STATE BOARD OF EQUALIZATION

STATE OF CALIFORNIA
BOARD OF EQUALIZATION
BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
Petitioner	)	

The Appeals Conference in the above-referenced matter was held on January 7, 1992, by Senior Staff Counsel W. E. Burkett in San Francisco, California.

Appearing for Petitioner:

Appearing for the Sales and Use Tax Department: Mr. Morris Verna, Jr., Supervising Tax Auditor

Protested Items

The protested tax liability for the period July 1, 1982 through March 31, 1984 is measured by:

	Item	State, Local and County
D.	Coach class beverage service revenue not reported.	$33,812
E.	Cost of complimentary beverage service not reported	$70,877

Contentions of Petitioner

D. Federal law prohibits the application of the California sales tax.

E. Federal law prohibits the application of the California use tax.

Summary

The underlying facts and circumstances for the taxpayer's protest for this period are the same as set forth in the decision prepared on this date for the petition filed by the taxpayer for the period April 1**,** 1984 to June 30, 1985. Reference should be made to that decision in reviewing the decision for the petition filed for this period.

Analysis & Conclusions

The analysis and conclusions for the companion decision prepared on this date for petitioner's protest for the period April I, 1984 to June 30, 1985 are hereby incorporated herein by reference and adopted as the decision for this separate period.

Recommendation

It is recommended that the taxes be redetermined without further adjustment as computed by the reaudit dated September 27, 1989.

W. E. BURKETT, SENIOR STAFF COUNSEL DATE: 1-27-1992

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Appearing for Petitioner:

Appearing for the Sales and Use Tax Department: Mr. Morris Verna, Jr., Supervising Tax Auditor

Protested Items

The protested tax liability for the period April 1, 1984 through June 30, 1985 is measured by:

	Item	State, Local and County
D.	Coach class beverage service revenue not reported.	$22,388
E.	Cost of complimentary beverage service not reported	$55,434

Contentions of Petitioner

D. Federal law prohibits the application of the California sales tax.

E. Federal law prohibits the application of the California use tax.

Summary

The petitioner is a foreign-based air carrier engaged in flights over the airways of the State of California. A prior audit of petitioner was conducted through June 30, 1979.

Protested item D consists of the computed price of drinks served to coach class customers while passenger aircraft operated by petitioner were in flight over the state of California. Protested item E consists of the cost of complimentary drinks served while passenger aircraft were in flight over the State of California.

All objections relating to the Ii1easure of tax have been resolved by reaudit and the protest of both items relates solely to a claim that taxation of the sale or use of the property is prohibited by federal law. Specifically, it is contended that the provisions of 19 USCA section 1309 operate to prohibit state taxation because it interferes with the Federal government's regulation of foreign commerce.

It is submitted that the liquor constitutes supplies for consumption in flight and that these may be accorded duty free and tax free status provided they are used by the airline in the course of international trade. Customs directive No. 3200-04 is cited in support of this conclusion. The petitioner has also filed a letter brief detailing its position.

The position of the Sales and Use Tax Department (Department) is that the preferences granted under federal law do not preclude the application of the sales and use tax because the liquor had been removed from the bond and was not otherwise exempt from state taxation at the time the taxable events occurred.

On flights from Canada to California, petitioner purchased the liquor in Canada. Under relevant customs regulations, petitioner was required to lock and seal its in-flight bars prior to landing in California. The bars remained locked and sealed during the entire ground stop.

Each of the authorities cited by the petitioner deal with property that was in a bonded facility while sold for use in foreign commerce. They are therefore distinguishable from the facts of this case. This includes the state exemption statute cited by petitioner. While it is argued that the on-site control required is equivalent to being held in bond, it is nevertheless clear that the property consumed over California is not at that time in the custody and control of the united States government.

In addition to this distinction, the absence of express preemption provides strong evidence that Congress did not intend to preclude state taxation. In Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1, the U.S. Supreme Court set out in its decision that the first and fundamental inquiry in any preemption analysis is whether Congress intends to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted and there is no actual conflict between what federal and state law prescribe, then there must be clear evidence of a congressional intent to preempt the specific field covered by the state law. There is no evidence of congressional intent to pre-empt in this case either in the wording of the statute or in the available legislative history.

In the Wardair Canada. Inc. case the court concluded that the tax did not violate the foreign commerce clause, because the United States by negative implication arising out of its various agreements with foreign countries had acquiesced in state taxation of fuel used by foreign commerce in international travel, because in most of these agreements, the united States committed itself to refrain from imposing national taxes on aviation fuel and in none of these agreements did the United States agree to deny the states the power asserted by Florida in that case.

Finally, we believe the U.S. Supreme Court's decision, West India Oil Co. v. Domenech, 311 U.S.20; 85 L. Ed.15, is noteworthy because it held that the territory of Puerto Rico was entitled to apply its sales tax to sales of property withdrawn from bonded storage without cover of Section 1309 because the enabling act which created the territory of Puerto Rico reserved this right to tax. Certainly the right to tax as reserved by this enabling act is of no greater import than the right to tax reserved to the states by the 10th Amendment to the Federal Constitution.

It is our conclusion that federal law does not preclude the application of the sales or use tax to the transactions in question.

Recommendation

It is recommended that the taxes be redetermined as computed by the reaudit dated September 27, 1989.

W. E. BURKETT, SENIOR STAFF COUNSEL DATE: 1-27-1992