State of California

Board of Equalization
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Memorandum

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

Date: August 11, 2008

From: Kristine Cazadd
Chief Counsel

Subject: **Request to File *Amicus Curiae* Brief in** *Loeffler et al. v. Target Corp.*
August 20, 2008 Board Meeting - Item M1 – Other Chief Counsel Matters

Loeffler et al. v. Target Corp.
Los Angeles County Superior Court Case No. BC36004
Second Dist. Ct. of Appeal No. B199287

This memorandum is to request approval to file *amicus curiae* (friend of the court) brief in the above matter. The Board has been invited by the Court of Appeal to file a brief and the Legal Department strongly recommends that the Board do so. As explained more fully below, this case could have a significant impact on the Board's interpretation and application of current law and on the Board's case load.

Loeffler and others sued Target in superior court under the Unfair Competition Law (UCL - Bus. & Prof. Code, §§ 17200 et seq.), alleging that Target had illegally collected sales tax reimbursement on the sale of hot coffee to go. The trial court granted Target's Demurrer to the Second Amended Complaint without leave to amend on the grounds that there is no private right of action that permits customers to sue retailers in matters relating to sales tax. The case was dismissed and Plaintiffs have appealed. The Board was not a party.

Appellants make two main arguments. First, they argue that the provisions of Revenue and Taxation Code section 6901.5, which provides that a retailer who has collected excess sales tax reimbursement must return the money to the consumers

who paid it or remit the funds to the Board, also provides for a private right of action against the retailer to recover the money.[1] Second, they argue that the refund statutes do not apply at all, because their action is against the retailer and not the Board.

The Court of Appeal, by letter dated August 1, 2008, invited the Board to submit an *amicus curiae* brief. The court's letter is attached for ease of reference. The court set forth six questions that it wants the Board to address. The brief must be filed by August 27, 2008. It has been assigned to Deputy Attorney General Joyce Hee. She has asked that the Board supply a draft to her no later than August 12, 2008.

If the court rules in Target's favor, it would have a significant impact on the Board's interpretation and application of these statutes and upon the case load. During the last decade, the Board has been involved, either as a named party or a cross-defendant, in about twenty similar cases. (The Legal Department is also aware of several other cases in which the Board was/is not a party.)

These cases follow a typical pattern. A class of plaintiffs sues a retailer or several retailers (in one case, three plaintiffs sued eight retailers, six of which cross-claimed against the Board), alleging that the retailers improperly collected "tax" (actually sales tax reimbursement or use tax) on the transactions at issue. Plaintiff(s) usually set the case up as a class action by alleging that by improperly collecting "tax", the defendants are committing "an unfair business practice" as defined in the UCL. They usually, but not always, also allege violation of the Consumers Legal Remedies Act (CLRA – Civ. Code §§ 1750 et seq.). In the cases in which the Board has been involved, if the plaintiff(s) did not name the Board as a party, the retailer has filed a cross-complaint against the Board, or the Board was brought in by order of court. About half of the cases in which the Board has been involved have been filed by one Los Angeles attorney.

In each of these cases, the Board has consistently maintained the position that such cases are nothing more than attempts to obtain a tax refund without following the procedures provided by the refund statutes (Rev. & Tax. Code, §§ 6901-6909.) Plaintiffs respond that they are not asking for a refund of "tax" but a return of an illegal "charge" that does not involve the refund statutes.

This case offers the Board an important opportunity to obtain a ruling from a Court of Appeal, confirming the Board's legal interpretation that consumers may not disguise an attempt to obtain a refund of either sales tax reimbursement or use tax from the retailer who collected it by alleging a violation of consumer remedies laws. There are several reasons why this principle is important.

1. If an appellate court ruling inconsistently with the Board's position, a result that could be obtained by future plaintiffs at the trial court regarding the application of

[1] The statute does not address excess use tax.

tax would be different than what the Board would require. The retailer would then be "whip-sawed" between the requirements of the Board under the Revenue and Taxation Code and the ruling of the court under the Business and Professions Code.

2. The statute of limitations under the UCL (Bus. & Prof. Code, § 17208) is one year longer than the three-year limitation provided by Revenue and Taxation code section 6487.

