State of California

Board of Equalization

Memorandum

: Mr. Gary J. Jugum

Date : January 5, 1990

From : Janet Vining

Subject : Whether Banks, the Federal Reserve Bank, and Amtrak Must Pay California's Hazardous Waste Fees

This memorandum will address whether banks, the Federal Reserve Bank, and/or Amtrak must pay California's hazardous waste fees if they generate, store, treat, or dispose of hazardous waste. These entities warrant special consideration because of statutory provisions, both state and federal, which impact their responsibility for various state taxes and fees.

Banks

Historically, national banks were not subject to state taxation. However, in 1969, Congress waived this immunity from state taxes and provided that the states could tax national banks by one of four specified measures. (12 U.S.C. Section 548.) In 1969, Congress amended Section 548 to provide that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Therefore, national banks and state banks are currently treated the same under state law.

Article XIII, Section 27, of the California Constitution, adopted in 1974 and amended in 1976, provides that:

> The Legislature, a majority of the membership of each house concurring, may tax corporations, including State and national banks, and their franchises by any method not prohibited by this Constitution or the Constitution or laws of the United States. Unless otherwise provided by the Legislature, the tax on State and national banks shall be according to or measured by their net income

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> and shall be in lieu of all other taxes and license fees upon banks or their shares, except taxes upon real property and vehicle registration and license fees. (Emphasis added.)

Section 23182 of the Revenue and Taxation Code codifies the constitutional provisions as follows:

> The tax imposed under this part upon banks and financial corporations is in lieu of all other taxes and licenses, state, county and, municipal, upon the said banks and financial corporations except taxes upon their real property, local utility user taxes, sales and use taxes, state energy resources surcharge, state emergency telephone users surcharge, and motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the state upon vehicles, motor vehicles or the operation thereof...

Section 23182, as originally adopted in 1949, included an exception only for real property taxes. In 1975, a reference to motor vehicle and other vehicle registration license fees was added. Finally, in 1979, the above-quoted language was adopted, adding various miscellaneous taxes, including local utility user taxes, sales and use taxes, state energy resource surcharge, and state emergency telephone users surcharge to the taxes which banks must pay in addition to the "in lieu" tax.

Section 25174 (now 25174.1) of the Health and Safety Code, which first imposed the land disposal in 1972, stated that the fee was to be set and collected by the Director of the Department of Health Services. In 1982, collection of the fee was transferred to the State Board of Equalization. In addition, the Board began collecting the Superfund tax in 1981, and the generator and facility fees in 1986. Therefore, the hazardous waste fees were not in existence, or not collected by the Board, before the 1979 amendment to Section 23182. While the hazardous waste fees may be similar to some of the miscellaneous taxes listed in Section 23182, they are not included, and the Board has no power to add them to the list. The California Constitution gives the Legislature the authority to require banks to pay the hazardous waste fees, but it has not yet done so.

In order to determine whether a bank's payment of Section 23182's "in lieu" tax relieves it from paying California's hazardous waste fees, the nature of those fees must

be investigated. If they are "taxes" or "license fees", then the bank pays its tax on net income in lieu of such charges.

Generally, taxation is a legislative function, and taxes are levied by legislatures to raise general revenues, regardless of any benefits bestowed by the government. A tax may be based solely on the ability to pay. A fee, on the other hand, is incident to a voluntary act, such as a request that a public agency permit an applicant to practice medicine or construct a house. The public agency normally may exact a fee for such a grant, which bestows a benefit on the applicant not shared by other members of society. National Cable Television v. United States, 415 U.S. 336 (1974). A "license fee" is generally defined as a price paid to a governmental authority for a license to engage in a particular occupation or for the privilege of engaging in such occupation. A license fee is also defined as a "charge made primarily for regulation, with the fee to cover cost and expenses of supervision of regulation." (Black's Law Dictionary, 5th Ed., 1979.)

The hazardous waste fees are deposited in two accounts (the Hazardous Waste Control Account and the Hazardous Substances Account), and are used to fund the regulation of hazardous waste storage, transport, treatment and disposal activities in California. The charges are, therefore, more like fees or license fees than taxes, with the possible exception of the Superfund tax (Health and Saf. Code § 25345) and, since August, 1989, the land disposal fee (Section 25174.1), both of which are used to fund general clean-up activities. The facility fee (Section 25205.2) and generator fee (Section 25205.5) are paid for the privilege of engaging in hazardous waste management activities and directly fund the regulation of such activities.

The only California case to discuss the nature of the license fees mentioned in Section 23182 is Citrus Belt Savings and Loan Assn. v. California Franchise Tax Board (1963) 218 Cal.App.2d 584. There, the court considered Section 23184 of the Revenue and Taxation Code, which provides that financial institutions must pay personal property taxes (and cannot take advantage of the "in lieu" tax applicable to banks), but may offset against such taxes any license fees they pay. The plaintiff savings and loan associations paid assessments required by the Finance Code, which were used to fund the regulation of savings and loan associations, and sought to offset such payments against their franchise taxes.

