

**BOARD OF EQUALIZATION****BUSINESS TAXES COMMITTEE MEETING MINUTES**

HONORABLE JOHN CHIANG, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: SEPTEMBER 24, 2003, TIME: 9:30 A.M.

ACTION ITEMS & STATUS REPORT ITEMS**Agenda Item No: 1****Title: Proposed Regulatory Changes to Incorporate Newly Enacted Revenue and Taxation Code Sections 6011(c)(12) and 6012(c)(12) Regarding Taxes Imposed by Indian Tribes into Regulation 1616,****Issue/Topic:**

Should the Board adopt proposed amendments to Regulation 1616, *Federal Areas*, to implement the newly enacted provisions of Revenue and Taxation Code (RTC) sections 6011(c)(12) and 6012(c)(12), which exclude from the definition of “gross receipts” and “sales price” the amount of tax imposed by any Indian tribe, provided the retailer is in substantial compliance with the Sales and Use Tax Law?

Committee Discussion:

Action 1 – Agreed Item. At the request of a Committee Member, this action item was removed from the agreed agenda for discussion.

Committee Members expressed some areas of concern. One area was how “substantial” compliance differs from “full” compliance. Staff clarified that the regulatory guidelines defining substantial compliance are not intended to invalidate the Indian tax exclusion solely on the basis that a Board examination of a taxpayer’s records disclosed isolated errors such as an unsupported claimed sale for resale. Staff further clarified that the proposed language does not create disparate treatment between retailers on Indian reservations and other retailers.

Another area of concern was the following language in subdivision (d)(3)(C)5: “At the time of the sale, the retailer must have no final and delinquent tax liability owed the Board with respect to Board-assessed taxes, and no delinquent tax liability owed the Board with respect to self-assessed tax.” The concern was that the retailer may not be aware at the time the sale is made that the situation described in this subdivision exists. Staff clarified that the provisions of subdivision (d)(3)(C)5 would only apply to transactions occurring after a Notice of Determination has been issued to the taxpayer for Board-assessed taxes, and the payment of such taxes have become delinquent. Staff further clarified that a taxpayer would be aware that he or she was delinquent with respect to self-assessed taxes.

A final concern was expressed that customers would be treated differently with some paying more sales tax reimbursement or use tax on their purchases, based on whether the retailer is in substantial compliance with subdivision (d)(3)(C)5, as proposed by staff.

Action 2 – Authorization to publish. There was no discussion of this item.

Regulation 1616. FEDERAL AREAS.

(a) IN GENERAL. Tax applies to the sale or use of tangible personal property upon Federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) ALCOHOLIC BEVERAGES. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on Federal reservations, shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.¹

(c) SALES THROUGH VENDING MACHINES. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

¹The following is a summary of the pertinent regulations which have been issued:

(a) GENERAL. Air Force Regulation 34-57, issued under date of February 9, 1968, Army Regulation 210-65, issued under date of May 4, 1966, and Navy General Order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) AIR FORCE. Air Force Regulation 34-57, Paragraph 5, permits commissioned officers' and noncommissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraph 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) ARMY. Army Regulation 210-65, Paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in Paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) NAVY. Navy General Order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sales of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

The proposed amendments contained in this document may not be adopted. Any amendments that are adopted may differ from this text.

(d) INDIAN RESERVATIONS.

(1) IN GENERAL. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) DEFINITIONS. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior. Indian organizations are entitled to the same exemption as are Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians. "Reservation" includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) SALES BY ON-RESERVATION RETAILERS.

(A) Sales by Indians.

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

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(C) Tribal Tax. Operative January 1, 2003, the measure of the California sales or use tax, that is, the sales price or gross receipts from a retail sale, does not include the amount of tax imposed by an Indian tribe on its reservation within the state of California upon or with respect to a retail sale of tangible personal property on the Indian tribe's reservation. To qualify for this exclusion, the following conditions must be met:

1. The tribal tax must be imposed by the governing body of the Indian tribe upon whose reservation the sale is made.

2. The tribal tax must be measured by a stated percentage of the sales price or gross receipts, whether the tribal tax is imposed upon the retailer or the consumer.

3. The retailer must maintain and make available for examination on request by the Board or its authorized representative, all records necessary to determine the correct tax liability under the Sales and Use Tax Law and all records necessary for the proper completion of the sales and use tax return, as explained in Regulation 1698.

4. At the time of the sale, the retailer must hold a valid and active seller's permit or a valid and active certificate of registration – use tax issued by the Board.

~~5. At the time of the sale, the retailer must have no final and delinquent tax liability owed the Board with respect to Board-assessed taxes, and no delinquent tax liability owed the Board with respect to self-assessed tax.~~

(CD) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, "Resale Certificates").

(4) Sales by Off-Reservation Retailers.

(A) Sales Tax - In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax - Permanent Improvements - In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax - Permanent Improvements - Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax - In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax - Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a

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reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

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