State of California

Board of Equalization
Legal Department-MIC: 83
Office of the Chief Counsel
Telephone: (916) 445-4380
Fax: (916) 323-3387

Memorandum

To: Honorable Judy Chu, Ph.D., Chair
Honorable Betty T. Yee, Vice-Chairwoman
Honorable Bill Leonard
Honorable Michelle Steel
Honorable John Chiang

Date: November 26, 2008

From: Kristine Cazadd
Chief Counsel

Subject: **December 17, 2008, Chief Counsel's Calendar – Petition to Adopt a Regulation to Designate Qualified Veteran Itinerant Vendors as Consumers of Tangible Personal Property**

Background

On June 13, 2008, Mr. William Connell submitted a petition pursuant to Government Code section 11340.6, requesting the Board to adopt a regulation specifying that a qualified veteran itinerant vendor is a consumer of any goods he or she offers for sale. Copies of the petition, a letter from petitioner to State Senator Mark Ridley-Thomas, an e-mail from petitioner to State Assembly Member Charles Calderon, petitioner's "Statement of Principle (Special Exemption [f]rom Tax[-]Related Burdens)," and Government Code sections 11340.6 and 11340.7 are attached. According to the petition, Business and Professions Code section 16102 and *Brooks v. County of Santa Clara* (1987) 191 Cal.App.3d 750, establish an exemption from sales and use tax for sales by a veteran-vendor of any goods he or she owns.

On June 4, 2008, petitioner filed a Complaint for Refund of Sales and Use Tax (Complaint) in Sacramento County Superior Court (Superior Court). That same day, the Complaint was served on the Board. The Complaint alleges that Business and Professions Code section 16102 exempts plaintiff (petitioner) from paying sales and use tax on his sales of food and beverages from his vending cart. On September 4, 2008, the Superior Court entered the Order and Judgment of Dismissal of the Complaint. The Notice of Entry of Judgment was served by mail on September 24, 2008.

On July 8, 2008, this petition first came before the Board. Due to proposed Board-sponsored legislation concerning qualified veteran itinerant vendors, as discussed below, the Board deferred consideration of the petition until its October 1, 2008, meeting in Sacramento. Subsequently, at petitioner's request, the matter was deferred for consideration at the Board's December 2008 meeting.

The Board has consistently taken the position that Business and Professions Code section 16102's exemption from the imposition of taxes or fees associated with county licenses to engage in the business of selling tangible personal property does not create an exemption under the Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.) nor the Uniform Local Sales and

Use Tax Law (Rev. & Tax. Code, § 7200 et seq.). (See, e.g., Sales and Use Tax Annotation 410.0900 (6/22/95).) This position is consistent with that of the Legislative Counsel in its opinions dated October 28, 1998 (Ops. Cal. Leg. Counsel, No. 14321, Business License Tax Exemption: Disabled Veterans), and August 17, 2006 (Ops. Cal. Leg. Counsel, No. 0611388, Veteran Business Licensing). Moreover, this position was confirmed by the Los Angeles County Superior Court (Case No. BC316467), which dismissed petitioner's lawsuit against the Board on this very issue, on the ground that the complaint did not state facts sufficient to constitute a cause of action. Thus, the Board, the Legislative Counsel, and the Los Angeles County Superior Court concur that there is currently no veteran's exemption that applies to petitioner's liabilities under the Sales and Use Tax Law or the Uniform Local Sales and Use Tax Law.

Furthermore, *Brooks v. County of Santa Clara* (1987) 191 Cal.App.3d 750, the case cited by petitioner, does not support his contention that Business and Professions Code section 16102 exempts his sales as a United States veteran from sales and use tax. *Brooks* held that a veteran's nut vending business, which was exempt from county license fees for hawking, vending, and peddling by virtue of Business and Professions Code section 16102, was also exempt from health license and permit fees imposed by the county under Health and Safety Code section 510. That case neither involves nor addresses sales and use taxes. Thus, *Brooks* does not establish a veteran's exemption from sales or use tax for retail sales of tangible personal property. We note that Board staff has historically considered *Brooks* in reaching the conclusion that there is no veteran's exemption applicable to petitioner's liabilities under the Sales and Use Tax Law or the Uniform Local Sales and Use Tax Law.

Lastly, the Board sponsored legislation during the 2008 legislative session in an effort to address petitioner's situation. Assembly Bill 3009, which was referred to the suspense file in the Assembly Revenue and Taxation Committee, generally provided that a United States veteran, as specified, shall be regarded as a consumer, rather than a retailer, of food products that he or she sells, provided that, for the purposes of selling these items, the veteran has no employees and no permanent place of business, as defined. A proposal to sponsor similar legislation will be before the Board at the Legislative Committee meeting scheduled for December 16, 2008.

Grounds for the Petition

The grounds advanced in the petition are as follows:

1. Business and Professions Code section 16102 specifies that qualified United States veterans have the right to sell goods, wares and merchandise that he or she owns without the payment of "any" taxes and fees.

2. *Brooks v. County of Santa Clara* (1987) 191 Cal.App.3d 750, has "upheld" Business and Professions Code section 16102.

