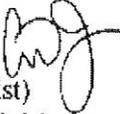


Memorandum

To: Debbie Kalfsbeek
Acting Administrator
Program Policy and Administration Branch (MIC:31)

Date: October 10, 2012

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

Subject: **Environmental Fee and Job Corps Center Operators and Service Providers**
Assignment No. 12-415

This memo is in response to your September 17, 2012, request for a legal opinion regarding the application of the California Environmental Fee¹ to Job Corps center operators and service providers, pursuant to an inquiry received by the Board of Equalization (BOE). You ask, first, if Job Corps center operators and service providers are exempt from liability for the Environmental Fee under section 158(d) (codified as 29 U.S.C.² § 2898) of the federal Workforce Investment Act of 1998 (Act).³ If not, you ask if they are exempt on any other basis as a "U.S. Government Corporation," as stated in the instructions for completing the Environmental Fee Return (BOE-501-EF (S2) REV. 19 (3-11)). In addition, you ask for clarification as to how to properly identify an entity as a "U.S. Government Corporation" that would be exempt from paying the Environmental Fee.

As discussed in detail below, although Job Corps center operators and service providers are not exempt from liability for the Environmental Fee under section 158(d) of the Act, they are exempt from paying the Environmental Fee as federal instrumentalities.

BACKGROUND

Relevant Law

"[O]rganizations that use, generate, store, or conduct activities in this state related to hazardous materials, . . . including, but not limited to, hazardous waste," are required to pay the Environmental Fee. (Health & Saf. Code, § 25205.6 (Section or § 25205.6), subs. (b) & (c).) An "organization" is "a corporation, limited liability company, limited partnership, limited liability partnership, general partnership, [or] sole proprietorship." (§ 25205.6, subd. (a).) As

¹ Health and Safety Code section 25205.6; also known as the "Corporation Fee" prior to July 18, 2006.

² All future statutory references will be to title 29 of the United States Code (29 U.S.C.) unless indicated otherwise.

³ P.L. 105-220, Aug. 7, 1998, HR 1385.

determined by the Department of Toxic Substances Control (DTSC), all organizations (with one exception not relevant here) with 50 or more employees employed in California for more than 500 hours in a calendar year are liable for the Environmental Fee.⁴ (§ 25205.6, subds. (e), (e) & (h); Cal. Code Regs., tit. 22, § (Regulation or Reg.) 66269.1, subd. (d).) Recently, on December 7, 2011, California's Third District Court of Appeal concluded that Environmental Fee imposed under Section 25205.6 is a constitutionally valid tax, not a fee. (*Morning Star Co. v. Bd. of Equalization* (2011) 201 Cal.App.4th 737, 742.)

Section 25205.6, Regulation 66269.1, and the Hazardous Substances Tax Law in the Revenue and Taxation Code (R&TC) are essentially silent with respect to the United States government, its agencies and instrumentalities. Neither Section 25205.6, nor Regulation 66269.1, nor the Hazardous Substances Tax Law contains any provision that imposes the fee on, or exempts from the fee, the United States government, its agencies and instrumentalities. R&TC section 43006 does include in the definition of "person" a "government corporation" and "the United States and its agencies and instrumentalities to the extent permitted by law" (emphasis added), and R&TC section 43012 provides that "taxpayer" is "any person liable for the payment of a fee or a tax specified in," as relevant here, Health and Safety Code (H&SC) section 25174, subdivision (a) (emphasis added). On the other hand, Section 25205.6 is not one of the tax or fee provisions specified in H&SC section 25174. In addition, neither Section 25205.6 nor Regulation 66269.1 uses the term "person" as it relates to imposition of the fee.

