



STATE BOARD OF EQUALIZATION
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KRISTINE CAZADD
Interim Executive Director

May 6, 2011

To Interested Parties:

**Notice of Proposed Regulatory Action
by the
State Board of Equalization**

Proposed to Adopt Regulation 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*

NOTICE IS HEREBY GIVEN

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt California Code of Regulations, title 18, section (Regulation) 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*. Regulation 1685.5 prescribes the manner in which the Board “shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table,” as required by Revenue and Taxation Code (RTC) section 6452.1, as amended by section 1 of Senate Bill No. (SB) 86 (Stats. 2011, ch. 14), and prescribes the use tax table for calendar year 2011.

PUBLIC HEARING

A public hearing on the adoption of the proposed regulatory action will be held in Room 207, 5901 Green Valley Circle, Culver City, at 9:30 a.m., or as soon thereafter as the matter may be heard, on June 21, 2011. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the proposed adoption of Regulation 1685.5.

AUTHORITY

RTC section 7051.

REFERENCE

RTC section 6452.1.

STATE BOARD OF EQUALIZATION



BOARD Deferred to the July 26-27 Board Meeting

At the *Dianna G. Johnson* Board Meeting

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Prior Law

RTC section 6452.1, as enacted by Statutes 2010, chapter 721, section 2, permits taxpayers to make an irrevocable election to report "qualified use tax" on an "acceptable [income] tax return" filed with the Franchise Tax Board (FTB) in order to make it more convenient for taxpayers to comply with their use tax obligations. RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721 defined the term "qualified use tax" to mean a taxpayer's actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and section 35 of article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer's purchases of tangible personal property subject to use tax.

Current Law

SB 86 was enacted on March 23, 2011. It amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their "estimated use tax liabilities," based upon their adjusted gross income for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, provides that "the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table" for inclusion in the instructions to the FTB's returns and use by eligible taxpayers.

Proposed Regulation

The Board proposes to adopt Regulation 1685.5 to prescribe the use tax table that taxpayers may use to estimate their calendar-year 2011 use taxes based upon their adjusted gross income, prescribe the manner in which the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board must make available to the FTB each year. The objectives of the proposed regulation are to fulfill the Board's duty to estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2011 and to clearly prescribe the manner in which the Board shall estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years.

There are no comparable federal regulations or statutes to Regulation 1685.5.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of proposed Regulation 1685.5 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of proposed Regulation 1685.5 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The adoption of proposed Regulation 1685.5 will enable the Board to fulfill its duty to estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2011 and clearly prescribe the manner in which the Board shall estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years. The Board's use tax tables will enable taxpayers to choose to report their estimated use tax liabilities for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), instead of calculating and reporting their actual unpaid use tax liabilities (as discussed above). And, the proposed regulation will not impose any new taxes, it will not change any exemptions or exclusions, and it will not even require taxpayers to use the Board's use tax tables to report their use tax liabilities. Therefore, the Board has made an initial determination that the adoption of proposed Regulation 1685.5 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of proposed Regulation 1685.5 may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the adoption of proposed Regulation 1685.5 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

Adoption of proposed Regulation 1685.5 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which this action is proposed, or be as effective as and less burdensome to affected private persons than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed regulation should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends when the public hearing begins at 9:30 a.m., or as soon thereafter as the matter may be heard, on June 21, 2011. If the Board receives written comments prior to the close of the written comment period, the statements, arguments, and/or contentions contained in those comments will be presented to and considered by the Board before the Board decides whether to adopt proposed Regulation 1685.5. The Board will only consider written comments received by that time.

**AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF
PROPOSED REGULATION**

The Board has prepared an underscored version of the text of proposed Regulation 1685.5 illustrating its express terms and an initial statement of reasons for the adoption of the proposed regulation. These documents and all the information on which the proposed regulation is based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed regulation and the Initial Statement of Reasons are also available on the Board's Website at www.boe.ca.gov.

