State of California

Board of Equalization
Legal Department-MIC: 82

Memorandum

To: Louise Bertoni, Acting Administrator
Waste Reduction Section (MIC:88)

Date: April 20, 2009

From: Carolee Johnstone, Tax Counsel III (Specialist)
Tax and Fee Programs Division (MIC:82)

Telephone: (916) 323-7713

Subject: **ASSIGNMENT NO. 09-038**
APPLICATION OF COVERED ELECTRONIC WASTE RECYCLING FEE TO SALES OF COVERED ELECTRONIC DEVICES TO FOREIGN DIPLOMATS

This is in response to your inquiry regarding application of the covered electronic waste recycling (eWaste) fee[1] to a sale in California of a covered electronic device (CED) to a foreign diplomat who presents a Tax Exemption Card issued by the United States Department of State (State Department). The question arose as a result of an eWaste fee audit of a retailer of CEDs who did not collect or remit the eWaste fee on a CED sold to a Taiwanese diplomat who presented a Personal Tax Exemption Card.

As part of your inquiry, you reference Sales and Use Tax Audit Manual (A.M.) section 0419.50, entitled Sales Tax Exemption for Foreign Diplomats, which explains that foreign diplomatic personnel who present a Tax Exemption Card are exempt from paying sales tax reimbursement on their retail purchases in California, according to the specifications set forth on the card itself.[2] Taiwan diplomats are specifically referenced as being exempt from "any taxes imposed by any state or local taxing authority," pursuant to the Taiwan Relations Act.[3] (A.M. § 0419.50; Annot. 250.0097; 22 U.S.C. § 3307.) Accordingly, Taiwan diplomats holding a Tax Exemption Card are exempt from sales or use tax, to the level of exemption stated on the card.

You also reference a previous legal opinion, dated May 3, 2005 (copy attached), which determined that, according to the Office of Foreign Missions in the State Department (OFM), foreign diplomats are not exempt from the eWaste fee, even under circumstances where they are exempt from sales or use tax. However, it is not entirely clear from an examination of the eWaste statutes that this determination was necessarily correct under all circumstances.

Based on information obtained from the OFM Web site (www.state.gov/ofm/tax/) and discussion with OFM personnel, it is correct that the Tax Exemption Cards issued by the OFM only exempt the holder of the card from paying certain specified state and local taxes. A Tax Exemption Card does not exempt the holder of the card from paying state and locally imposed fees. Unfortunately, whether or not a particular purchase of a CED is exempt from the eWaste fee is more complicated.

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[1] Imposed under section 42464 of the Electronic Waste Recycling Act of 2003, Chapter 8.5 (commencing with section 42460) of Part 3 of Division 30 of the Public Resources Code (Act). All future statutory references will be to the Public Resources Code unless stated otherwise.

[2] See also Cal. Code Regs., tit. 18, § 1619, subd. (a); Sales and Use Tax Annot. (Annot.) 250.0000 et seq. Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the law with respect to specific factual situations. (Cal. Code Regs., tit.18, § 5700, subds. (a)(1), (c)(2).)

[3] Designated the "Taiwan Relations Act" (P.L. 96-8, § 1), codified at 22 U.S.C. §§ 3301-3316.

DISCUSSION

First, there are two types of Tax Exemption Cards: (1) a Personal Tax Exemption Card that is only for personal use by a duly accredited consulate, embassy, or eligible international organization employee who is entitled to the tax exemption privileges stated on the card; and (2) a Mission Tax Exemption Card that may be used only for official purchases by a foreign consulate, embassy, or international organization employee who is authorized to make purchases on behalf of that foreign mission, where all purchases are made in the name of the mission and paid for by a mission check or credit card (not with cash or a personal check). The Mission Tax Exemption Card may not be used for personal purchases.

The Personal Tax Exemption Card bears the picture and personal identification of the consulate, embassy, or international organization employee who is entitled to the tax exemption privileges stated on the card. The Mission Tax Exemption Card bears the picture and identification of the consulate, embassy, or international organization employee who is authorized to make purchases on behalf of the mission that is entitled to the tax exemption privileges stated on the card.

In addition, each type of card may have one of two different levels of exemption from state and local sales and use, restaurant, lodging (hotel), and similar taxes[4] normally charged to a customer: (1) exemption from all such state and local taxes nationwide (blue stripe); and (2) limited exemption based on a specified purchase amount or type of tax (yellow stripe). The level of exemption and types of taxes from which the bearer is eligible for exemption are described on the back of the card.

Under the eWaste Act, "person" is defined as:

> [A]n individual, trust firm, joint stock company, business concern, and corporation, including, but not limited to, a government corporation, partnership, limited liability company, and association. Notwithstanding Section 40170, "person" also includes a city, county, city and county, district, commission, the state or a department, agency, or political subdivision thereof, an interstate body, and the United States and its agencies and instrumentalities to the extent permitted by law. (§ 42463, subd. (o) [emphasis added].)