The court first determined that the terms "license" in Section 23182 and "license fees" in Section 23184 are substantially equivalent, since the intent of the two sections

taken together is to equalize the tax burdens of banks and other financial institutions. The court recognized the "inherent distinction between governmental charges designed to produce general revenue and those calculated merely to produce sufficient funds from regulated activities to cover the cost of such regulation." Id. at p. 590. While finding that the Finance Code assessments were clearly made for purposes of regulation, the court stated that the nature of the charge did not necessarily determine whether the Legislature intended to encompass it within the meaning of "license" or "license fee". Since similar assessments were made against banks to cover the cost of their regulatory supervision, the court found that the charges were not "licenses" or "license fees", as that term is used in Section 23182, since allowing financial corporations to offset them would discriminate against banks that paid similar charges in addition to the "in lieu" tax.

The court also considered fees paid by personal property brokers and small loan brokers under other sections of the Financial Code, which had been allowed as offsets under Section 23182. The court noted that these sums were paid in fixed amounts (not related to the costs of regulating the businesses) and were paid into the state's general fund, and that the personal property brokers and small loan brokers were separately assessed for the costs of regulating their businesses under other sections of the Financial Code. For these reasons, the court concluded that the sums were the type of charges comprehended by the term "license fees" in sections 23182 and 23184, while assessments for regulation were not.

The Citrus Belt case could be read to hold that fees assessed to fund regulation are not "license fees" for purposes of Section 23182. However, the court stated that its decision was not controlled by the "true nature of the charge". Rather, the court looked to the fact that banks are statutorily required to pay a similar type of fee for regulation, in addition to the "in lieu" tax. Therefore, allowing the savings and loan associations an offset for such a fee would discriminate against the banks. There is no similar problem with the hazardous waste fees. If banks pay a special tax in lieu of the hazardous waste fees, then savings and loan associations can offset such fees against their taxes.

I conclude that, pursuant to Revenue and Taxation Code Section 23182, banks pay a tax on their net income, in lieu of the other taxes and license fees, including the hazardous waste fees (land disposal fee, Superfund tax, facility fee and generator fee).

Federal Reserve Bank

The Federal Reserve Bank of San Francisco has protested billings it received from the State Board of Equalization for the hazardous waste generator fee and land disposal fee.

Title 12, United States Code, Section 531 provides:

> Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate.

Since federal law specifically exempts federal reserve banks from all state and local taxation, such banks are responsible for the charges imposed in California law for generating, handling and disposing hazardous waste only if those charges are fees rather than taxes. A final answer concerning the federal reserve bank's liability for the hazardous waste fees will have to await a resolution of the general question of federal government liability for such fees. If it is determined that Congress, in 42 U.S.C. Section 6961, waived federal immunity from the hazardous waste fees, then, because of the special statutory language in 12 U.S.C. Section 531 concerning federal reserve banks, a further inquiry will be necessary to decide whether the charges are "taxes" using the three-prong test in Massachusetts v. U.S.

Amtrak

The State Board of Equalization has billed Amtrak (operated by the National Railroad Passenger Corporation) for the generator fee.

Title 45 U.S.C., Section 546b, states:

> Notwithstanding any other provision of law, the National Railroad Passenger Corporation (the "Corporation") shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981, including such taxes and fees levied after September 30, 1982: Provided, however, That notwithstanding any provision of law, the Corporation shall not be exempt from any taxes

> or other fees which it is authorized to pay as of September 10, 1982....

Amtrak was established by Congress as a United States corporation for profit (45 U.S.C. § 541), with the goal of maintaining and improving rail passenger service, federal controls over Amtrak management and operations, and federal financial support for Amtrak (45 U.S.C. §§ 501, 501a). In adopting Section 546b, quoted above, Congress sought to guarantee Amtrak's fiscal integrity by insuring that the money it appropriated to Amtrak would be used to fund the railroad's operations, and would not be diverted to states and localities. National Railroad Passenger Corporation v. Commonwealth of Pennsylvania Public Utility Commission, et al., 665 F.Supp. 402 (E.D. Pa. 1987).

Although Congress sought to shield Amtrak from the payment of any taxes or fees imposed by a state, such as California's hazardous waste fees, it specified that Amtrak is not exempt from any "taxes or other fees which it is authorized to pay as of September 10, 1982". The question, therefore, is whether Congress elsewhere specifically authorized Amtrak to pay the hazardous waste fees.

The answer lies in 42 U.S.C. Section 6961, the waiver of federal immunity in the Resource Conservation and Recovery Act (RCRA). Section 6961 requires that "[E]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the federal government" must comply with all state substantive and procedural requirements concerning the control and abatement of hazardous waste disposal, including the payment of reasonable service charges. If Amtrak is a department, agency or instrumentality of the federal government, and if the hazardous waste fees are included within Section 6961's reference to "requirements" or "service charges", then Amtrak must pay the fees regarding any hazardous waste it generates, stores, treats, or submits for disposal.