More generally, under the United States Constitution, states are prohibited by the supremacy clause (art. VI, § 2) from imposing any tax on any activity, agency, or instrumentality of the federal government unless Congress expressly waives the federal government's sovereign immunity from state taxation under specific circumstances. (See *Novato Fire Protection Dist. v. United States* (9th Cir. 1999) 181 F.3d 1135, 1138 [citing *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316 (1819 U.S. LEXIS 320, ***107-110); *United States v. Allegheny County* (1944) 322 U.S. 174, 176].) The Supreme Court determined, early on, that the supremacy clause "precludes a state from levying a tax on the operations of the United States." (*Ibid.*) The Supreme Court also expressed in *Department of Energy v. Ohio* (1992) 503 U.S. 607 that it is a "common rule" that "any waiver of the National Government's sovereign immunity must be unequivocal, [and] [w]aivers of immunity must be 'construed strictly in favor of the sovereign[]' [and] not 'enlarged . . . beyond what the language requires.'" (*Id.* at p. 615 [internal quotes and citations omitted]; see also *Orff v. United States* (2005) 125 S.Ct. 2606, 2610; *United States v. Torres (In re Torres)* (1st Cir. 2005) 432 F.3d 20 [2005 U.S. App. Lexis 27768, *10].)

Job Corps

With respect to Job Corps center operators and service providers, a Job Corps was established within the Department of Labor (DOL) (29 U.S.C. § 2883), and an Office of Job Corps was established within the Office of the Secretary in the DOL (§ 2883a). The head of the Office of Job Corps is "a senior member of the civil service" appointed by the Secretary of Labor, receives funds from the Secretary to carry out the Job Corps program, and has contracting authority. (§

⁴ The Environmental Fee is administered by the BOE pursuant to the Hazardous Substances Tax Law, part 22 (commencing with section 43001) of division 2 of the Revenue and Taxation Code. The fee is imposed under chapter 6.5 (commencing with section 25100), entitled Hazardous Waste Control Law, of division 20 of the Health and Safety Code, which is administered by the DTSC.

2883a.) These provisions support a conclusion that the Office of Job Corps is "the United States" for purposes of the Environmental Fee.

On the other hand, a Job Corps center operator or service provider is merely a contractor that performs certain functions pursuant to a contract with the DOL (e.g., §§ 2887, 2888, 2891, 2892, 2899), so it cannot be the "United States." The DOL may contract with a federal agency to be a Job Corps center operator, so in some instances an operator may be an "agency" of the United States. (§ 2887(a)(1)(A).) However, in other instances, the operator may be a state or local agency, a vocational school, or a private organization. (§ 2887(a)(1)(A).) Service provider contracts are between the DOL and local entities. (§ 2887(a)(1)(B).)

DISCUSSION

1. Job Corp center operators and service providers are not exempt from the Environmental Fee pursuant to the section 158(d) of the Workforce Investment Act

Section 158(d) of the Act states, in relevant part, that:

[An] entity that is an operator or service provider for a Job Corps center . . . shall not be liable . . . to any State . . . for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes imposed on, or measured by, gross receipts in connection with any payments made to or by such entity Such an operator or service provider shall not be liable to any State . . . to collect or pay any sales, excise, use, or similar tax imposed on the sale to or use by such operator or service provider of any property, service or other item in connection with the operation of or provision of services to a Job Corps center. (§ 2898(d) [emphasis added].)

Congress originally adopted essentially the same provision when it enacted section 12 of the Job Training Partnership Act (JTPA) Amendments of 1986 (which amended section 437(c) of the JTPA [§ 1707(c), the predecessor to § 2898(d)]).⁵ It was clear from this language that "contractors" who operate Job Corps centers (as the entities were originally referred to in the JTPA) were exempt from collecting or paying state or local sales or use taxes imposed by California and its subdivisions; accordingly, the Legal Department of the Board of Equalization (Board) issued a legal opinion, dated June 12, 1987, that generated Sales and Use Tax (SUT) annotation 505.0230.⁶ However, this annotation is only applicable to taxes imposed under the SUT Law⁷ and to taxes imposed under other laws that are "similar" to sales and use taxes.

