

Wednesday, November 19, 2003

The Board met at its offices at 450 N Street, Sacramento, at 9:35 a.m., with Ms. Migden, Chairwoman, Mr. Parrish, Vice Chairman, Mr. Leonard and Mr. Chiang present, Ms. Mandel present on behalf of Mr. Westly in accordance with Government Code section 7.9.

CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARINGS

Long Term Investment Trust, 158367, 198764

1994, \$1,992,463.87 Claim for Refund, \$328,848.82 Penalty

1997, \$339,876.00 Claim for Refund

1998, \$674,099.00

1999, \$363,095.00

2000, \$212,790.00

For Claimant:

Derick J. Brannan, Representative

C. Stephen Rosander, Tax Counsel

William Devine, V.P. Government Affairs

John Renfield, Tax Counsel

For Franchise Tax Board:

Contribution Disclosures pursuant to Government Code section 15626: A disqualifying contribution was disclosed to Mr. Wesley. No other disqualifying contributions were disclosed.

Issues: Whether the Board is prohibited by section 3.5 of Article III of the California Constitution from granting appellant's request that sections 17632, 17651, 23771, and 23731 et seq. of the California Revenue and Taxation Code be found to be unconstitutional and, therefore, unenforceable.

Assuming that the Board determines that it is not precluded from deciding the constitutionality of the referenced statutes, whether the federal Employee Retirement Income Security Act of 1974 preempts – and thereby makes unconstitutional and unenforceable – those California statutes that provide for a tax on the unrelated business taxable income of tax-exempt trusts, including sections 17632, 17651, 23771, and 23731 et seq. of the California Revenue and Taxation Code.

Whether appellant has met its burden of proving “reasonable cause” and the absence of “willful neglect” for its failure to timely file its 1994 tax return so as to permit the Board to abate the delinquent filing penalty imposed under section 19131, subdivision (a), of the Revenue and Taxation Code.

Action: Mr. Parrish moved to cancel the penalty, otherwise sustain the action of the Franchise Tax Board. Ms. Migden made a substitute motion that the appeal be submitted for decision. The motion unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard and Mr. Chiang voting yes, Mr. Wesley not participating in accordance with Government Code section 15626.

SPECIAL TAXES APPEALS HEARINGS

American Bankers Life Assurance Company of Florida, 185747

7-1-97 to 12-31-98, \$24,307.26 Interest, \$00.00 Penalty

American Bankers Insurance Company of Florida, 83069

4-1-98 to 12-31-98, \$3,545.57 Interest, \$00.00 Penalty

For Petitioner:

Enrique Castelo, Representative

Darwin E. Pace, Representative

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For Department of Insurance: Geoffrey Margolis, Tax Counsel
 For Property and Special Taxes Department: Trecia Nienow, Tax Counsel
 Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.
 Issue: Whether the calculation of quarterly prepayments of the annual premium tax includes the low-income housing tax credit.
 Action: Upon motion of Ms. Migden and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard and Mr. Chiang voting yes, Mr. Westly not participating in accordance with Government Code section 7.9, the Board ordered that the petition be submitted for decision.

SALES AND USE TAX APPEALS HEARINGS

Jerames Industries, Inc., 112004

10-1-96 to 9-30-99, \$45,786.54 Tax

For Petitioner: Joseph Micallef, Representative
 Jesse McClellan, Representative

For Sales and Use Tax Department: Warren L. Astleford, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: A disqualifying contribution was disclosed to Ms. Migden. No other disqualifying contributions were disclosed.

Issues: Whether petitioner made a taxable retail sale of a portion of its business assets.

Whether petitioner is entitled to a credit for any use tax reported by its out-of-state vendors on petitioner's purchases of tools, consumable supplies, and manufacturing aids.

Action: The Board deferred consideration of this matter to later in the day.

Steven R. Maruta, 134881

7-1-92 to 6-30-00, \$14,882.19 Tax, \$1,488.34 Failure to File Penalty

For Petitioner: Robert A. Petersen, Representative

For Sales and Use Tax Department: Jeffrey H. Graybill, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether petitioner was an employee of Fantasy, Inc., or independent contractor.

Whether petitioner's charges for taking pictures on film supplied by Fantasy, Inc., are subject to sales tax.

