Updated Informative Digest for

Adoption of Proposed Amendments to California Code of Regulations,

Title 18, Section 1616, Federal Areas

On November 15, 2011, the State Board of Equalization (Board) held a public hearing on and unanimously voted to adopt the original text of the proposed amendments adding subdivision (d)(4)(G) to California Code of Regulations, title 18, section (Regulation) 1616, *Federal Areas*, described in the Notice of Proposed Regulatory Action. The Board did not receive any written comments from interested parties regarding the proposed amendments to Regulation 1616, no interested parties appeared at the public hearing on November 15, 2011, and there have not been any changes to the applicable laws or the effect of the adoption of the proposed amendments to Regulation 1616 described in the Informative Digest included in the Notice of Proposed Regulatory Action.

The Informative Digest included in the Notice of Proposed Regulatory Action provides:

"Current Regulation 1616

"RTC section 6352 exempts the sale and the storage, use, or other consumption of tangible personal property from sales and use tax when California is prohibited from taxing the sale or use of tangible personal property under federal law, including the United States Constitution.

"In 1831, Chief Justice Marshall recognized that Indian tribes, which are officially recognized by the government of the United States, are independent nations that retain inherent rights to self-government. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16.) Justice Marshall also recognized that article 1, section 8, clause 3 of the United States Constitution reserves to the United States Government the exclusive authority to regulate commerce with the Indian tribes. (*Id.* at p. 18.)

"Subsequent United States Supreme Court opinions further explained that federally-recognized Indian tribes "retain 'attributes of sovereignty over both their members and their territory'" (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 [quoting from *United States v. Mazurie* (1975) 419 U.S. 544, 557]), "as a separate people, with the power of regulating their internal and social relations, and thus far [are] not brought under the laws" of the United States or the states in which the tribes reside. (*Bracker*, 448 U.S. at p. 142 [quoting from *McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164, 173, which was quoting from *United States v. Kagama* (1886) 118 U.S. 375].)

"In 1978, subdivision (d) was added to Regulation 1616 to prescribe the circumstances underwhich the sale and use of tangible personal property on an Indian reservation[1] are

[1] In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of

exempt from sales and use tax under RTC section 6352 because the tax is preempted by federal law. Subdivision (d) is based upon United States Supreme Court cases regarding the federal preemption of the states' authority to tax federally-recognized Indian tribes and their members, which have held that the application of state sales and use tax is preempted with regard to the sale and use of property on Indian reservations if the legal incidence of the tax falls on a tribe or tribal members. Regulation 1616, subdivision (d), is still consistent with United States Supreme Court opinions preempting California sales and use tax when the tax unlawfully infringes upon federally-recognized Inidan tribes' sovereignty over their reservations. (See, e.g., *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 101-102.)

"Pursuant to the current provisions of Regulation 1616, subdivision (d)(4)(A) and (E), sales tax will not apply to the sale of tangible personal property to an Indian if the property is delivered to the Indian and ownership of the property transfers to the Indian on a reservation, and use tax will not apply to tangible personal property delivered to an Indian on a reservation unless the property is used off a reservation more than it is ued on a reservation during the first 12 months following delivery. The federal preemption recognized by the current provisons of Regulation 1616, subdivision (d), allows the government of a federally-recognized Inidan tribe to purchase tangible personal property for use in tribal self-governance without being subject to California sales and use tax if the property is delivered to the tribal government on its tribe's reservation and the property is used on the reservation more than it is used off reservation during the first 12 months following delivery. The current provisions of Regulation 1616, subdivision (d), do not address situations where California sales and use tax is preempted by federal law because the tax unlawfuly infringes on federally-recognized Indian tribes' soveriegnty over their members.

"<u>Proposed Amendments to Regulation 1616</u>

"United States Supreme Court opinions published after the initial adoption of Regulation 1616, subdivision (d), have established additional "principles with respect to the boundaries between state regulatory authority and tribal self-government" in the context of state taxation. (*Bracker*, *supra*, 448 U.S. at p. 141.) The United States Supreme Court has held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members" (*Id.* at p. 143) in cirucmtances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them" (*Id.* at p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220]);

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any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

- State taxation of Indians is not generally preempted outside Indian reservations, however, state taxation of Indians outside of Indian reservations may nonetheless be preempted under appropriate circumstances (see, e.g., *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, in which Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court; see also *Wagnon*, *supra*, 546 U.S. at p. 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149] indicating that there are some exceptions to the "general" rule that states are permitted to tax Indians when they reside outside of Indian reservations); and

- "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members" (*Bracker*, *supra*, 448 U.S. at p. 142), and state taxation is preempted when "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" indicate that, in a "specific context, the exercise of state authority would violate federal law" (*Id.* at p. 145) because it unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them." (*Id.* at p. 142.)