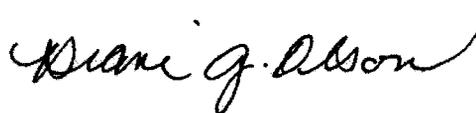
**SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE
SECTION 11346.8**

The Board may adopt proposed Regulation 1685.5 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts proposed Regulation 1685.5, the Board will prepare a Final Statement of Reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov

Sincerely,



Diane G. Olson, Chief
Board Proceedings Division

DGO:reb

Initial Statement of Reasons

Proposed Adoption of California Code of Regulations, Title 18, Section 1685.5, *Calculation of Estimated Use Tax - Use Tax Table*

SPECIFIC PURPOSE AND NECESSITY

Prior Law

Revenue and Taxation Code (RTC) section 6452.1, as enacted by Statutes 2010, chapter 721, section 2, permits taxpayers to make an irrevocable election to report "qualified use tax" on an "acceptable [income] tax return" filed with the Franchise Tax Board (FTB) in order to make it more convenient for taxpayers to comply with their use tax obligations. RTC section 6452.1, subdivision (d)(2), as enacted by Statutes 2010, chapter 721 defined the term "qualified use tax" to mean a taxpayer's actual unpaid use tax liability after applying the state use taxes imposed under the Sales and Use Tax Law (RTC § 6001 et seq.) and section 35 of article XIII of the California Constitution, and the local and district use taxes imposed in conformity with the Bradley-Burns Uniform Local Sales and Use Tax Law (RTC § 7200 et seq.) or in accordance with the Transactions and Use Tax Law (RTC § 7251 et seq.) to the taxpayer's purchases of tangible personal property subject to use tax.

Current Law

Senate Bill No. (SB) 86 (Stats. 2011, ch. 14) was enacted on March 23, 2011. It amended RTC section 6452.1 to make it more convenient for taxpayers to comply with their use tax obligations by giving taxpayers the option to report their "estimated use tax liabilities," based upon their adjusted gross income for income tax purposes, for one or more single nonbusiness purchases of individual items of tangible personal property each with a sales price of less than one thousand dollars (\$1000), as determined from a use tax table, instead of calculating and reporting their actual unpaid use tax liabilities (as described above). In addition, RTC section 6452.1, subdivision (d)(2)(A)(i)(II), as amended by SB 86, provides that "the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table" for inclusion in the instructions to the FTB's returns and use by eligible taxpayers.

Proposed Regulation

The Board proposes to adopt Regulation 1685.5 to prescribe the use tax table that taxpayers may use to estimate their calendar-year 2011 use taxes based upon their adjusted gross income, prescribe the manner in which the Board shall annually calculate

the estimated amount of use tax due according to a person's adjusted gross income for calendar-year 2012 and subsequent years, and prescribe the format of the use tax tables the Board must make available to the FTB each year. The objectives of the proposed regulation are to fulfill the Board's duty to estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2011 and to clearly prescribe the manner in which the Board shall estimate the amount of use tax due according to a person's adjusted gross income and make the estimate available to the FTB in the form of a use tax table for calendar-year 2012 and subsequent years.

During its April 26, 2011, meeting, the Board determined that it was necessary to adopt Regulation 1685.5 for the specific purposes of implementing, interpreting, and making specific the provisions of RTC section 6452.1 providing that "the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table" and prescribing the use tax table for calendar-year 2011.

There are no comparable federal regulations or statutes to Regulation 1685.5.

DOCUMENTS RELIED UPON

The Deputy Director for the Board's Sales and Use Tax Department, Jeffrey McGuire, submitted a memorandum dated April 15, 2011, to the Board Members for consideration at the April 26, 2011, Board meeting, which contained staff's request for the Board's authorization to begin the formal rulemaking process to adopt Regulation 1685.5. The Board relied upon the April 15, 2011, memorandum, the exhibits to the April 15, 2011, memorandum, which illustrate the text of proposed Regulation 1685.5 and identify the sources of the data the Board will use to perform the calculations prescribed by Regulation 1685.5, and comments made during the April 26, 2011, discussion of the April 15, 2011, memorandum in deciding to propose the adoption of Regulation 1685.5.

ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt proposed Regulation 1685.5 at this time or, alternatively, whether to take no action at this time and seek additional input from interested parties. However, the Board decided to begin the formal rulemaking process to adopt the proposed regulation at this time in order to comply with deadlines for including the Board's use tax table in the instructions to the FTB's 2011 income tax returns.

NO ADVERSE ECONOMIC IMPACT ON BUSINESS

The adoption of proposed Regulation 1685.5 will enable the Board to implement the provisions of RTC section 6452.1 providing that "the Board shall annually calculate the estimated amount of use tax due according to a person's adjusted gross income and by

July 30 of each calendar year make available to [the] Franchise Tax Board such amounts in the form of a use tax table” and prescribe the use tax table for calendar-year 2011. Eligible taxpayers will have the option to use the Board’s use tax tables to estimate their use tax liabilities for calendar-year 2011 and subsequent years, but taxpayers may also choose to continue to calculate and report their actual unpaid use tax liabilities (as discussed above). Furthermore, the adoption of the proposed regulation will not impose any new taxes, and it will not change any exemptions or exclusions. Therefore, the Board has made an initial determination that the adoption of proposed Regulation 1685.5 will not have a significant adverse economic impact on business.

The proposed regulation may affect small business.

**Proposed Text of
California Code of Regulations, Title 18, Section 1685.5**

Section 1685.5. Calculation of Estimated Use Tax - Use Tax Table.

(a) In General.

The Board of Equalization (BOE) is required to annually calculate the estimated amount of use tax due according to a person's adjusted gross income (AGI) and make such amounts available to the Franchise Tax Board (FTB), by July 30 of each year, in the form of a use tax table for inclusion in the instructions to the FTB's returns.

(b) Definitions and Data Sources.

(1) AGI Ranges. The use tax table shall be separated into eight (8) AGI ranges as follows:

(A) AGI less than \$20,000;

(B) AGI of \$20,000 to \$39,999;

(C) AGI of \$40,000 to \$59,999;

(D) AGI of \$60,000 to \$79,999;

(E) AGI of \$80,000 to \$99,999;

(F) AGI of \$100,000 to \$149,999;

(G) AGI of \$150,000 to \$199,999;

(H) AGI more than \$199,999.

(2) Use Tax Liability Factor or Use Tax Table Percentage. For the 2011 calendar year the use tax liability factor or use tax table percentage shall be 0.070 percent (.0007). On May 1, 2012, and each May 1 thereafter, the BOE shall calculate the use tax liability factor or use tax table percentage for the current calendar year by multiplying the percentage of income spent on electronic and mail order purchases for the proceeding calendar year by 0.37, multiplying the product by the average state, local, and district sales and use tax rate, and then rounding the result to the nearest thousandth of a percent.

(3) Total Personal Income. Total personal income shall be determined by reference to the most current personal income data published by the United States Bureau of Economic Analysis.

(4) Total Spending at Electronic Shopping and Mail Order Houses. Total spending at electronic shopping and mail order houses shall be determined by reference to the most current electronic shopping and mail order house spending data published by the United States Census Bureau.

(5) Percentage of Income Spent on Electronic and Mail Order Purchases. The percentage of income spent on electronic and mail order purchases during a calendar year shall be calculated by dividing the total spending at electronic shopping and mail order houses for that year by the total personal income for that year, multiplying the result by 100, and rounding the result to the nearest tenth of a percent.

(6) Average State, Local, and District Sales and Use Tax Rate. The average state, local, and district sales and use tax rate for a calendar year shall be the total of:

(A) The rates of the statewide sales and use taxes imposed under section 35 of article XIII of the California Constitution and the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) in effect on January 1 of that year;

(B) The statewide rate of local tax imposed under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) in effect on January 1 of that year; and

(C) The weighted average rate of the district taxes imposed under the Transactions and Use Tax Law (Rev. & Tax Code, § 7251 et seq.) in effect in the various jurisdictions throughout the state on January 1 of that year after taking into account the proportion of the total statewide taxable transactions (by dollar) reported for each jurisdiction during the fourth quarter of the calendar year that is two years prior to the calendar year for which the calculation is made. For example, the total reported taxable transactions (by dollar) for the fourth quarter of 2010 shall be used to determine the weighted average rate of the district tax rates in effect on January 1, 2012, to calculate the weighted average rate of district taxes for calendar year 2012.

