



STATE BOARD OF EQUALIZATION

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Fourth District, Los Angeles

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State Controller

CYNTHIA BRIDGES
Executive Director

May 9, 2014

Dear Interested Party:

Enclosed is the Initial Discussion Paper on proposed revisions to Regulation 1588, *Seeds, Plants and Fertilizer*. Before the issue is presented at the Board's September 23, 2014 Business Taxes Committee meeting, staff would like to invite you to discuss the issue and present any additional suggestions or comments. Accordingly, an interested parties meeting is scheduled as follows:

May 21, 2014
Room 122 at 10:00 a.m.
450 N Street, Sacramento, CA

If you would like to participate by teleconference, call 1-888-636-3807 and enter access code 499201. You are also welcome to submit your comments to me at the address or fax number in this letterhead or via email at Susanne.Buehler@boe.ca.gov by June 6, 2014. Copies of the materials you submit may be provided to other interested parties, therefore, ensure your comments do not contain confidential information. Please feel free to publish this information on your website or distribute it to others that may be interested in attending the meeting or presenting their comments.

If you are interested in other Business Taxes Committee topics refer to our webpage at (<http://www.boe.ca.gov/meetings/btcommittee.htm>) for copies of discussion or issue papers, minutes, a procedures manual, and calendars arranged according to subject matter and by month.

Thank you for your consideration. We look forward to your comments and suggestions. Should you have any questions, please feel free to contact our Business Taxes Committee staff member Ms. Lynn Whitaker at 916-324-8483, who will be leading the meeting.

Sincerely,

A handwritten signature in blue ink that reads "Susanne Buehler".

Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department

SB: lw
Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District
Honorable Michelle Steel, Vice Chair, Third District
Honorable Betty T. Yee, Member, First District (MIC:71)
Senator George Runner (Ret.), Member, Second District (via email)
Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel

(via email)

Mr. David Hunter, Board Member's Office, Fourth District
Mr. Jaclyn Appleby, Board Member's Office, Fourth District
Mr. Neil Shah, Board Member's Office, Third District
Mr. Tim Treichelt, Board Member's Office, Third District
Mr. Alan LoFaso, Board Member's Office, First District
Ms. Mengjun He, Board Member's Office, First District
Ms. Yvette Stowers, Board Member's Office, First District
Mr. Ramon Salazar, Board Member's Office, First District
Mr. Sean Wallentine, Board Member's Office, Second District
Mr. James Kuhl, Board Member's Office, Second District
Mr. Lee Williams, Board Member's Office, Second District
Mr. Alan Giorgi, Board Member's Office, Second District
Ms. Tanya Vandrick, Board Member's Office, Second District
Ms. Natasha Ralston Ratcliff, State Controller's Office
Ms. Cynthia Bridges (MIC:73)
Mr. Randy Ferris (MIC:83)
Mr. Jeffrey L. McGuire (MIC:43)
Mr. Jeff Vest (MIC:85)
Mr. Jeff Angeja (MIC:85)
Mr. David Levine (MIC:85)
Mr. Robert Tucker (MIC:82)
Mr. Bradley Heller (MIC:82)
Ms. Monica Silva (MIC:82)
Mr. Larry Mendel (MIC:82)
Mr. Todd Gilman (MIC:70)
Ms. Laureen Simpson (MIC:70)
Mr. Bill Benson (MIC:67)
Mr. Joe Fitz (MIC:67)
Mr. Wayne Mashihara (MIC:46)
Mr. Kevin Hanks (MIC:49)
Mr. Bradley Miller (MIC:92)
Ms. Kirsten Stark (MIC:50)
Mr. Clifford Oakes (MIC:50)
Ms. Lynn Whitaker (MIC:50)
Mr. Robert Wilke (MIC:50)

INITIAL DISCUSSION PAPER

Regulation 1588, *Seeds, Plants and Fertilizer*

Issue

Whether the Board should amend Regulation 1588, *Seeds, Plants and Fertilizer*, to include carbon dioxide (CO₂) in the definition of fertilizer.

Background

Revenue and Taxation Code section [6358 \(d\)](#) provides an exemption from tax for the gross receipts from the sale and use of fertilizer applied to land the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588, *Seeds, Plants and Fertilizer*, defines “fertilizer”.