Options for Board Action

Pursuant to Government Code section 11340.7 (copy attached), upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation, the Board shall:

1. Deny each petition, in whole or in part, indicating in writing why the Board has reached its decision on the merits of the petition; or

2. Initiate the rulemaking process and schedule the matter for public hearing in accordance with the rulemaking provisions of the Administrative Procedure Act. (Gov. Code, § 11346 et seq.)

If the Board schedules the matter for public hearing, it may, prior to setting the public hearing date and authorizing publication of the notice of hearing, hold public discussion of the proposal. (Gov. Code, § 11346.45.) For example, the Board may refer the matter to the Business Taxes Committee for the full or abbreviated version of that process.

Furthermore, the Board may grant any other relief or take any other such action it may determine to be warranted by the petition. (Gov. Code, § 11340.7, subd. (b).)

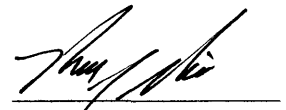
The decision of the Board regarding the petition is required to be in writing and to include the reasons therefore. The decision must be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register. (Gov. Code, § 11340.7, subd. (d).)

Staff Recommendation

Because the Board currently lacks statutory authority to specify that veterans be declared consumers, rather than retailers, of tangible personal property that they sell, staff recommends that the petition be denied.

Additional Information

Staff is available to provide additional information and to render whatever assistance the Board may require in making its decision. If you have any questions on these matters, please contact Assistant Chief Counsel Randy Ferris at (916) 261-2976.

APPROVED: 

Ramon J. Hirsig
Executive Director

KEC:ef
Attachments
J:/Chief Counsel/Finals/WilliamConnell 12-08Memo.doc
J:/Business/Use/Final/MCCAI/WilliamConnell 12-08Memo.doc

cc: Mr. Ramon Hirsig (MIC:73)
Ms. Randie Henry (MIC:43)
Mr. Randy Ferris (MIC:82)
Ms. Carla Caruso (MIC:82)

ATTACHMENTS

STATEMENT OF PRINCIPLE

(Special Exemption From Tax Related Burdens)

On March 24, 1893, the State of California adopted an Act (the "ACT"), Exhibit A, that recognized that "... every soldier, sailor or marine of the United States, who is unable to obtain a livelihood by manual labor, shall have the right to hawk, peddle and vend any goods ....without payment of any license, tax, or fee *whatsoever*." (emphasis added)*.

By including the word, "whatsoever", the clear legislative intent was to remove ALL tax related burdens from this limited group of former military people.

Under the provisions of *California Code of Civil Procedure Section 1859 (Enacted 1872)*, Exhibit B, the intention of the legislature must be followed if at all possible.

However, subsequent, to the adoption of the ACT, other tax related acts were passed which did not specifically exempt this limited group from their provisions, and *CONTRARY TO THE CLEAR INTENT OF THE LEGISLATURE, tax related burdens have been place on these former military people.*

It is the position of this **STATEMENT OF PRINCIPLE** that, in the interests of justice and in keeping with the provisions of Section 1859 of the Code of Civil Procedure, the legislative intent of the ACT should be carried out and that all provisions of any law, state or local, that contradicts the clear intent of the ACT be modified so as to exempt this limited group from any state or local tax related burdens.

Specifically this STATEMENT OF PRINCIPLE is directed to the need to clarify Section 6051 (et seq.) of the Revenue and Taxation Code, copy attached as Exhibit C, to make it clear that the former military people who come within the provisions of the ACT *are exempt from the requirements of collecting sales tax.*

Request is hereby made that the proper parties take necessary and proper action to modify Section 6051 of the Revenue and Taxation Code and its related provisions to comply with the intent of the legislature and the ACT by specifically exempting the former military people who come within the provisions of the ACT from the requirements of collecting sales tax.

Respectfully submitted,

William M Connell

William Connell,
U.S. Army Veteran

**A copy of Section 16102 of the Business and Professions Code that relates to this matter is attached as Exhibit D.*

Regulation for (Qualified Itinerant Veteran Vendors) as Consumers of Goods, Wares or Merchandise (owned by the Veteran him/her). Contained in Business & Professions Code 16100, 16100.5, **16102.**

The statutory reference that supports the regulatory provision that is being suggested is contained in the March 12, 1872 and the March 24, 1893 enactment that recognizes that "every soldier, sailor or marine of the United States shall have the right to hawk, peddle and vend any goods, wares or merchandise that he/she owns.....without payment of any license, tax, or fee whatsoever, weather municipal, county or State. Business & Professions code 16102 has been upheld in California Supreme Court in "*Brooks vs. Santa Clara*", 1987 a Published case 191 CAL. APP. 3rd 750; 236 CAL Rptr. 509; 1987 CAL. App. However the State Board of Equalizations has failed to abide by the PLAIN MEANING of the enactment and this has resulted in an "*illegal taking*" from the Veteran. This proposed regulation, to include the Veteran as the consumer instead of the retailer, as stated in section (a) below, this would clarify SBOE's apparent confusion of the issue.
Upon presentation of AB 3009 to the Assembly Revenue & Taxation Committee, on May 12, 2008 where SBOE employees were present; the Assembly committee chairman stated "why has this not been handled at the SBOE level?" The chairman also inquired of any published cases. The SBOE employees were mistaken by not providing the chairman with the proper answer of "*Brooks vs. County of Santa Clara, 1987*". This mirrors the exact position I have held for years; and is the reason for my request for this petition. I do not understand why the SBOE refuses to acknowledge that *Brooks vs. County of Santa Clara* was NOT overturned and that they continue to ignore a high court case that is on point, and the failure to bring this published case to the attention of the Revenue & Taxation Committee Chairman.