3. The UCL provides for the plaintiff's attorney to collect attorneys' fees, generally not available under Revenue and Taxation Code section 7156.

4. Under the UCL, the court may grant declaratory relief regarding the retailer's business operation that gave rise to the allegedly improperly collected tax or tax reimbursement, effectively by-passing the anti-injunction provisions of Revenue and Taxation Code section 6931.

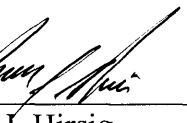
5. The UCL requirements to maintain a class action are greatly different and significantly more liberal than those prescribed by Revenue and Taxation Code section 6904.

6. If a judgment were entered against Target in this case, the Board would not be able to approve a refund to the retailer, because the retailer could not identify the buyers and return any refund to them. Such a decision would set a precedent, as this case is an example of the typical situation, where the purchase allegedly improperly taxed was made in an over-the-counter transaction.

The basic case on which the Board traditionally relies, and on which Target relies in this appeal, is a federal case, *Brennan v. Southwest Airlines* (9th Cir. 1998) 134 F.3d 1405. The court there interpreted an income tax refund statute which is similar in language to Revenue and Taxation Code section 6932. The court rejected the attempt to use consumer remedy laws to adjudge what it concluded was at heart, a tax refund issue. While the principles enunciated by the court apply with equal force to California law, the case is not controlling on state courts and is only persuasive at best. This litigation provides the opportunity to obtain an authoritative ruling from a state appeals court on this issue.

For the above reasons, the Legal Department requests that the Board approve filing an *amicus brief* in this case. As the appeals court has requested Board participation, the court will likely give great weight to the Board's position.

Assistant Chief Counsel, Litigation Division Robert Lambert and Tax Counsel IV John Waid will be prepared to answer any questions you have. Mr. Lambert can be reached at (916) 324-6593, and Mr. Waid can be reached at (916) 324-3828.

Approved: 

Ramon J. Hirsig
Executive Director

KC/JLW/gm
Attachment: Letter of August 1, 2008, from Joseph A Lane, Clerk, Second District Court of Appeal

LegalAffairs/Litigation/1BoardMemos/Statusclosedandopensession/SalesandUse

cc: (w/ Attachment)

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Deputy Attorney General, Oakland

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Mr. Stephen Rudd	(MIC: 46)
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Court of Appeal

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August 1, 2008

Edmund G. Brown, Jr., Attorney General
of the State of California
300 S. Spring Street
Los Angeles, California 90013

Re: *Kimberly Loeffler et al. v. Target Corporation*
2d Civ. No. B199287
(Los Angeles Super. Ct. No. BC360004)

Dear Attorney General Brown:

We invite your office to file an amicus curiae brief on or before August 27, 2008, in *Loeffler et al. v. Target Corporation*, Case No. B199287, regarding the following issues:

1. Whether Article XIII, section 32 of the California Constitution applies to an action by a customer against a retailer for recovery of erroneously or illegally collected sales taxes;

2. Whether a customer can maintain a class action against a retailer for recovery of erroneously or illegally collected sales taxes, without (a) filing a claim pursuant to Revenue and Taxation Code, section 6901 et seq.; and (b) naming the California State Board of Equalization as a defendant in the action;

3. Whether the California State Board of Equalization is an indispensible party in this case;

4. Whether a customer of a retailer can file a claim for recovery of erroneously or illegally collected sales taxes under California Code of Regulations, title 18, section 5230 et seq.;

5. Whether a customer who pays an erroneously or illegally collected sales tax to a retailer has a remedy against (a) the retailer and/or (b) the California State Board of Equalization, and if so, the nature of the remedy; and

6. Any other issue raised by the parties in this appeal.

Enclosed are copies of the parties' briefs. If your office files an amicus curiae brief, the parties may file responsive briefs on or before September 10, 2008. The Court intends to set this matter on calendar on October 15, 2008.

Very truly yours,

JOSEPH A. LANE, Clerk

By _____
Deputy Clerk
Z. HERALDEZ

PSK/at
Enclosures

cc (without enclosures):

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