

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HOME SAVINGS AND LOAN ASSOCIATION)

For Appellant: Martin S. Schwartz
Attorney at Law

For Respondent: Bruce R. Langston
Counsel

OP I N I O N

This appeal is made pursuant to section 26076 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Home Savings and Loan Association for refund of franchise tax in an amount of over \$1.00 for each of the income years 1967 and 1968, and pursuant to section 26075, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Home Savings and Loan Association for refund of franchise tax in the amount of \$204,698.59 for the income year 1969.

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The issue presented by this appeal is whether appellant may offset against its franchise tax the amounts it paid as utility user taxes and sales tax.

Appellant; a California corporation, timely filed its franchise tax returns for the income years 1967, 1968, and 1969. On February 27, 1978, appellant filed a claim for refund for each of the years on appeal. Despite the length of time between the filing of appellant's tax returns and, the filing of the claims for refund, we assume the claims were timely filed since respondent raised no statute of limitations issue. Appellant's claims for refund were based on, its contention that it was entitled to offset against its franchise tax the amount it paid during those years in utility user taxes and sales tax. Respondent determined that appellant was not entitled to such an offset and denied the claim for income year 1969. Respondent took no action with regard to the claims for income years 1967 and 1968. Since more than six months have passed since the filing of those claims, they are deemed disallowed pursuant to section 26076 of the Revenue and Taxation Code. This appeal followed.

Section 23184 of the Revenue and Taxation Code allows financial corporations to offset against their franchise tax certain taxes paid during the income year. Subdivision. (a) (2) of that section allows a savings and loan association to offset against its franchise tax, excise taxes it pays for the privilege of "[s]toring, using or otherwise consuming tangible personal property in this state." (Rev. & Tax. Code, § 23184, subd. (a)(3).) Appellant contends that this language is broad enough to encompass both the utility user taxes and the sales tax. We must disagree.

The language of subdivision (a) (2) of section 23184 is identical to the language of section 5201 of the Revenue and Taxation Code, which imposed the use tax. The California Supreme Court has compared utility user taxes to the state's use tax and concluded they are "substantially different" taxes. (*Kivera v. City of Fresno*, 6 Cal.3d 132 [98 Cal.Rptr. 281, 490 P.2d 793] (1971).) Since subdivision (a) (2) of section 23184 allows an offset only of amounts paid in use tax, and the utility user taxes are not use taxes, appellant is not entitled to offset the amount it paid in utility user taxes.

Similarly, appellant is not entitled to offset the amount it paid in sales tax because the sales tax is different from the use tax. The sales tax is a tax imposed

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upon the seller "[f]or the privilege of selling tangible personal property at retail" (Rev. & Tax. Code, § 6051) (emphasis added), whereas the use tax is imposed upon the purchaser for the privilege of using, storing or consuming tangible personal property. (Rev. & Tax. Code, § 6201.) Although the two taxes are complementary in that the use tax was imposed to help retailers in this state compete with retailers outside California, they are separate taxes. (Bank of America v. State Bd. of Equal., 209 Cal.App.2d 780 [26 Cal.Rptr. 348] (1962).)

Appellant's position apparently is that despite the definitional differences, the sales tax is actually imposed upon the purchasers and thus is actually a tax on the privilege of using personal property. As support for this proposition, appellant relies on the case of Diamond National v. State Equalization Board, 425 U.S. 268 [47 L.Ed.2d 780] (1976), which involved the issue of whether national banks were exempt from California's sales tax under a federal statute in effect at that time. The Supreme Court held that it was not bound by California court decisions concluding that the incidence of the state sales tax falls upon the seller. The Court went on to conclude that the incidence of the California sales tax fell upon the national bank, and therefore that the national banks were exempt from the tax.

Appellant's reliance upon that case is misplaced. In Occidental Life Ins. Co. v. State Bd. of Equalization, 135 Cal.App.3d 845 [185 Cal.Rptr. 779] (1982), the court reviewed the Diamond National case and the authority cited therein and determined that those cases applied only when there was a question of federal immunity or exemption and that for state purposes California courts were entitled to adhere to their opinion that the incidence of the state's sales tax falls upon the seller. Since there is no question of federal immunity involved in this appeal, the incidence of the sales tax is not on appellant, the user of the property, and, thus, the sales tax cannot be considered to be a tax for the privilege of using personal property. Accordingly, no offset against franchise tax is allowed under section 23184 of the Revenue and Taxation Code.

Appellant's final argument is that the denial of the claimed offset is unconstitutional. We cannot decide this issue since section 3.5 of article III of the California Constitution precludes our determining that the statutory provisions involved are unconstitutional or unenforceable.

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For the reasons stated above, **the** action of respondent must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Home Savings and Loan Association for refund of franchise tax in an amount of over \$1.00 for each of the income years 1967 and 1968, and in denying the claim of Home Savings and Loan Association for refund of franchise tax in the amount of \$204,698.59 for the income year 1969, be and the same is hereby sustained.

Done at Sacramento, California, this 31st day of January, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins _____, Chairman
Ernest J. Dronenburg, Jr. _____, Member
Conway II. Collis _____, Member
William M. Bennett I _ _ _ _ , Member
Walter Harvey* _____, Member

*For Kenneth Cory, per Government Code section 7.9