(c) Calculation of the Estimated Use Tax Liability.

(1) The estimated use tax liability for the AGI range described in subdivision (b)(1)(A) shall be determined by multiplying \$10,000 by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(2) The estimated use tax liability for the AGI ranges described in subdivision (b)(1)(B) through (G) shall be determined by multiplying the midpoint of each AGI range by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(3) The estimated use tax liability for the AGI range described in subdivision (b)(1)(H) shall be determined by multiplying each range member's actual AGI by the use tax liability factor or use tax table percentage and then rounding the result to the nearest whole dollar.

(d) Use Tax Table Format.

(1) The use tax table for calendar year 2011 shall provide as follows:

<u>Adjusted Gross Income (AGI) Range</u>	<u>Use Tax Liability</u>
<u>Less Than \$20,000</u>	<u>\$7</u>
<u>\$20,000 to \$39,999</u>	<u>\$21</u>
<u>\$40,000 to \$59,999</u>	<u>\$35</u>
<u>\$60,000 to \$79,999</u>	<u>\$49</u>
<u>\$80,000 to \$99,999</u>	<u>\$63</u>
<u>\$100,000 to \$149,999</u>	<u>\$88</u>
<u>\$150,000 to \$199,999</u>	<u>\$123</u>
<u>More than \$199,999 -Multiply AGI by 0.070% (.0007)</u>	

(2) The use tax tables for calendar year 2012 and subsequent years shall utilize the same format as the use tax table for calendar year 2011.

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Section 6452.1, Revenue and Taxation Code.

Regulation History

Type of Regulation: Sales and Use Tax

Regulation: 1685.5

Title: 1685.5, *Calculation of Estimated Use Tax – Use Tax Table*

Preparation: Brad Heller

Legal Contact: Brad Heller

Board proposes to adopt Regulation 1685.5, *Calculation for Estimated Use Tax – Use Tax Table*, for the specific purpose of implementing the new use tax table provisions of Revenue and Taxation Code section 6452.1.

History of Proposed Regulation:

May 6, 2011	OAL publication date; 45-day public comment period begins; Interested Parties mailing
April 26, 2011	Notice to OAL
April 26, 2011	Business Tax Committee, Board Authorized Publication (Vote 3-2)

Sponsor: NA

Support: NA

Oppose: NA

Memorandum

To : Honorable Jerome E. Horton, Chairman
 Honorable Michelle Steel, Vice Chair
 Honorable Betty T. Yee, First District
 Senator George Runner (Ret.), Second District
 Honorable John Chiang, State Controller

Date : June 20, 2011

From : Robert Ingenito
 Chief, Research and Statistics Section

Subject **Project Regulation 1685.5 Alternative Use Tax Lookup Table - Should ABx1 28 become Law.**

This Memo follows up on a request that staff develop an alternative lookup table for consideration by the Board, should the Governor sign ABx1 28. The Research & Statistics staff reviewed the current proposed lookup table and the language in the proposed ABx1 28, and calculated the alternative look up table set forth below. The alternative lookup table does not reflect other current and potential future actions by the Legislature.

Current Lookup Table before the Board:

Regulation 1685.5 as Proposed. This is the lookup table currently under consideration with respect to Regulation 1685.5:

Adjusted Gross Income (AGI) Class				Use Tax Liability
Less Than \$20,000				\$7
\$20,000	to	\$39,999		\$21
\$40,000	to	\$59,999		\$35
\$60,000	to	\$79,999		\$49
\$80,000	to	\$99,999		\$63
\$100,000	to	\$149,999		\$88
\$150,000	to	\$199,999		\$123
Over \$200,000 Multiply AGI by 0.070%				

Alternative Lookup Table, if ABx1 28 is signed into law:

Below is an alternative lookup table, which assumes that (1) the Governor signs ABx1 28, and (2) the bill's revenue estimate of a \$317 million (\$200 million General Fund) revenue gain is actually realized. An increase of \$317 million would reduce the 2011-12 estimated use tax gap by 37 percent. Thus, the alternative table reduces the use tax liability for each income class by that amount (adjusting for a half-year effect, before rounding to the nearest dollar).

