

**From:** Gene Johnson [<mailto:gjohnsonca@comcast.net>]  
**Sent:** Monday, June 13, 2011 12:02 PM  
**To:** Heller, Bradley (Legal)  
**Subject:** Proposed Regulation 1685.5  
**Importance:** High

**Proposed Adoption of Regulation 1685.5**  
**Calculation of Estimated Use Tax – Use Tax Table**  
Submitted via email on June 13, 2011  
by Gene Johnson

I recently reviewed this proposed regulation, and in response to your request for written comments from the public I am submitting the following.

The adoption of a use tax table greatly simplifies record keeping for the average person, but its use does raise several questions. Before listing these questions, I would like to point out an inconsistency, or at least poor wording, at the bottom of page 3 in the “Initial Statement of Reasons.” The following is a direct quote:

*Therefore, the Board has made an initial determination that the adoption of Proposed Regulation 1685.5 will not have a significant adverse economic impact on business.*

*The proposed regulation may affect small business. (Emphasis added)*

You are saying it may affect small business, but it will not have an adverse economic impact. Does this imply it will have a positive economic impact? This seems confusing but it is a small point.

The following questions are listed in no particular order.

1. One must question whether the use tax amount produced by this table bears any resemblance to reality. To the best of my knowledge, nobody has been able to prove a direct correlation between incomes and use tax liabilities incurred. Some people with very high incomes might not make any purchases subject to use tax. Some lower income people might make a lot of these purchases. It might be difficult to defend this concept against a serious challenge by a taxpayer rights organization. I know the use of the table is voluntary, but I am unaware of any other tax that is routinely based on estimates like this. Certainly the factors used to calculate the tax can be subject to question. The income ranges used appear to be random and they can create a situation where \$1 in additional income can result in a healthy increase in the amount of use tax due. Why not simply publish a factor to be multiplied by the taxpayer’s actual AGI to determine the use tax amount due?
2. Has BOE considered allowing a de minimis exemption from use tax? Is it really worth anyone’s time (taxpayer, FTB, or BOE) to report \$7 in use tax? If I understand correctly, BOE will not issue a determination for less than \$50 because the administrative costs make it impractical. Why require use tax reporting for less than this amount? I

understand the argument that \$7 reported by a million people adds up to serious money. However, this tax has already generated a lot of negative publicity because so many taxpayers think it is a new tax; perhaps giving the “little guy” a break might help with public relations.

3. In the past, I believe that practitioner-prepared returns have been less likely to report use tax to FTB than individually-prepared returns. This seems to result from the opinion of tax professionals that reporting use tax on the FTB tax return is an election and not a requirement. The inclusion of an optional table in this regulation does little to dispel this misconception.
4. Should this regulation state that persons registered with BOE as cigarette and tobacco products consumers cannot use this table?
5. Taxpayers who are able to maintain records adequate enough to calculate their actual use tax liability are very likely to report the amount from the table if it is less than their actual obligation. Is BOE precluded from issuing a subsequent determination if the person reported use tax based on the look-up table? Should there be a provision for a substantial understatement (say 25% or more) of actual use tax liability if the taxpayer uses this table?
6. I am not sure if this comment directly affects this regulation, but it involves FTB’s collection of the use tax on behalf of BOE. It also affects the public relations impact of their procedures. When FTB receives payment for the amount due on a state income tax return that also includes use tax, a serious problem develops if there is an underpayment. FTB applies the money to the total liability in the following order:
  - i. State income tax due
  - ii. Penalties or interest applicable to state income tax due
  - iii. Use tax due

Taxpayers are sometimes unaware of additional penalties or interest they owe to FTB on their state income tax liability so they remit only funds for the state income tax and the use tax they are reporting. However, FTB will apply the funds first to state income tax due, second to penalties and interest owed them, and third to use tax. Then they report any unpaid use tax to BOE. When BOE attempts to collect funds due for use tax, taxpayers seldom understand why BOE is contacting them about a liability they reported to FTB and which they believe they have already paid to FTB. While this appears to be a simple administrative procedure, it often results in unfavorable public relations which should be considered. It also creates additional unnecessary work for FTB and BOE. The obvious solution is for FTB to apply funds to the tax due (including use tax) first and then to their penalties and interest. This also more closely matches the intent of the taxpayer.

Thank you for considering my comments. I would appreciate hearing your response.