The current provisions of Regulation 1588 (b)(1) explain that “fertilizer” includes manure, commercial fertilizers (as defined in Food and Agricultural Code (FAC) section 14522), and agricultural minerals (as defined in FAC section 14512). Excluded from the definition of fertilizer are soil amendments (as defined in FAC section 14552) and auxiliary soil and plant substances (as defined in FAC 14513). Although “manures sold without guarantees for plant nutrients” are included in the list of soil amendments in FAC 14552, Regulation 1588 provides that such items are not consider soil amendments for purposes of the regulation. (See Exhibit 2 for relevant FAC definitions.)

The Sales and Use Tax Department’s (SUTD) regulation files show that the basis for the exemption is that fertilizer is applied to land for the purpose of furnishing elements to be absorbed by the plant. Those elements enter into the food supply of the plants themselves and become a part of the product grown. If that product is sold, the fertilizer is not taxable as it is regarded as a sale for resale. The same reasoning applies to products grown for human consumption and to products used as feed for animal life that are food for human consumption. The absorption of the fertilizer into the food supply of the plants themselves is different than the function of soil amendments or auxiliary soil and plant substances, not defined as fertilizers, which do not, in any material quantity, enter into the food supply of the plants themselves.

Discussion – Current treatment of CO₂

Staff has previously considered CO₂, to be fertilizer when applied to land in farming. This direction is found in Sales and Use Tax Annotation¹ 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The backup letter to the annotation explains that in the examined situation, CO₂ was sold to farmers for application to land through their irrigation systems. At the time the legal opinion

¹ Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached by staff counsel as applied to specific factual situations. They are a research tool and intended to provide guidance regarding the interpretation of Board statutes and regulations. Annotations are not regulations and do not have the force or effect of law.

INITIAL DISCUSSION PAPER
Regulation 1588, *Seeds, Plants and Fertilizer*

was written, the Department of Agriculture considered CO₂ sold for such a purpose to be an agricultural mineral.

More recently, an issue came up in the audit of a hydroponic farmer where SUTD staff questioned whether CO₂ should be considered fertilizer as it was not applied to land. The taxpayer converts the CO₂ to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The CO₂ percolates up and is absorbed by the leaves of the plant in order to support the life of the plant. After reviewing the FAC definitions, SUTD staff questioned whether CO₂ should be considered an agricultural mineral, which is included in the definition of fertilizer, or an auxiliary soil and plant substance, which is not.

Staff believes that CO₂ can be included as a fertilizer based on the Board's historical treatment of CO₂ as fertilizer, and because its use is consistent with the basis for the exemption from tax. Specifically, the CO₂ is used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of a plant's growth. Further, staff believes this treatment should be allowed whether the CO₂ was used in soil farming or in hydroponic farming. Staff's proposed revisions to Regulation 1588 are shown in Exhibit 1.

Summary

Based on BOE's longstanding treatment of CO₂ as a fertilizer and how CO₂ is used by plants, staff recommends Regulation 1588 be amended to clarify that for purposes of the regulation, "fertilizer" includes CO₂. Staff welcomes any comments, suggestions, and input from interested parties on this issue. Staff also invites interested parties to participate in the May 21, 2014, interested parties meeting. The deadline for interested parties to provide written responses regarding this discussion paper is June 6, 2014.

Prepared by the Tax Policy Division, Sales and Use Tax Department

Current as of 5/7/2014

REGULATION 1588. SEEDS, PLANTS AND FERTILIZER.

(a) SEEDS AND PLANTS. Tax does not apply to sales of seeds, annual plants, and operative January 1, 1999, non-annual plants, the products of which ordinarily constitute food for human consumption or are to be sold in the regular course of the purchaser's business, including fruit trees, berry vines, and grape rootlings or rootstock, or cuttings of every variety. Tax does not apply to sales of seed, the products of which will be used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption or the products of which are to be sold in the regular course of the purchaser's business.

(b) FERTILIZER.