Whether the penalty for failure to file returns should be abated.

Action: Upon motion of Ms. Migden and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Mr. Leonard directed staff to exchange information with the Employment Development Department to avoid state agencies taking inconsistent positions in cases such as *Steven R. Maruta, 134881*.

Whitewater West Industries, Ltd., 161041

1-1-93 to 6-30-99, \$40,036.51 Tax, \$00.00 Penalty

For Petitioner: Barbara Keys, Representative

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

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Issue: Whether petitioner has established that its customer, Concord Entertainment Inc. has paid the use tax, either by self-reporting or pursuant to an audit determination.
Action: Upon motion of Ms. Migden, and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Royal Jade House, Inc., 128624, 160280

7-1-97 to 6-30-00, \$28,537.90 Tax, \$5,707.58 Penalty

For Petitioner: Wah C. Wong, Petitioner
Willie W. Lee, Representative

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether taxpayer is entitled to additional adjustment for non-sale amounts allegedly included in audited bank deposits.

Whether the credit differences (overpayments) should be used to offset the debit differences (understatements) that were established between bank deposits and reported total sales of each quarterly period.

Whether the negligence penalty was properly applied.

Whether relief from the penalty for failure to pay the determination timely (finality penalty) is warranted.

Action: Upon motion of Ms. Migden, and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

Rima Naif Hamati, 132983

7-1-96 to 12-31-98, \$161,213.13 Tax, \$40,471.34 Fraud Penalty

For Petitioner: Ramin Akhavan, Enrolled Agent
Mark Goshgorian, Attorney

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether petitioner failed to report all of his recorded taxable sales for the audit period July 1, 1996 through December 3, 1996.

Whether petitioner underreported his taxable sales for the period October 1, 1996 through December 31, 1998 (audit item 2).

Whether the fraud penalty was properly assessed.

Action: Upon motion of Ms. Migden and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board deferred consideration of this matter to the December 4, 2003 meeting.

Jerames Industries, Inc., 112004

10-1-96 to 9-30-99, \$45,786.54 Tax

For Petitioner: Joseph Micallef, Representative
Jesse McClellan, Representative

For Sales and Use Tax Department: Warren L. Astleford, Tax Counsel

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Contribution Disclosures pursuant to Government Code section 15626: A disqualifying contribution was disclosed to Ms. Migden. No other disqualifying contributions were disclosed.

Issues: Whether petitioner made a taxable retail sale of a portion of its business assets.
 Whether petitioner is entitled to a credit for any use tax reported by its out-of-state vendors on petitioner's purchases of tools, consumable supplies, and manufacturing aids.

Action: The Board deferred consideration of this matter to the first quarter of 2004.

FINAL ACTION ON APPEAL HEARD NOVEMBER 19, 2003

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard and Mr. Chiang voting yes, Ms. Mandel not participating in accordance with Government Code section 15626, in the appeal of *Long Term Investment Trust, 158367, 198764*, the Board ordered that the late filing penalty be canceled, otherwise sustained the action of the Franchise Tax Board.

FINAL ACTION ON PETITION HEARD NOVEMBER 19, 2003

Upon motion of Ms. Migden, seconded by Mr. Leonard and duly carried, Ms. Migden, Mr. Parrish and Mr. Leonard voting yes, Mr. Chiang voting no, Ms. Mandel not participating in accordance with Government Code section 7.9, the Board ordered that the petition of *American Bankers Life Assurance Company of Florida, 185747*, and *American Bankers Insurance Company of Florida, 83069*, be granted.

SALES AND USE TAX APPEALS HEARINGS

R.J.E. Trade International, Inc., 84138

1-15-96 to 6-30-99, \$31,077.42 Tax

For Petitioner:

Appearance Waived

For Sales and Use Tax Department:

Sharon Jarvis, Tax Counsel

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether petitioner's sales of free-standing cardboard printed matter, commonly known as standees, to Cendant Software (Cendant) qualify as exempt sales of non-returnable containers.

Whether petitioner obtained a timely and valid resale certificate from Cendant, and thus, is relieved of the sales tax liability on its sales to Cendant.

Alternatively, whether petitioner's sales to Cendant should be deleted from the measure of tax because they were included in the audit of Cendant.

