

STATE OF CALIFORNIA

560.0173

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
)	
W--- B---)	No. SR -- XX XXXXXXX-010
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel Stephen A. Ryan on July 5, 1994 in Culver City, California.

Appearing for Petitioner:

Ms. S--- J---
CPA

Appearing for the
Sales and Use Tax Department:

Ms. Tami Pistoni
Tax Auditor

Mr. Hal Murray
Supervising Tax Auditor

Protested Item

The protested tax liability for the period October 1, 1989 through September 30, 1992 is measured by:

<u>Item</u>	<u>State, Local and County</u>
A. Ex-tax price paid to purchase assets for use	\$144,269

Petitioner's Contentions

Revenue and Taxation Code section 6352 exempts petitioner from use tax since section 6381 exempts from sales tax the seller, Federal Deposit Insurance Corporation.

Summary

Petitioner operates a bank. This was its first audit.

Petitioner purchased office assets without paying sales tax reimbursement or use tax. The goods were shipped to petitioner from California locations of the seller, the Federal Deposit Insurance Corporation ("FDIC").

The Board's Sales and Use Tax Department ("Department") did not impose sales tax on FDIC. Use tax was imposed upon petitioner measured by the price petitioner paid to FDIC.

Petitioner contends that Revenue and Taxation Code section 6352 can be interpreted that there is a use tax exemption applicable here since the State is prohibited from imposing a sales tax on FDIC pursuant to Revenue and Taxation Code section 6381. In other words, the use tax exemption would not be limited to cases in which the State is prohibited from imposing a use tax on the purchaser. Petitioner's position is that the Legislature did not solely link together the two use tax subjects in section 6352. Its representatives believe that a use tax exemption can apply pursuant to section 6352 if either the State is prohibited from imposing sales tax on the seller or if the State is prohibited from imposing a use tax on the purchaser.

Analysis and Conclusions

Absent an exemption or exclusion, sales tax is imposed on a retailer measured by the "gross receipts" derived by it from California retail sales (Rev. & Tax. Code § 6051). Use tax measured by the sales price is imposed upon a purchaser who uses in California the property purchased from a retailer for such use, unless an exemption applies (Rev. & Tax. Code §§ 6201 and 6202). There is a use tax exemption which arises when the Board is satisfied that the gross receipts from that sale are included in the sales tax measure (Rev. & Tax. Code § 6401).

Section 6352 reads as follows:

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State." (Emphasis added by petitioner.)

Petitioner concedes that the Board is prohibited from imposing sales tax against FDIC (see the Supremacy Clause of the U.S. Constitution; and U.S. v. County of Allegheny (1944) 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209, which cites the general rule that instrumentalities of the Federal Government are immune from direct taxation by a State).

Petitioner's interpretation of section 6352 is unacceptable. The Board is not imposing any tax on the transferor, FDIC. The Board has determined a use tax against petitioner as the purchaser. Any prohibition against the Board's imposition of a sales tax against the transferor is irrelevant to the potential use tax liability of the purchaser. Sales and use taxes are separate taxes which compliment each other, but do not both apply as a result of the same sale/purchase.

The two use tax subjects in section 6352 apply together. The two sales tax subjects apply together. Neither use tax subject applies to a sales tax subject, and vice versa. Any lack of the word "respectively" in the statutory language, or any literal out-of-context use of the emphasized words "and" or "or" cannot change the laws regarding the Board's imposition of sales or use taxes in situations involving the U. S. Government.

The Board is not prohibited from imposing a use tax against a purchaser solely as a result of the Board being prohibited pursuant to Revenue and Taxation Code section 6381 from imposing a sales tax against FDIC as the transferor. There would need to be a prohibition against the Board from imposing a use tax against the purchaser in order for petitioner to prevail.

Revenue and Taxation Code section 6402 provides for a use tax exemption for the California storage, use or consumption of most property purchased from an unincorporated agency or instrumentality of the U.S. Since FDIC is incorporated rather than unincorporated, that exemption is not applicable. We point out here that there would be no need for section 6402 under petitioner's interpretation of section 6352 because there would be an automatic use tax exemption for a person who makes a purchase from a U.S. Government instrumentality since the Board is prohibited from imposing a sales tax on a U.S. instrumentality.

Recommendation

Redetermine without adjustment.

Stephen A. Ryan, Senior Staff Counsel

7-22-94
Date