Adjusted Gross Income (AGI) Class				Use Tax Liability¹
Less Than \$20,000				\$6
\$20,000	to	\$39,999		\$17
\$40,000	to	\$59,999		\$29
\$60,000	to	\$79,999		\$40
\$80,000	to	\$99,999		\$51
\$100,000	to	\$149,999		\$71
\$150,000	to	\$199,999		\$100
Over \$200,000 Multiply AGI by 0.057%				
¹ These use tax liabilities reflect a half-year effect of the enactment of ABx1 28.				

Please let me know if you have any questions or need additional information.

RI:ls

- cc: Ms. Regina Evans
 Mr. Louis Barnett
 Mr. Alan LoFaso
 Mr. Sean Wallentine
 Ms. Marcy Jo Mandel
 Ms. Kristine Cazadd
 Mr. Randy Ferris
 Ms. Margaret Shedd



June 20, 2011

Rick Bennion
Regulations Coordinator
California Board of Equalization
450 N Street
Sacramento, CA 95814
richard.bennion@boe.ca.gov

Re: Upcoming Board Agenda Item F1, Proposed Adoption of 18 CCR §1685.5

Dear Mr. Bennion:

On June 21, 2011, the Board is scheduled to vote on the staff's request to adopt proposed Regulation §1685.5 to implement the new use table provisions under R&TC §6452.1. This letter serves as a request for the Board to reject the staff's recommendation.

R&TC §6452.1(d)(2)(A), as amended by SB 86 (Ch. 11-14), directs the Board to calculate the estimated amount of use tax according to a person's state adjusted gross income, and, by July 30 of each calendar year, make the amounts available to the Franchise Tax Board in the form of a table. The statute does not require the Board to promulgate a regulation, nor does it require the Board to include a use tax look-up table as part of a regulation.

CalTax believes that the Board should not promulgate a regulation at this time. The public has not had sufficient opportunity to vet its concerns about the methodology used to prepare the table.

CalTax sent a letter to BOE Chair Jerome Horton on April 25 (following) pointing out numerous problems with the Board's proposed use tax look-up table and urging members of the Board to postpone adoption of the proposed regulations. CalTax's Dave Doerr, Rob Gutierrez and I also verbally expressed our concerns at the staff's May 18, 2011 use tax gap stakeholders' meeting. CalTax's main concern is that the table overstates a taxpayer's use tax liability.

To date, we have not received a response from the Board or staff addressing our concerns. We understand that a second stakeholders' meeting has been scheduled for 1 p.m. on June 28 in Sacramento. However, this date is after the scheduled Board vote on June 21. If the Board approves the staff's recommendation and adopts the regulation, it will be too late to change the table based on comments received from taxpayers on June 28.

In addition, the use tax look-up table should not be included as part of a regulation if the staff believes a regulation is necessary. The regulation should address the methodology, but should not include the actual look-up numbers. If staff wants to change the table in the future and it is included as part of a regulation, they must first go through the regulatory process.

Rick Bennion
June 20, 2011
Page 2

CalTax has historically supported a use tax look-up table as a way to increase compliance for California's use tax laws, as long as using such a table would not subject taxpayers to an audit. SB 86 addressed CalTax's concerns by adding R&TC §6452.1(g), which precludes the Board from making any understatement determinations for certain taxpayers who elect to use the use tax look-up table. That said, it is in the state's best interest to make the use tax look-up table as enticing as possible so that taxpayers will use it. As currently drafted, a taxpayer with California adjusted gross income as little as \$1 would owe \$7 in use tax. Of course, this is an extreme example, but it should prove the point that the look-up table produces an overstated use tax liability for some taxpayers, as pointed out in CalTax's April 25 letter.