Whether petitioner's sales of standees qualify for the printed sales message exemption.

Whether any products sold comply with the exemption for labels.

Action: Upon motion of Ms. Mandel, seconded by Mr. Chiang and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

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FINAL ACTION ON PETITIONS HEARD NOVEMBER 19, 2003

Mr. Parrish moved to cancel the failure to file penalty, otherwise redetermine as recommended by the Appeals Division, in the petition of *Steven R. Maruta, 134881*. The motion was seconded by Mr. Leonard but failed to carry, Mr. Parrish and Mr. Leonard voting yes, Ms. Migden, Mr. Chiang and Ms. Mandel voting no.

Upon motion of Ms. Mandel, seconded by Mr. Chiang and duly carried, Ms. Migden, Mr. Chiang and Ms. Mandel voting yes, Mr. Leonard voting no, Mr. Parrish abstaining, the Board ordered that the petition be redetermined as recommended by the Appeals Division.

Upon motion of Ms. Mandel, seconded by Mr. Chiang and unanimously carried, Ms. Migden, Mr. Chiang, Mr. Leonard, Mr. Parrish and Ms. Mandel voting yes, the Board ordered that the petition of *Whitewater West Industries, Ltd., 161041*, be redetermined as recommended by the Appeals Division.

Upon motion of Mr. Parrish, seconded by Mr. Chiang and unanimously carried, Ms. Migden, Mr. Chiang, Mr. Leonard, and Ms. Mandel voting yes, the Board ordered that in the petition of *Royal Jade House, Inc., 128624, 160280*, the negligence penalty be cancelled, otherwise redetermine as recommended by the Appeals Division.

CORPORATE FRANCHISE AND PERSONAL INCOME TAX MATTERS, ADJUDICATORY

OII Third Partial Consent Decree Cash Account Escrow, 139239

1992, \$2,843.00 Tax, \$1,421.50 Penalties

1993, \$9,558.00 Tax, \$4,779.00 Penalties

1994, \$12,067.00 Tax, \$6,033.50 Penalties

1995, \$28,707.00 Tax, \$14,353.50 Penalties

1996, \$36,273.00 Tax, \$18,136.50 Penalties

1997, \$37,007.00 Tax, \$18,503.50 Penalties

Considered by the Board: September 11, 2003

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Action: Ms. Mandel moved to reverse the action of the Franchise Tax Board. The motion was seconded by Mr. Leonard. Ms. Mandel withdrew the motion.

The Board deferred consideration of this matter to the December 2003 Board Meeting.

ADMINISTRATIVE SESSION

BOARD COMMITTEE REPORTS

Legislative Committee

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board approved the Legislative Committee report (Exhibit 11.12).

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Customer Services and Administrative Efficiency Committee

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board approved the Customer Services and Administrative Efficiency Committee report (Exhibit 11.13).

Business Taxes Committee

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board approved the Business Taxes Committee report (Exhibit 11.14).

Property Tax Committee

Upon motion of Mr. Chiang, seconded by Mr. Parrish and unanimously carried, Ms. Migden, Mr. Parrish, Mr. Leonard, Mr. Chiang and Ms. Mandel voting yes, the Board approved the Property Tax Committee report (Exhibit 11.15).

Exhibits to these minutes are incorporated by reference.

2003 BOARD/ASSESSORS' MEETING

The Board recessed at 11:45 a.m. and reconvened at 11:50 a.m. with Ms. Migden, Chairwoman, Mr. Parrish, Vice Chairman, Mr. Leonard and Mr. Chiang present, Ms. Mandel present on behalf of Mr. Westly in accordance with Government Code section 7.9.

Chairwoman Migden opened the annual meeting of the Board and county assessors required under section 15607 of the Government Code to discuss administrative issues related to assessment and taxation laws and to promote uniformity and tax procedural issues throughout the state. Ms. Migden welcomed the county assessors to the Board meeting.

David Gau, Deputy Director of the Property and Special Taxes Department, welcomed the county assessors to the meeting on behalf of the Board Members.

