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840.0101: Proceeds Due A County.

The amount paid by the State Board of Equalization to satisfy a court judgment and interest thereon is properly charged to and deducted from timber tax distributions paid by the State Controller to the counties where the taxes were originally collected. C 12/5/1990.

December 5, 1990

<Redacted Text>
Auditor - Controller
<Redacted Text>
<Redacted Text>
<Redacted Text>

Dear <Redacted Text>

This is in further response to your <Redacted Text>, letter to Mr. Paul Crebbin acknowledged by Mr. Earle Gutman on November 8, 1990, as a claim by <Redacted Text> "for refund" of timber yield taxes interest paid to <Redacted Text>. According to the claim, <Redacted Text> is seeking a "refund" of its proportionate share of interest paid, which it calculates to be <Redacted Text> through <Redacted Text>, as the result of the federal courts' decision in <Redacted Text>. It is apparent that the claim is not a "claim for refund" as that term is generally understood. That is, it is not a claim by a taxpayer for the return of tax, interest or penalty which has been erroneously or illegally paid by that taxpayer. Rather, it is in the nature of a demand for indemnification from the state for county revenue used to pay certain costs which are a normal incident of timber yield tax litigation.

<Redacted Text>.followed from the Board's application of Revenue and Taxation Code Sections 38115, 38301, and 38104 to the first persons who acquired timber from <Redacted Text>. Article III, Section 3.5 of the California Constitution provides that an administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional:

"(b) To declare a statute unconstitutional:

"(c) To declare a statute unenforceable, or to refuse to enforce statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

In view of Article III, Section 3.5, the State Board of Equalization, which asserted and collected the taxes, was required to continue to assert and collect the taxes, was required to continue to assert and collect the taxes until an appellate court concluded that they were not collectable. Thus, until <Redacted Text>, when the United States Circuit Court of Appeal, Ninth Circuit, upheld the United States District Court's <Redacted Text>, judgement concluding that the taxes were not collectable with respect to Indian timber, the Board legally had no alternative but to continue to apply the sections to all timber, including Indian timber.

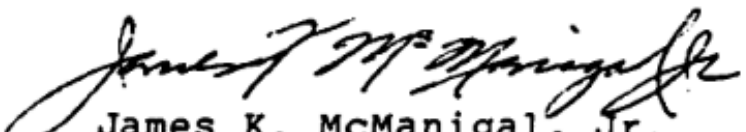
Further, once the matter was decided by the United States Circuit Court of Appeal, petitions for hearing were filed by both parties in the United States Supreme Court. As you know, the Supreme Court ultimately declined to hear the matter. Upon being notified of the denial, the Board proceeded to pay the amount of the judgment, plus interest as required by the judgement and by law.

An additional consideration, in our view, is the fact that from the dates the counties received the bi-annual timber taxes distributions from the State Controller, including all amounts received from Indian timber, the counties had had the full use of those amounts as well as the right to any interest which might accrue thereon. Thus, since the counties, not the state, had had full benefit of the taxes the counties are obligated to bear the financial burden of any refunds of taxes and interest.

Finally, and most importantly, there is simply no statutory authority for payment by the Board of the <Redacted Text> claim. Under the Timber Yield Tax Law, all taxes, interest and penalties are required to be paid to the Board and deposited in the Timber Tax Fund of the State Treasury. (Revenue and Taxation Code sections 38901 and 38903.) The money in the Timber Tax Fund is appropriated for specifically enumerated purposes.

(Revenue and Taxation Code section 38904.) Generally speaking, those purposes are limited to the payment of refunds of taxes, interest and penalties to taxpayers pursuant to statutory refund provisions (Revenue and Taxation Code section 38601 and following) and allocation by the Controller (Revenue and Taxation Code sections 38905 and 38905.1). Nothing in these sections authorizes payment by the Board of the type of claim submitted on behalf of <Redacted Text>. Accordingly, Board staff will take no further action on this <Redacted Text> claim.

Very truly yours,



James K. McManigal, Jr.
Tax Counsel

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