For the foregoing reasons, CalTax respectfully requests the Board to reject staff's recommendation to adopt the regulation in its current form. We also request that staff continue to work with CalTax and other stakeholders with a common goal of meeting the July 30 statutory deadline for making the use tax look-up table available to the Franchise Tax Board.

Sincerely,



Gina Rodriguez
Vice President of State Tax Policy

cc: The Honorable Jerome Horton, Chair, Board of Equalization
The Honorable Michelle Steel, Vice Chair, California State Board of Equalization
The Honorable Betty T. Yee, California State Board of Equalization
The Honorable George Runner, California State Board of Equalization
The Honorable John Chiang, State Controller



April 25, 2011

The Honorable Jerome Horton, Chair
California State Board of Equalization
450 N Street, MIC 72
Sacramento, CA 95814

Subject: Proposed Regulation 1685.5, Calculation of Estimated Use Tax – Use Tax Table

Dear Honorable Jerome Horton:

The California Taxpayers Association is a nonpartisan, nonprofit association that supports good tax policy, opposes unnecessary taxes and promotes government efficiency. CalTax urges the members of the Board of Equalization to postpone adoption of the proposed regulations for the use tax look-up table.

To date, no interested parties meetings have been held to discuss the use tax table. CalTax believes that the interested parties meeting process is crucial to developing a fair and accurate table. The table proposed in Regulation 1685.5 is neither accurate nor a fair representation of what a taxpayer's use tax liability would be under the law. Listed below are CalTax's concerns:

- **Use Tax Table Methodology Needs Further Review.** The use tax table relies on several estimates that need further clarification to substantiate the accuracy of the table's calculation. For example, the regulation uses data that shows use tax liabilities have grown exponentially during the past several years, despite a global financial crisis and the crash of the housing market.
- **Does the Use Tax Table Seek to Generate Revenue Beyond What is Owed?** Another concern CalTax has is whether the BOE's design of the lookup table generate revenue beyond what is owed. As intended, the use tax table should purely be a tool for the Board to improve compliance.

Of the nine other states currently utilize use tax lookup tables, three states have a set range for taxpayers to use when calculating their use tax liability. Basing the use tax table percentage on a range make the use tax liability computation more reasonable, and reflects differences in consumption patterns.

- **Use Tax Table Does Not Account for Different Local Use Tax Rates.** Local sales and use tax rates differ by city and county, and such differences should be reflected in a lookup table. The Board of Equalization could address use tax rate differences by creating a new publication. The BOE already publishes data in Publication 71, which lists the sales and use tax rates for all counties, cities and special districts in California.

CALIFORNIA TAXPAYERS ASSOCIATION

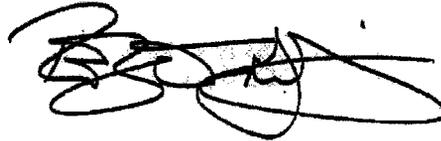
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The Honorable Jerome Horton, Chair
April 25, 2011
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- **Use Tax Table Does Not Reflect Prospective Changes in the Use Tax Rate.** It is uncertain whether the use tax rate will remain at 8.25 percent past June 30. Currently, the Legislature is deliberating whether the rate should be extended. It is uncertain what will happen. The regulation assumes the rate will continue by using the January 1 use tax rate for the entire year.

CalTax looks forward to working with the Board of Equalization members and the Board's staff as the use tax table is implemented. However, for the foregoing reasons, we respectfully request that the Board postpone enactment of the use tax lookup table and vet the regulation through the interested parties' process.

Sincerely,



Robert Gutierrez, Research Analyst
California Taxpayers Association

cc: Honorable Michelle Steel, Vice Chair, California State Board of Equalization
Honorable Betty T. Yee, California State Board of Equalization
Honorable George Runner, California State Board of Equalization
Honorable John Chiang, State Controller
Jeff McGuire, Deputy Director of the Sales and Use Tax Department

From: Gene Johnson [mailto:gjohnsonca@comcast.net]
Sent: Monday, June 13, 2011 12:02 PM
To: Heller, Bradley (Legal)
Subject: Proposed Regulation 1685.5
Importance: High

Proposed Adoption of Regulation 1685.5
Calculation of Estimated Use Tax – Use Tax Table
Submitted via email on June 13, 2011
by Gene Johnson

I recently reviewed this proposed regulation, and in response to your request for written comments from the public I am submitting the following.