Further, "consumer" is defined, under the eWaste Law, to mean "a person who purchases a new or refurbished covered electronic device in a transaction that is a retail sale or in a transaction to which a use tax applies pursuant to Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code." (§ 42463, subd. (d) [emphasis added].) The eWaste fee is imposed on a "consumer," who "shall pay a covered electronic waste recycling fee upon the purchase of a new or refurbished covered electronic device." (§ 42464, subd. (a).)

The bearer of a Personal Tax Exemption Card, a person whose photograph and identification is on the card, would be an "individual" included in the definition of "person" under the eWaste fee law (§ 42463, subd. (o)) and, therefore, a "consumer" who is required to pay the eWaste fee when

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[4] But not fuel or utility taxes; a separate credit card or other document of exemption is required for exemption from these taxes.

purchasing a CED for use in California, regardless of the person's level of exemption from various types of taxes.

On the other hand, since no "foreign mission," "foreign consulate," "foreign embassy," "international organization," or any similarly-described entity is included in the definition of "person" under the eWaste fee law, such foreign mission, consulate, embassy, or international organization cannot be a "consumer" who is required to pay the eWaste fee. The eWaste fee would not apply to the purchase of a CED made for official purposes in the name of a foreign mission pursuant to a Mission Tax Exemption Card.

In sum, foreign diplomatic personnel who present Personal Tax Exemption Cards issued by the State Department must pay the eWaste fee when they purchase new or refurbished CEDs in, or for use in, California, regardless of their level of exemption from state and local taxes. On the other hand, an employee of a foreign consulate, embassy, international organization, or other similar entity who presents a Mission Tax Exemption Card issued by the State Department when he or she purchases a new or refurbished CED in California on behalf of his or her foreign consulate, embassy, or eligible international organization and pays for the CED with a check or credit card in the name of such entity, is not required to pay the eWaste fee on the purchase, because the foreign mission is not a "consumer" under the eWaste Act and, therefore, not subject to the eWaste fee.

Please let me know if you have any questions regarding the information provided here or if you would like further assistance with this matter.

CDJ/ef
J:/Bus/Special/Final/Johnstone/E-WasteFee/09-038.doc

Attachment: Memorandum to Dennis P. Maciel from M. Judith Nelson, 5/3/05 ["Page 2" and the text of footnote 2 (if there ever was any) are not included in the copy of this document that is presently available]

cc: Mickie Stuckey (MIC:48)
Andrei Shkidt (MIC:48)
Dave Cathy (MIC:48)
Randy Ferris (MIC:82)
Steve Smith (MIC:82)

State of California

Board of Equalization
Legal Department-MIC: 82

Memorandum

To : Mr. Dennis P. Maciel, Chief
Excise Taxes and Fees Division, MIC: 56

Date: May 3, 2005

From : M. Judith Nelson
Senior Tax Counsel, MIC:82

Telephone: (916) 324-2641
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Subject: Applicability of the E-Waste Recycling Fee to Sales of Covered Electronic Devices (CEDs) to Native Americans and Foreign Diplomats

This is in response to your memorandum to Assistant Chief Counsel Janice Thurston, dated November 18, 2004, in which you requested clarification regarding the application of the Electronic Waste Recycling Fee (e-waste recycling fee) to sales to Native Americans and foreign diplomats. Your questions can be summarized as:

(1) Will the e-waste recycling fee be imposed upon a foreign diplomat at the time of purchase of a CED and, if so, will the retailer be required to collect and remit the e-waste recycling fee to the Board of Equalization?
(2) Will the e-waste recycling fee be imposed upon an on-reservation Indian purchaser of a CED at the time of purchase? and
(3) Will an on-reservation Indian retailer be required to collect the fee from a non-Indian purchaser and remit the fee to the Board of Equalization?

Our responses follow.[1]

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[1] Your questions, in their entirety are as follows:

"1. Will the fee apply to retail sales of CEDs to foreign diplomats? Purchases of CEDs by foreign consuls or diplomats holding a tax exemption card issued by the U.S. Department of State may be exempt from sales or use tax under specific circumstances. There are no provisions in the Fee Collection Procedures Law that exempts [sic] similar transactions from the Electronic Waste Recycling Fees.

"2. Will the fee apply to sales to Native Americans (Indians) when the Ced is shipped directly to the reservation". Also, can the Board require collection of the fee by Indian retailers for sales made on the reservation to non-Indians or for shipment off the reservation? We have been advised informally by the Legal Department that two main questions are at issue here. (1) whether California can regulate these activities of Indians on a reservation under Public Law 280, by which the federal government has granted

Discussion and Analysis

The E-Waste Recycling Fee Applies to Retail Sales of CEDs to Foreign Diplomats. The Office of Foreign Missions in the United States Department of State is responsible for the Diplomatic Tax Exemption Program, which provides the sales and use tax exemptions to eligible foreign officials on assignment in the United States. Tax exemption privileges for foreign diplomats, consular officers, and staff members are generally based on two treaties: the *Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations*. These treaties have been ratified by the United States and are the supreme law of the land under Article VI of the U.S. Constitution. Because the tax exemption privilege is based on reciprocity, not all foreign missions are entitled to tax exemption. Foreign officials entitled to tax exemptions are issued a Tax Exemption Card by the Office of Foreign Missions—and the level of tax exemption is indicated by the color of the card and the written explanation on the card.[2] The Office of Foreign Missions advises that there is no exemption from the e-waste recycling fee afforded under the relevant federal law.

