retailer and an Indian purchaser who does not reside on a reservation (as required by Regulation 1616(d)(3)(A)2.), while no tax is imposed when the seller is a non-Indian off-reservation retailer and the transaction is negotiated off the reservation but completed on the reservation.

⁵ California Vehicle Code section 550 defines a "semi-trailer" as a vehicle designed for carrying persons or property, in conjunction with a motor vehicle, and so constructed that some part of its weight or that of its load rests upon, or is carried by another vehicle. A semi-trailer truck, also referred to as a big-rig or 18-wheeler, is a truck consisting of a tractor, or towing engine, and a trailer that carries the freight (<http://en.wikipedia.org/wiki/Semi-trailer>).

⁶ Similarly, if a vessel such as a three-masted sailing vessel is delivered on a reservation without a large body of water to an Indian purchaser who resides on the reservation, it is not reasonably likely that the Indian purchaser will

used the vehicle on a reservation half or more of the time during the first 12 months following delivery, the Indian purchaser may apply to this Agency for a refund of the use tax.

We next address your questions concerning Sales and Use Tax Annotation 305.0360 (6/2/89) and Sales and Use Tax Annotation 305.0024 (10/21/96). As discussed below, these annotations are consistent with each other, as well as with our conclusion about the application of tax.

Sales and Use Tax Annotation 305.0360 (6/2/89)⁷ explains that under Regulation 1616(d)(4)(E), if a vehicle is used on the reservation more than off the reservation during the first 12 months of ownership, the vehicle's principal place of use is on the reservation. You are mistaken in concluding that this "principal use" analysis means that an Indian reservation is not within California. We note that Indian reservations are "territory owned or ceded to the United States" within the meaning of Revenue and Taxation Code section 6017, as described above. By the terms of that statute, therefore, any Indian reservation within the exterior boundaries of California is *in* California. The principal use test articulated in Regulation 1616(d)(4)(E) and in the annotation is analogous to, but not identical with, the test articulated in Regulation 1620(b)(4)(B)1.⁸ for determining whether a vehicle purchased and first functionally used outside California is subject to use tax.

Sales and Use Tax Annotation 305.0024 (10/21/96) discusses the application of tax to an Indian's on-reservation purchase of property. The annotation states that a sale of property "by an off-reservation retailer negotiated off a reservation but with the sale occurring to an Indian on the reservation is exempt from tax if *the Indian resides on a reservation*, unless the purchaser uses the property off the reservation more than one-half of the first 12 months after the purchase." (Emphasis added.)

The annotation also states that an on-reservation sale by an off-reservation retailer to an Indian who does not reside on a reservation is subject to use tax. However, the annotation does

use the vessel on the reservation more than off the reservation, and the off-reservation retailer is required to collect use tax from the Indian purchaser and remit it to this Agency.

⁷ Sales and Use Tax Annotation 305.0360 provides: "Regulation 1616 sets forth the conditions under which the use of property, including vehicles, vessels, and aircraft, purchased by an Indian from an off-reservation retailer and delivered to the purchaser on the reservation is exempt from use tax. The test for 'use' is a 'principal use' test covering the first 12 months following delivery. Thus, if a vehicle is used on the reservation more than it is used off the reservation during that first 12-month period, the principal use is considered to be on the reservation. When not in functional use, the vehicle would be 'garaged' (stored or used) on the reservation." (6/2/89).

⁸ We note that Senate Bill 1100 ("SB 1100") was effective August 16, 2004. SB 1100 amends Revenue and Taxation Code section 6248 to replace, as specified, the existing 90-day test with a 12-month test to determine whether the out-of-state purchase of a vehicle, vessel, or aircraft (on or after October 1, 2004) was a purchase for the purpose of storage, use, or other consumption in California and subject to use tax. The new law with the 12-month test will be in effect until July 1, 2006. We assume that the provisions of SB 1100 do not apply to the facts you describe.

not discuss whether an Indian purchaser who does not reside on a reservation, but who accepts delivery of the vehicle on the reservation, is subject to use tax if the vehicle is used off the reservation more than it is used on the reservation during the first 12 months after purchase (the “12-month test”). It cannot be assumed, based upon the lack of discussion in the annotation, that the “12-month test” (that is, that use tax applies if the Indian purchaser uses the property off the reservation more than one-half of the first 12 months after the purchase) does not apply to purchases by Indians who do not reside on a reservation. Rather, as we have discussed above, the “12-month test” applies to any vehicle purchase from an off-reservation dealer, when the vehicle is delivered on a reservation, i.e., the sale takes place on the reservation, to the Indian purchaser who resides off the reservation.

In conclusion, we summarize the use tax collection obligation of an off-reservation retailer for vehicles delivered by the facilities of the retailer on a reservation to an Indian purchaser. When an off-reservation vehicle dealer delivers a vehicle on a reservation to an Indian purchaser who does not reside on a reservation, the dealer is obligated to collect use tax from the Indian purchaser and remit the tax to this Agency. When an off-reservation dealer delivers a commercial vehicle on a reservation to an Indian purchaser who resides on a reservation, the dealer is also obligated to collect use tax from the Indian purchaser and remit the tax to this Agency. However, when an off-reservation dealer delivers a vehicle to be used for personal purposes to an Indian purchaser who resides on a reservation, the dealer is not obligated to collect and remit use tax. Under these circumstances, if the Indian purchaser uses the vehicle off the reservation more than half the time during the first 12 months after delivery, it is the responsibility of the Indian purchaser to remit use tax to this Agency.

We will provide any further information that you require.

CJC:ds

cc: Mr. Mark Noack (JH)
Ms. Freda Orendt (MIC:74)
Mr. Jeffrey L. McGuire (MIC:92)
Mr. Jim Kuhl (MIC:92)
Ms. Kelly Reilly (MIC:47)
Ms. MaryAnn Hay (MIC:47)
Mr. Vic Anderson (MIC:44)
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