The question here is whether the Environmental Fee is "similar" to the types of taxes listed in section 2898(d). Unfortunately, the language of the statute is ambiguous. In other words, is the phrase "use by" to be interpreted to stand on its own, so that Job Corps center operators and service providers would be exempt from paying any tax that is determined to be imposed on their

⁵The terms used in these two statutes have been revised over the years (e.g., "entity" for "contractors"), but the substantive provisions remain exactly the same today.

⁶SUT annotation 505.0230 opined that, pursuant to section 1707, "a sale of tangible personal property to or by, or purchase of tangible personal property by, the operator of a Job Corps Center, program, or activity under contract with the U.S. Department of Labor is exempt from sales or use tax."

⁷Part 1 (commencing with section 6001) of division (2) of the Revenue and Taxation Code.

"use" of "any property . . . or other item" (and, it could be argued, the Environmental Fee is imposed on their "use" of hazardous materials), or should the phrase "use by" be modified by the phrase "imposed on, or measured by, gross receipts"? Fortunately, both the U.S. House of Representatives and the U.S. Senate inserted a joint explanatory statement into the Congressional Record with respect to the 1986 amendments, which included a comment about section 12 (i.e., § 1707(c)), as follows:

The bill amends section 437(c) [of the JTPA] to ensure that all Job Corps activities and transactions . . . which are carried out pursuant to contracts with the Secretary [of Labor] by either for-profit or non-profit Job Corps contractors are exempted from all State gross receipts, excise, sales, use, business privilege, or similar taxes (such as occupational taxes) measured by gross receipts. This language is fully consistent with the original Congressional intent of the Act, and is supported by the Department of Labor. (Remarks of Rep. Hawkins [California] on S. 2069, 99th Cong., 2d Sess., 132 Cong. Rec. H 8806 (daily ed. Oct. 1, 1986).)

It is evident from this language that Congress intended for Job Corps center operators and service providers to be exempt from all state and local taxes that are imposed on, or measured by, gross receipts, and that Congress did not intend for them to be exempt from paying state or local taxes that are imposed on, or measured by, other than gross receipts. The Environmental Fee is imposed on "organizations that use, generate, store, or conduct activities in this state related to hazardous materials" and is measured by the number of persons employed by the organization, not on or by gross receipts. Accordingly, although they are exempt from collecting and paying California and local sales and use taxes, Job Corps center operators and service providers are not exempt, under the Act, from paying the California Environmental Fee.

2. Job Corps center operators and service providers are exempt from liability for the Environmental Fee as federal instrumentalities

Although we conclude that Job Corps center operators and service providers are not exempt from paying the Environmental Fee under section 158(d) of the Act, they may be exempt from paying the Environmental Fee as instrumentalities of the United States.

An entity may be determined to be a federal instrumentality, and, therefore, have immunity, for some purposes (e.g., from state taxation) but not for other purposes (e.g., from lawsuit under the Federal Tort Claims Act). (*Lewis v. United States* (9th Cir. 1982) 680 F.2d 1239, 1242-1243 (*Lewis*)). The test for determining whether an entity may be a federal instrumentality, for purposes of immunity from state and local taxation, "is very broad." (*Id.* at p. 1242.) The test "is whether the entity performs an important governmental function." (*Ibid.* [emphasis added].) Stated another way, "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, as least insofar as the activity being taxed is concerned." (*United States v. New Mexico* (1982) 455 U.S. 720, 735 [emphasis added].) Further, "to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes'" (*id.* at p. 736 [citation omitted]); the taxpayer must be "virtually . . . an arm of the Government" (*ibid.* [citation omitted]). The U.S. Supreme Court determined that the American Red Cross is a federal instrumentality and immune from state taxation because, in addition to being under government supervision and managed by

government appointees, it provides a wide variety of functions indispensable to the working of the Armed Forces and assists the federal government in providing disaster assistance in time of need. (*Dept. of Employment v. United States* (1966) 385 U.S. 355, 358-360.)