(1) DEFINITION. The term "fertilizer" includes commercial fertilizers, agricultural minerals, ~~and~~ manure, and carbon dioxide. The terms "commercial fertilizers" and "agricultural minerals" as used herein are defined in Sections 14522 (commercial fertilizer) and 14512 (agricultural minerals) of the Food and Agricultural Code. "Manure" means the excreta of any domestic animal or domestic fowl which is not artificially mixed with any material except a material which has been used for bedding, sanitary, or feeding purposes for such an animal or fowl or for the preservation of the manure. The term "fertilizer" does not include "packaged soil amendments" or "auxiliary soil and plant substances" as these terms are defined (with the exception noted below) in Sections 14552 (packaged soil amendments) and 14513 (auxiliary soil and plant substances) of the Food and Agricultural Code. For purposes of this regulation, "manures sold without guarantees for plant nutrients" as described in Section 14552 of the Food and Agricultural Code are not soil amendments.

(2) APPLICATION OF TAX. Tax does not apply to sales of fertilizer to be applied to land or hydroponic farming materials (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

When insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business.

FOOD AND AGRICULTURAL CODE - FAC

DIVISION 7. AGRICULTURAL CHEMICALS, LIVESTOCK REMEDIES, AND COMMERCIAL FEEDS [12500 - 15340]

(Division 7 enacted by Stats. 1967, Ch. 15.)

CHAPTER 5. Fertilizing Materials [14501 - 14682]

(Chapter 5 repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

ARTICLE 2. Definitions [14511 - 14564]

(Article 2 added by Stats. 1990, Ch. 504, Sec. 2.)

Included in “fertilizer” per Regulation 1588

14522.

“Commercial fertilizer” means any substance which contains 5 percent or more of nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively, which is distributed in this state for promoting or stimulating plant growth. “Commercial fertilizer” includes both agricultural and specialty fertilizers. “Specialty fertilizers” may contain less than 5 percent nitrogen (N), available phosphoric acid (P₂O₅), or soluble potash (K₂O), singly or collectively.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

14512.

“Agricultural mineral” means any substance with nitrogen (N), available phosphoric acid (P₂O₅), and soluble potash (K₂O), singly or in combination, in amounts less than 5 percent which is distributed for farm use, or any substance only containing recognized essential secondary nutrients or micronutrients in amounts equal or greater than minimum amounts specified by the director, by regulation, and distributed in this state as a source of these nutrients for the purpose of promoting plant growth. It shall include gypsum, liming materials, manure, wood fly ash, sewage sludge not qualifying as commercial fertilizer, and captured dilute solutions.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

Specifically excluded per Regulation 1588 (except for 14522(h))

14552.

“Packaged soil amendment” means any substance distributed for the purpose of promoting plant growth or improving the quality of crops by conditioning soils solely through physical means. It includes all of the following:

- (a) Hay.
- (b) Straw.
- (c) Peat moss.
- (d) Leaf mold.
- (e) Sand.
- (f) Wood products.
- (g) Any product or mixture of products intended for use as a potting medium, planting mix, or soilless growing media.
- (h) Manures sold without guarantees for plant nutrients.
- (i) Any other substance or product which is intended for use solely because of its physical properties.

(Repealed and added by Stats. 1990, Ch. 504, Sec. 2.)

14513.

“Auxiliary soil and plant substance” means any chemical or biological substance or mixture of substances or device distributed in this state to be applied to soil, plants, or seeds for soil corrective purposes; or that is intended to improve germination, growth, yield, product quality, reproduction, flavor, or other desirable characteristics of plants; or that is intended to produce any chemical, biochemical, biological, or physical change in soil; but does not include commercial fertilizers, agricultural minerals, pesticides, soil amendments, or manures. It shall include the following:

- (a) Bacterial inoculants.
- (b) Biotics.
- (c) Lignin or humus preparations.
- (d) Microbial products, including genetically engineered microorganisms.
- (e) Soil binding agents.
- (f) Synthetic polyelectrolytes.
- (g) Wetting agents to promote water penetration.
- (h) Any similar product intended to be used for influencing soils, plant growth, or crop or plant quality.

(Amended by Stats. 1996, Ch. 361, Sec. 99. Effective January 1, 1997.)