RCRA defines a "Federal agency" as "any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government, including any Government corporation, and the Government Printing Office." (42 U.S.C. § 6903(4)). Although Amtrak was established as a United States corporation (45 U.S.C. § 541), Congress specifically stated that the National Railroad Passenger Corporation "will not be an agency or establishment of the United States Government." (45 U.S.C. § 541). The only case to directly address the issue of whether Amtrak is a federal instrumentality found that it was not, at least for purposes of assessing

punitive damages. Sentner v. Amtrak, 540 F.Supp. 557 (D.C. N.J. 1982). In Sentner, the Federal Government argued that, while Congress specified that Amtrak was not an agency or establishment of the United States, it could, nonetheless, be an "instrumentality" of the government. The Court rejected this argument, finding nothing in the legislative history or case law to indicate that Congress intended the term "establishment" to be read so narrowly.

The Sentner case should, however, be restricted to its facts, since it was based on general legal principles of sovereign immunity. In the area of hazardous waste fees, RCRA provides specific statutory authorization for Amtrak to pay the hazardous waste fees. The relevant sections of RCRA were adopted in 1976, six years after 45 U.S.C. Section 541, which states that Amtrak is not a federal agency. I conclude that the more recent legislative pronouncement controls, and Amtrak is subject to RCRA Section 6961's waiver of sovereign immunity.

This conclusion is further supported by National Railroad Passenger Corporation v. The City of New York, 695 F.Supp. 1570 (D.C., N.Y., 1988). In that case, the court held that Section 546b did not exempt Amtrak from paying rental payments to New York City, pursuant to franchise agreements, for the use of municipal streets, waterways and public lands. The Court examined the legislative history of Section 546b, and noted that it was adopted to relieve the increasing burdens imposed on the federal treasury as a result of Amtrak's continuing operating deficit. Federal dollars, intended to fund the operation of a national rail passenger system, were being converted into local revenues collected by cities in the Northeast. Section 546b was adopted to stop this payment of "taxes with taxes". The Court noted that, although Amtrak probably was not an instrumentality of the federal government for tax immunity purposes, Congress made Amtrak statutorily immune from state taxation, according it the same protection from state taxation that the federal government itself receives. The committee reports leading to passage of Section 546b indicate Congress's desire to shield Amtrak to the same extent as the United States is exempt from the payment of taxes and other fees, but not to exempt it from paying fees for services used, such as water and sewer, which the United States also must pay. The Court therefore resolved the case by reference to case law governing federal tax immunity. Applying the three-prong test of Massachusetts v. United States, 435 U.S. 444 (1978), the Court found the rent payments made to New York City to be "user fees", or voluntary payments made to the government in exchange for particular benefits.

Two of Amtrak's arguments in NRPC v. New York are particularly relevant to the consideration of California's hazardous waste fees. Concerning the third prong of the Massachusetts v. U.S. test (whether the fees exceed the cost to the government of the benefits supplied), Amtrak argued that a distinction should be made between the money New York spent providing the railroad with water and sewer services and the cost of the opportunities that the city lost when it permitted the railroad to use its property. The Court rejected this argument, because the use of the land imposed a real economic cost on the government. The Court was thus unwilling to restrict its consideration of the benefits supplied by the government to such fee-for-services programs as water and sewer services. This supports the Board's position that various components of the Department of Health Services' Toxic Substances Program (such as research and consultation) are benefits the government provides to those who pay the hazardous waste fees.

Amtrak also argued that, even if the rental payments were not taxes, they should be construed to be "fees" within the meaning of "any taxes or other fees" in Section 546b. However, the Court found that the legislative history of Section 546b made it clear that the phrase "any taxes or other fees" was meant to be read as simply extending to Amtrak the full scope of the federal government's sovereign immunity. Under this interpretation, Amtrak would not be immune from responsibility for California's hazardous waste fees by virtue of the inclusion of the word "fees" in Section 546b.

The holding in NRPC v. New York, as well as a comparison of the statutory provisions creating Amtrak and in RCRA, supports the conclusion that Amtrak is immune from payment of California's hazardous waste fees only to the extent that the federal government is so immune. Section 546b exempts Amtrak from taxes or fees imposed by a state, unless it is authorized to pay such taxes or fees, and Section 6961 of RCRA provides that authorization. While 45 U.S.C. Section 541 states that Amtrak is not a federal agency or establishment, RCRA, which was adopted six years after Section 541, includes federal corporations in its definition of the federal entities that must meet all local requirements concerning the abatement of hazardous waste.

I conclude that Amtrak must pay California's hazardous waste fees to the same extent as the federal government is liable for those fees.

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