This petition is to request the following regulation as outlined below, be adopted by the SBOE for clarification of existing State Statute and that the SBOE follow the PLAIN MEANING of the existing enactment.

(a) **GENERALLY.** Except as provided in subdivision (e), a qualified itinerant Veteran vendor is a consumer of, and shall not be considered a retailer of any goods, ware, or merchandise that he/she owns and offers for sale.
(b) **DEFINITIONS.** For the purpose of selling any goods, wares or merchandise by itinerant means only. Itinerant Vendor Veteran
(c) A qualified Itinerant Veteran vendor means a soldier, sailor, airman, or marine of the United States who has received an honorable discharge or a release from active duty under honorable conditions from such service.
(d) "Permanent place of business" means any building or other permanently affixed structure that is used in whole or part for sales of goods, wares, and merchandise that the veteran owns.
(e) This section shall not apply to the sale or use of spirituous, malt, vinous or any other intoxicating beverage.

REQUIRED DOCUMENTATION: When the Board determines it is necessary for efficient administration of the Sales and Use Tax Law, a qualified itinerant Veteran vendor shall be considered a consumer of any goods, wares, or merchandise that he/she owns, then sells when he/she has obtained a certificate from the Board. Documentation required for Veteran to obtain the certificate shall include proof of release from active duty under honorable conditions, or his/her honorable discharge from the United States military service, or a certified copy thereof.

(1) SWAP MEETS, FLEA MARKETS, OR SPECIAL EVENTS. The operator of the event as provided in Revenue and Taxation Code 6073, is required to obtain written evidence that each seller holds a valid seller's permit, the itinerant Veteran vendor is required to submit certification from the Board that he/she is tax exempt.
(2) CATERING TRUCKS. When operating out of a facility pursuant to Health and Safety Code section 114295, the qualified itinerant Veteran vendor will provide a tax exemption certification from the Board to address as provided in Revenue and Taxation Code section 6074 regarding sales to catering truck operators.

June 13, 2008

Senator Mark Ridley-Thomas, Chair
State of California, All Officers, All Elected Officials

I call your attention to AB 1952 by Berg

Nowhere in statute or in any high court ruling *Brooks vs. Santa Clara, 1987* or in any regulation is section B & P Code 16100, 16100.5, **16102** mentioned or described as a business license waiver. I request you review the March 12th, 1872 ACT and the March 24th, 1893 ACT. "Any license, tax, or fee whatsoever whether city, county or State."

18.7% of returning Veterans on welfare, relief or unemployment! It is a good idea to extend this tax exemption to every Veteran. However, it should be noted that this grave error, of referring to this ACT as a business license waiver is a major mistake and not supported by the PLAIN MEANING of the enactment. I believe a stand- alone statute would allow all Veterans this tax exemption status. Do not amend the unique and specific tax language that is contained in the current enactment. The *Brooks vs. Santa Clara, 1987*, 191 Cal.App.3d 750, a high court ruling confirms this statute 16102 in its totality where the statute was given full force and effect and is binding to all courts of this state by the California Court of Appeals.

By all means help all the Veterans but never ignore the public purpose or the intent of the original enactment. The enclosed Regulation to the SBOE would go a long way to clear up any misinterpretations of existing statute of 16102.

Respectfully,

William M. Connell

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Date: Mon, 2 Jun 2008 08:17:46 -0700 (PDT)

From: "Linda Renee Fenton" <fentonlr@yahoo.com>

Subject: Veterans Tax Exemption Enactment of March 24, 1893

To: assemblymember.calderon@assembly.ca.gov

AB 3009 Brownley

Sir, thank you very much for allowing me to speak to your committee on May 12, 2008 regarding AB 3009 by Brownley. You inquired if there were any published cases. It seems the SBOE employees do not wish to acknowledge that there is a published case "on point." ***Brooks vs. County of Santa Clara, 1987.*** I did not want to interupt or correct anyone during your meeting. However, I believe it is most important that we are clear about the true facts. The attached file was send to the SBOE this morning. Thank you for all your hard work and concern for our veterans. Reply requested.

William M. Connell

Attachments

Files:

Petition_for_Regulation_060208.doc (33k) [Preview]

GOV. § 11340.6 . Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346). This petition shall state the following clearly and concisely:

(a) The substance or nature of the regulation, amendment, or repeal requested.

(b) The reason for the request.

(c) Reference to the authority of the state agency to take the action requested.

GOV. § 11340.7 . (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.

(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.