"Therefore, the Board reviewed the particular facts and circumstances applicable to the imposition of California's sales and use tax on the sale of tangible personal property to and the storage, use, or other consumption of tangible personal property by the tribal governments of Indian tribes that are officially recognized by the United States, but cannot satisfy the current provisions of the exemptions prescribed by Regulation 1616, subdivision (d)(4)(A) and (E), because their tribes do not have reservations on which to take delivery of and use their property or their tribes have undeveloped reservations where it would be impractical to take delivery of and use their property.

"First, the Board found that there was a major shift in the United States' policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes' sovereignty and land, and the federal government's duty to help restore Indian tribes' economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> [¶] . . . [¶]

> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Thus, the Department of the Interior "has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes" since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and "the land is freed from federal and state taxes." (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

"Second, the Board found that the Department of the Interior's discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: "Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls." (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe's government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, the Board determined that California's taxation of sales to and purchases by federally-recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands would unlawfully infringe upon their tribal sovereignty in certain contexts. A determination that is supported by the maxim that "the power to tax involves the power to destroy . . . [and] that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another." (*McCulloch v. State of Maryland* (1819) 17 U.S. 316, 431.)

"Third, the Board found that all three branches of the federal government have recognized Indian tribes' interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." (*Bracker*, *supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that "(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government." (25 U.S.C. § 3601.) Additionally, the United States Department of Justice conducts its Indian affairs under a June 1, 1995, policy memorandum, in which the Attorney General recognizes similar attributes of tribal sovereignty.

"Fourth, the Board reviewed the present status of California's Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their unique status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California's settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to "exterminate" the indigenous population.

Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original

> Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.
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> This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.

"These unique BIA-recognized circumstances left a number of federally-recognized Indian tribes that are still located in California with no reservations on which to conduct their governmental activities, or undeveloped reservations, which lack adequate meeting facilities, essential utility services, or mail service, making it impractical for the tribes to conduct their governmental activities on their reservations. And, it is due to these unique BIA-recognized circumstances that both landless tribes and the tribes with undeveloped reservations are currently unable to exercise their rights to self-governance without interference from California's sales and use tax.

"Therefore, during its July 26, 2011, Business Taxes Committee meeting, the Board determined that the nature of the state, federal, and tribal interests at stake dictate that federal law preempts the imposition of California's sales and use tax on the sale of tangible personal property to and the use of tangible personal property by the tribal governments of federally-recognized California Indian tribes, when such property is purchased for use in tribal self-governance, and the tribal governments have no reservation on which to conduct their governmental activities or the tribal governments have undeveloped reservations where it is impractical to conduct their governmental activities, due to the unique BIA-recognized circumstances discussed above. This is because the taxation of these types of transactions involving off-reservation sales and use, and only these types of off-reservation transactions, would directly interfere with the tribes' sovereignty and therefore unlawfully infringe on the rights of federally-recognized Indian tribes to make their own laws and be ruled by them. The Board has not found any persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off reservation.

"The Board determined that it is necessary to amend Regulation 1616 to add a new subdivision (d)(4)(G) for the specific purpose of implementing, interpreting, and making specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The Board determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the sale and use of tangible personal property that is delivered to an officially-recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the Board to verify exempt transactions. The Board understands that tribes may not own any real estate where their tribal governments can meet to conduct tribal business and they may occasionally meet at more than one place during a given period, and the Board has proposed to adopt a "principal place" test because the Board determined that such a test is sufficiently flexible to take into account the varying circumstances under which some tribal governments meet and therefore does not unlawfully infringe on the tribes' rights to self-governance. The Board also determined that it is necessary for the proposed amendments to Regulation 1616 recognizing such federal preemption to only exempt the use of tangible personal property if the property is used in tribal self-governance more than it is used for purposes other than tribal self-governance within the first 12 months following delivery. This is because the Board is not preempted from imposing a use tax on property that is used off reservation more than it is used on a reservation within the first 12 months following delivery and that is also used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.

"As a result, the Board proposes to amend Regulation 1616, to add a new subdivision (d)(4)(G), to implement, interpret, and make specific the provisions of RTC section 6352 by recognizing the additional, limited federal preemption described above. The objective of the proposed amendments is to clarify the additional circumstances under which sales of tangible personal property to and the use of tangible personal property by the governments of federally-recognized Indian tribes are exempt from California sales and use tax because the tax is preempted by federal law.

"There are no comparable federal regulations or statutes to Regulation 1616."