Joan Thayer, Marin County Assessor and President of the California Assessors' Association, thanked the Board for this opportunity to address both her colleagues and the Board Members. She stated that this meeting was a longstanding tradition between the Board and County Assessors and had its genesis in the days when they had a combined meeting at the California Assessors' Association Annual Conference. Ms. Thayer commented that for her and many county assessors it's not just a formality, but a very important meeting because the Board and the county assessors have been major players in maintaining the integrity of California's property tax system. This year has been an extraordinarily busy and challenging year. We have seen legislation, rules and sometimes Court decisions subtly redefining basic assessment and appraisal terminology. Ms. Thayer stated that her goal as well as that of the incoming president

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in 2004, Cris Andrews, was and is to put aside any past differences and work with the Board anew to achieve what should be a common goal: A uniform and fair property tax system insofar as the law permits. The Letters to Assessors issued by the Board are very helpful, as are many of the property tax rules. Ms. Thayer thanked the county assessors for their support and the Honorable Board Members here today for this opportunity to meet with them.

Cris Andrews, Shasta County Assessor/Recorder and the incoming president-elect of the California Assessors' Association, commented that he was honored to have that position. He stated that during the next year, the assessors and Members would learn to appreciate and be pleasantly relieved that brevity will be the hallmark of his presidential operations. Mr. Andrews commented that he read section 15607 of the Government Code regarding the official summons for assessors to meet with the Board and stated that the first thing that struck him was that the assessors and the Board share mutual goals and common objectives. Mr. Andrews finds considerable agreement between the Board and the assessors in reviewing the Board's mission statement and goals and comparing them to the purpose and goals of the California Assessors' Association. Mr. Andrews stated that he pledged his cooperation with the Board to work on mutual goals. The California Assessors' Association will remain committed to promoting cooperation and uniformity in the assessment community, to work with the Board and interested parties to assure that property tax administration is lawful and just. Mr. Andrews respectfully asked the Board to consider consolidating this mandatory annual meeting with the assessors' annual conference in 2004, which would return to a past practice that was beneficial to all.

Mr. Chiang extended his apologies for not being able to participate in the annual meeting in the afternoon due to scheduling conflicts. He expressed his deep interest in the issues and his great respect for the participants and spirit of the meeting.

The Board recessed at 12:07 p.m. and reconvened at 1:35 p.m. with Mr. Parrish, Mr. Leonard and Ms. Mandel present.

State Fiscal Situation

Elizabeth Hill, Legislative Analyst, Legislative Analyst's Office, presented an overview of the State's fiscal situation and discussion of the State's budget for the upcoming year. Ms. Hill thanked all of the county assessors stated that the Legislature relies heavily on its interaction with them in understanding what is happening on the ground throughout California. She introduced her colleague, Mark Ibell, who is assigned to the budgets of the Board of Equalization and the Franchise Tax Board. Mr. Ibell does a great deal of State and local interaction, particularly with property tax, and recently the vehicle license fee.

Legislative Update

Martin Helmke, Chief Consultant, Senate Revenue and Taxation Committee, provided a brief overview of the property tax legislation and emerging issues in 2004 legislation. Mr. Helmke stated that over the years there have been a number of proposals for consolidating the Board of Equalization and the Franchise Tax Board. Last year AB 986 was introduced by

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Assemblyman Jerome Horton requesting a study of the consolidation of the cashiering offices' operations of the Board of Equalization, the Franchise Tax Board and the Employment Development Department. Mr. Helmke believes there will be continuing interest in property tax allocation reform. He mentioned that AB 23 may no longer be necessary since the Office of Administrative Law approved the joint tenancies and the domestic partners regulations. Mr. Helmke stated that airplanes are probably going to be assessed by the Board. AB 593 has a pretty good chance of passage.

Mr. Parrish commented that he was happy to be at the meeting and expressed his hope that the county assessors and the Board could continue down the path of a spirit of cooperation and working together. Mr. Parrish stated that he was pleased that the county assessors of California are elected and not appointed, which makes them extremely effective. He has enjoyed working with them and further commented that elected representatives are critical to the future of California.

Timothy Boyer, Interim Executive Director, talked briefly about the Governor's executive order regarding the freeze on regulatory action by State agencies.

Mr. Leonard thanked Joan Thayer and Cris Andrews for their reports. He stated that he was looking forward to the meeting and working with each and every one of the county assessors. He hoped that the information provided at the meeting today would be helpful for the reports to their respective Board's of Supervisors and constituents about the issues facing the State in the coming year.

