

Memorandum

170.0002.750

To : Mr. Steven Biggers
Santa Rosa District

Date: August 22, 1996

From : John S. Butterfield
Tax Counsel

Telephone: (916) 324-2653

Subject: R--- R--- B--- and C---
Account No. SN -- XX-XXXXXX

You have requested a legal opinion regarding your proposed collection activities with regard to the above referenced account. As I understand the situation, a final determination as to use tax collection liability has been issued against the above named retailer. The retailer is probably either the federally-recognized tribe itself, or a corporation chartered by the Bureau of Indian Affairs under section 17 of the Indian Reorganization Act.

You propose to issue a notice of withhold under Revenue and Taxation Code section 6702 to a number of off-reservation banks in an effort to attach funds owned by the retailer. We recommend that you not take this action.

Indian tribes enjoy sovereign immunity from unconsented suit. *United States v. United States Fidelity & Guaranty Co.*, 309 US 506 (1940). This immunity extends to section 17 business corporations owned by the tribe itself. *Namekagon Dev. Co. v. Bois Forte Res. Housing Auth.*, 517 F2d 508 (8th Cir. 1975). While a section 17 corporation may waive its sovereign immunity by contract, allowing it to be sued, the waiver does not extend to a right to attach or levy property of the tribe or the corporation unless the property was specifically pledged to the creditor. *Maryland Cas. Co. v. Citizen's Nat'l Bank*, 361 F2d 517 (5th Cir. 1966).

While a withhold order issued under Revenue and Taxation Code section 6702 is not technically a lawsuit, the fact that it levies or attaches property of the tribe would make it unenforceable due to sovereign immunity. In 1978, the Board issued a withhold notice to Bank of America during a cigarette tax collection dispute with the Chemehuevi tribe. The tribe sued the Board in U.S. District Court, and the court issued an injunction against the Board, which prohibited

it from enforcing its withhold order, due to the sovereign immunity of the tribe. *Chemehuevi Indian Tribe v. Cal. State Bd.*, 492 F.Supp. 55 (N.D. Cal. 1979).¹

The United States Supreme Court has addressed the argument of states that they have been given a “right” (to compel tribes to collect use tax on sales to non-Indians) without a remedy (i.e. we cannot sue the tribe for the collection liability). In *Oklahoma Tax. Com. v. Potawatomi Tribe*, 498 US 505 (1991), the court said that states may employ indirect means to enforce its rights, such as seizing untaxed merchandise off the reservation (assuming title has not yet passed to the tribe), attempting to assess wholesalers to the tribe, or, perhaps, bringing a suit against individual officers or agents of the tribe. All of these alternatives would require the active participation of the Attorney General’s office, and probably should not be undertaken at the District Office collection level.

Finally, I note that these restrictions apply only in the cases of tribes or tribal owned corporations. You may continue to employ withholds and levies against individual Indians, as they have no immunity, and if a corporation has some ownership by non-Indian individuals, based on the facts in each case, it may be possible to proceed against the corporation.

JSB/cmm

cc: Mr. Gary J. Jugum (MIC: 82)
Santa Rosa District Administrator (JH)

¹ One of the attorneys which represented the Chemehuevi Tribe in that litigation, Mr. Forman, represents the Robinson Rancheria in this matter.