The adoption of a use tax table greatly simplifies record keeping for the average person, but its use does raise several questions. Before listing these questions, I would like to point out an inconsistency, or at least poor wording, at the bottom of page 3 in the “Initial Statement of Reasons.” The following is a direct quote:

Therefore, the Board has made an initial determination that the adoption of Proposed Regulation 1685.5 will not have a significant adverse economic impact on business.

The proposed regulation may affect small business. (Emphasis added)

You are saying it may affect small business, but it will not have an adverse economic impact. Does this imply it will have a positive economic impact? This seems confusing but it is a small point.

The following questions are listed in no particular order.

1. One must question whether the use tax amount produced by this table bears any resemblance to reality. To the best of my knowledge, nobody has been able to prove a direct correlation between incomes and use tax liabilities incurred. Some people with very high incomes might not make any purchases subject to use tax. Some lower income people might make a lot of these purchases. It might be difficult to defend this concept against a serious challenge by a taxpayer rights organization. I know the use of the table is voluntary, but I am unaware of any other tax that is routinely based on estimates like this. Certainly the factors used to calculate the tax can be subject to question. The income ranges used appear to be random and they can create a situation where \$1 in additional income can result in a healthy increase in the amount of use tax due. Why not simply publish a factor to be multiplied by the taxpayer’s actual AGI to determine the use tax amount due?
2. Has BOE considered allowing a de minimis exemption from use tax? Is it really worth anyone’s time (taxpayer, FTB, or BOE) to report \$7 in use tax? If I understand correctly, BOE will not issue a determination for less than \$50 because the administrative costs make it impractical. Why require use tax reporting for less than this amount? I

understand the argument that \$7 reported by a million people adds up to serious money. However, this tax has already generated a lot of negative publicity because so many taxpayers think it is a new tax; perhaps giving the "little guy" a break might help with public relations.

3. In the past, I believe that practitioner-prepared returns have been less likely to report use tax to FTB than individually-prepared returns. This seems to result from the opinion of tax professionals that reporting use tax on the FTB tax return is an election and not a requirement. The inclusion of an optional table in this regulation does little to dispel this misconception.
4. Should this regulation state that persons registered with BOE as cigarette and tobacco products consumers cannot use this table?
5. Taxpayers who are able to maintain records adequate enough to calculate their actual use tax liability are very likely to report the amount from the table if it is less than their actual obligation. Is BOE precluded from issuing a subsequent determination if the person reported use tax based on the look-up table? Should there be a provision for a substantial understatement (say 25% or more) of actual use tax liability if the taxpayer uses this table?
6. I am not sure if this comment directly affects this regulation, but it involves FTB's collection of the use tax on behalf of BOE. It also affects the public relations impact of their procedures. When FTB receives payment for the amount due on a state income tax return that also includes use tax, a serious problem develops if there is an underpayment. FTB applies the money to the total liability in the following order:
 - i. State income tax due
 - ii. Penalties or interest applicable to state income tax due
 - iii. Use tax due

Taxpayers are sometimes unaware of additional penalties or interest they owe to FTB on their state income tax liability so they remit only funds for the state income tax and the use tax they are reporting. However, FTB will apply the funds first to state income tax due, second to penalties and interest owed them, and third to use tax. Then they report any unpaid use tax to BOE. When BOE attempts to collect funds due for use tax, taxpayers seldom understand why BOE is contacting them about a liability they reported to FTB and which they believe they have already paid to FTB. While this appears to be a simple administrative procedure, it often results in unfavorable public relations which should be considered. It also creates additional unnecessary work for FTB and BOE. The obvious solution is for FTB to apply funds to the tax due (including use tax) first and then to their penalties and interest. This also more closely matches the intent of the taxpayer.

Thank you for considering my comments. I would appreciate hearing your response.