Ms. Mandel, Deputy Controller to State Controller Steve Westly, expressed that she was happy to be at the meeting to see all of the county assessors. Ms. Mandel briefly discussed legislation regarding the valuation of low-income housing and tax credits. She commented that she and the State Controller look forward to working with the county assessors in the future.

Betty Yee, Chief Deputy to Chairwoman Migden, welcomed all the county assessors to the meeting on behalf of the Chairwoman and also expressed congratulations to Joan Thayer for a pretty remarkable year of leadership with the association. She congratulated Cris Andrews for the upcoming year and stated that the Chairwoman's office looks forward to working with him. Ms. Yee briefly addressed the issue of change in ownership and new construction which came from a recent survey. She expanded on Mr. Parrish's comment that there are really 63 elected officials in California that are stewards of the property tax system, all 58 of the county assessors and the five Members of the Board. Ms. Yee stated that the Chairwoman's office is looking forward to continuing to work in the spirit of cooperation.

Taxpayers' Rights Advocate's Office

Jennifer Willis, Taxpayers' Rights Advocate, and Bob Reinhard, Technical Advisor, Taxpayers' Rights Advocate's Office, discussed a couple of highlighted issues in the Taxpayers' Rights Advocate's Annual Report. Assessment appeals is the most common issue, which has been addressed by development of the Board's Publication 30, Residential Property

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Assessment Appeals. The second major issue is declines in values of Proposition 8 value restorations. The Taxpayers' Rights Advocate's Office was successful in getting Senate Bill 1105 enacted. In closing, Jennifer personally thanked all of the county assessors for making the Taxpayers' Rights Advocate's Office's job interesting and easier. She expressed her gratitude to the staff within the Board, particularly David Gau and Dean Kinnee in Property Taxes; Kristine Cazadd and Lou Ambrose in the Legal Division; and, Rose Marie Kinnee and Margaret Shedd in the Legislative Division.

Mr. Reinhard reported that there were three emerging issues in this year's Taxpayers' Bill of Rights Annual Report. One of which deals more with the tax collector's office and how it functions differently than the assessors' offices. Many of the calls received in the Taxpayers' Rights Advocate's Office are referred by the county assessors. Mr. Reinhard briefly commented on the proposed change to the grandparent/grandchild exclusion. Mr. Reinhard commented that their office appreciates working with the county assessors and that through some of the contacts received, they are able to propose changes that do help all the taxpayers in the State.

Legislative Update

Kristine Cazadd, Assistant Chief Counsel, Property Taxes Division, Legal Department, and her staff provided a Power Point presentation and handouts to accompany their comments. Ms. Cazadd commented that two letters would be issued to the county assessors regarding rule amendments. Ms. Cazadd stated that the amendments to Rules 462.040 and 462.240 became effective November 13, which preceded the Governor's executive order issued November 17 regarding the review of rules.

Mary Ann Alonzo, Senior Tax Counsel, provided a brief overview of the exemption of low-income housing owned by limited partnerships.

Anthony Epolite, Senior Tax Counsel, and Mike Lebeau, Tax Counsel, Property Taxes Division, Legal Department, reported on the state assessee's valuation issues and particularly what happened this year with regard to electric power generation facilities.

Shirley Johnson, Tax Counsel, Property Taxes Division, Legal Department, made a short presentation on the military housing issue: When is military housing a taxable PI and when is it nontaxable as being owned by the government.

Melanie Darling, Senior Tax Counsel, discussed the taxation of Indian property, real property, personal property, and properties leased to Indian tribes, Indian persons and Indian rancherias.

Ms. Cazadd explained the remainder of the presentation which was on the results of the change-in-ownership and new construction survey. She encouraged the assessors to work with staff during the coming year in addressing the issues seen as a result of their comments on the survey.

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Mr. Gau thanked all of the county assessors for attending the meeting. Mr. Gau stated that the common theme he heard throughout the meeting was communication and urged the assessors to continue to communicate with the Board and staff.

The Board adjourned at 3:55 p.m.

The foregoing minutes are adopted by the Board on February 18, 2004.

Note: The following case was removed from the calendar prior to the meeting: *Howard Marcus, 183969.*