State of California

Board of Equalization
Legal Division-MIC: 85

M e m o r a n d u m

305.0024.250

To : Mr. Robert Liley
Rancho Mirage

Date: August 26, 1996

From : John S. Butterfield
Tax Counsel

Telephone: (916) 324-2653

Subject: Indian Reservations

I have your inquiry of July 8, 1996 for response. In a subsequent telephone conversation, you informed me that the department has, for sales tax administration purposes, been operating under the premise that the United States Supreme Court has required that, when reservation land is comprised of a "checkerboard" pattern, the outside boundary of the "checkerboard" be used to determine whether the state's taxing authority can be imposed. We believe that premise should not be automatically applied.

The Supreme Court case to which I believe you are referring is *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, the case concerned the Flathead Reservation, a contiguous area of approximately 1.25 million acres located in the Bitter Root River Valley. This reservation was established in 1855 by the Treaty of Hell Gate in what is now the State of Montana. In the ensuing 100 years, about half of the land in the reservation was acquired in fee title, by both Indian and non-Indian residents, due to "allotment" acts authorized by Congress and other means. As a result, within the boundaries of the reservation, ownership of various pieces of land might be held in fee by a non-Indian, in fee by an Indian, as an allotment to an individual Indian held in trust by the U.S., or held in trust for the tribe as a whole. These parcels were randomly distributed through-out the reservation, and for shorthand, the Supreme Court referred to this as a "checkerboard" pattern. This did not mean literally as we know a checkerboard today (i.e. rectangular pieces of uniform size, alternating in a pattern) but rather that the various forms of ownership were intermingled with each other. The Court decided that it would be too difficult for law enforcement or taxation purposes to determine what was "Indian country" based on the land title status and instead decreed that all the land within the reservation, including parcels that were once trust land but were now owned by non-Indians in fee, would be considered "Indian country."

In contrast, the A--- C--- Reservation was originally established, by Executive Order rather than Treaty, partially in a traditional, alternating section, checkerboard fashion. If you consider the reservation land sections held by the United States and reserved to the tribe as the "red squares" of the checkerboard, then it is clear that the "black squares" were not part of the reservation when it was established. In fact, at the time the reservation was established, the United States did not even own

the black squares, they having been conveyed to the railroad prior to the establishment of the reservation. Thus, in contrast to the *Moe* case, where the question was whether reservation land lost its status as "Indian country" when it passed into private ownership, in the case of the A--- C--- reservation, the black squares were never reservation land in the first place.

The analysis does not end with a determination as to whether the land in question is reservation land, however. Jurisdiction depends on whether the land is "Indian country" under 18 USC section 1151(b). Although our regulation speaks only in terms of "reservation," it is clear that it should apply to all Indian country. Reservation land is always "Indian country," but in addition parcels of land which are not within a reservation, but are held by the U.S. in trust for Indians ("trust lands") are Indian country, as well as land which is held by Indians under a patent from the U.S. and subject to restrictions on alienation. Finally, Indian country also includes "dependent Indian communities." These lands are those which are not reservation land, not trust lands, but which have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. John*, 437 US 634 at 648-49 (1978).

As I understand your current concern, you are auditing several businesses which are located on a "black square." A contention has been made that deliveries at these business should be considered as having been negotiated or delivered "on a reservation" for purposes of Regulation 1616(d)3(B) and (d)(4)(E). Unless you are provided with proof that the land in question is either reservation land (i.e. included in the description of the land which was reserved to the tribe), or held in trust by the U.S. for the benefit of an Indian or a tribe, or otherwise subjected to superintendence of the United States, the sales tax or use tax should be applied.

At least as to reservation lands, the document you faxed me appears to describe the original reservation with enough specificity that a local title company could provide you with a map overlay which would allow you to determine which property is within a "red square." Trust lands can usually be confirmed by a title company as well, even by street address, and the name of the current, recorded title holder will often be provided for no charge as a customer service. If the company reports that title is in the United States, or an agency of the United States as trustee for the benefit of an Indian or a tribe, that should be sufficient. If the taxpayer contends that even though the property is not reservation land, or trust land, that it is a "dependent Indian community," they should be required to prove that status, and in the absence of proof, tax should apply.

We recognize that this analysis may be a departure from previous board practice, but we believe that it is the correct application of the law. If you have further questions or concerns, please give me a call.

JSB/cmm

cc: Mr. Gary J. Jugum
Mr. David L. Levine