Application of the Electronic Waste Recycling Fee to Indians.

Retail Sale of CED to an Indian Consumer on the Reservation. Generally states are precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it (*Bryan v. Itasca County* (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed. 2d 710; *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 107 S.Ct. 1083, 94 L. Ed. 2d 244). Respect for the long tradition of tribal sovereignty and self-government underlies the rule that state jurisdiction over Indians in Indian country will not be implied easily.

In 1953, Congress enacted Public Law 280 (28 U.S.C. § 1360), which gives six states, including California, jurisdiction over civil causes of action involving Indians which arise in Indian lands to the same extent as those states have jurisdiction over other civil causes of action. Public Law 280 also provides that the states' civil laws of general application to private persons or property have the same force and effect within Indian country as they have elsewhere in the state.

In *Bryan v. Itasca County, supra*, the U.S. Supreme Court rejected the argument that, in Public Law 280, Congress granted the listed states general civil regulatory authority over Indian property. The Court held that the primary purpose of Public Law 280 was to grant the states jurisdiction over private civil litigation involving reservation Indians in state court. The law also gave the states broad criminal jurisdiction over offenses committed by or against Indians within Indian country in the states. However, the Court held that Public Law 280 did not grant the states general civil regulatory authority over Indian lands or the power to tax reservation Indians.

State law may be applied to Indian land when the conduct of non-Indians is involved, unless such application would impair a right granted or reserved by federal law or would infringe on the right of reservation Indians to make their own laws and be ruled by them (*Segundo v. City of Rancho*

Mirage (9th Cir. 1987) 813 F.2d 1387). In *Segundo*, members of the Agua Caliente Band of Cahuilla Indians argued that the city could not apply rent control ordinances to a mobile home park operated by a non-Indian entity on Indian land. The court agreed, noting that the trend has been to rely on federal preemption of state regulation, using notions of Indian self-government as a backdrop against which assertions of state regulatory authority must be assessed. The court found that the comprehensive federal regulatory scheme covering the leasing of Indian lands preempted the application of state and local laws to the mobile home park.

In *The People ex rel Department of Transportation v. Naegele Outdoor Advertising Co. of California* (1985) 38 Cal.3d 509, the court held that California could not regulate billboards on Indian reservations. The court found that there was no clear expression of Congressional intent that the state be allowed to regulate such billboards and, in addition, the state's regulatory program was preempted by the operation of the federal Highway Beautification Act.

No federal cases directly address the application of California's Electronic Waste Recycling Act of 2003 to sales of covered electronic devices to or by reservation Indians. However, in *State of Washington, Department of Ecology v. U.S. Environmental Protection Agency*, (9th Cir. 1985) 752 F.2d 1465, Washington applied to the Environmental Protection Agency (EPA) to regulate all hazardous waste-related activities on Indian lands. The EPA interpreted the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901, *et seq.*) not to grant state jurisdiction over the activities of Indians in Indian country. The court deferred to EPA's interpretation, noting that states are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it. The court found that even though Indians are subject to RCRA under federal law, RCRA does not authorize the states to regulate Indians on Indian lands and that Congress had not clearly expressed an intention to permit such state regulation. The court concluded that "...EPA correctly interpreted RCRA in rejecting Washington's application to regulate all hazardous waste-related activities on Indian lands. We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands. The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations." (*State of Washington, Department of Ecology v. U.S. Environmental Protection Agency*, (9th Cir. 1985) 752 F.2d 1465, p. 1470.)

Based on the foregoing analysis, a retailer that sells a covered electronic device to an Indian on a reservation would not be required to collect and remit the fee since no fee is imposed.

<u>Retail Sale of CED to Non-Indian Consumer on the Reservation</u>. In the case where a non-Indian purchases a covered electronic device at a retail establishment located on a reservation, the fee would be imposed on the consumer, and the retailer, even a tribal retailer, would be required to collect and remit the fee. Our conclusion is based on the Supreme Court's ruling with respect to certain tax collection obligations of tribal retailers. In *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* (1976) 452 U.S. 463 at p. 483, the United States Supreme Court noted, "The state's requirement that the [on-reservation] Indian tribal seller collect a tax validly

imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." Later, in *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 151, the Supreme Court reiterated that "[a] state may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax," and upheld the "simple collection burden" upon the on-reservation Indian retailer imposed by the state's tax law. While the fee is not a tax, but rather a regulatory fee, we conclude that the fee collection burden should be viewed as a minimal burden, in the same manner as is a state tax collection burden.

I trust that the information provided has been responsive to your inquiry. Please feel free to contact me if you have additional questions.

MJN/ef

cc: Ms. Lynn Bartolo (MIC:57)
Ms. Sharon Jarvis (MIC:82)
Mr. Randy Ferris (MIC:82)
Ms. Carla Caruso (MIC:82)
Mr. Joseph Smith – DTSC
Mr. Robert Conheim - CIWMB