Relying on these and other court opinions, the Board's Legal Department concluded that, in order to determine if the Air Force Academy Athletic Association was a federal instrumentality for purposes of the sales and use taxes, this entity would (1) "have to be an integral part of [here] the Air [F]orce" and (2) "charged with an essential function in the operation of the Air Force," and (3) "the degree of supervision by the Air Force would have to be more than casual or perfunctory." (Legal Opinion by Ronald Dick, 6/4/90 [backup letter to SUT annotation 505.0045]; see also Memo from Kelly W. Ching to G. Jung, 7/11/95 [backup memo to SUT annotation 505.0377].⁸)

Here, the Job Corps centers are integral to Congress's determination "to provide employment and training assistance to economically disadvantaged youth and adults and to workers dislocated from their jobs." (Remarks of Rep. Gunderson on S. 2069, 99th Cong., 2d Sess., 132 Cong. Rec. H 8806 (daily ed. Oct. 1, 1986).) The DOL, through its Office of Job Corps, may have been able to operate the Job Corps centers itself, but Congress directed the DOL (i.e., "[t]he Secretary shall") to enter into agreements with federal, state, and local agencies, vocational schools, and private organizations to operate each center, and permitted the DOL to enter into agreements with local entities to provide services to the centers. (§ 2887(a)(1).) In other words, the Job Corps center operators and service providers are an "integral part" of the Job Corps program and are "charged with an essential function in the operation of" the Job Corps program; without Job Corps centers, there would be no Job Corps program.

Further, the supervision provided by the DOL, through its Office of Job Corps, is considerably more than "casual or perfunctory." First, Congress specifies the activities that the center operators and service providers must perform (§ 2888(a)) and the standards of conduct they are expected to enforce, including the disciplinary measures to be taken (§ 2892). The DOL must: establish procedures to ensure each operator and service provider maintains an acceptable (as specified) management information system; perform audits of the center operators and service providers; establish indicators of performance; conduct annual assessments and develop and implement performance plans for underperforming centers; and report annually to the appropriate Congressional committees. (§ 2899.) In other words, the DOL closely supervises the Job Corps center operators and service providers, and Congress maintains oversight over the Job Corps program.

In addition, Congress provides the funding for the Job Corps center operators and service providers, through the contracts between the DOL and the operators and service providers (§ 2898, subd. (e)), and, although the operators and service providers are not government appointees, as are the managers of the American Red Cross, the DOL must make certain that each operator and service provider meets very stringent criteria before the DOL will enter into a contract with them (§ 2887). The DOL is also very closely involved in the recruitment, screening, selection, assignment, counseling, testing, and monitoring of the Job Corps program

⁸ Annotations do not have the force or effect of law but are intended to provide guidance regarding the interpretation of the Sales and Use Tax Law with respect to specific factual situations. (Reg. 5700, subds. (a)(1), (c)(2).)

enrollees (§§ 2884-2886, 2889, 2899), even to the extent of providing personal allowances to the enrollees if the DOL determines it to be necessary or appropriate to meet their needs.

It was Congress's purpose to implement "a national Job Corps program . . . to assist eligible youth who need and can benefit from an intensive program . . . to become more responsible, employable, and productive citizens." (§ 2881(1).) Clearly, the operators of and service providers to the Job Corps centers "perform[] an important governmental function." (*Lewis, supra*, 680 F.2d at p. 1242.) Therefore, based on all of the foregoing, the entities that operate and provide service to Job Corps centers are determined to be "federal instrumentalities" for purposes of the Environmental Fee and are exempt from paying the fee pursuant to the supremacy clause of the United States Constitution, as discussed above. Lastly, the law does not support an assertion that Congress has waived federal immunity with respect to the Environmental Fee.⁹

3. The term "U.S. Government Corporations" should be replaced

The instructions to the Environmental Fee Return state that "U.S. Government Corporations" do not have to pay the fee. As noted above, neither Section 25205.6 nor Regulation 66269.1 exempts the federal government from liability for the Environmental Fee, let alone makes any mention of a "U.S. Government Corporation." We suspect that, sometime prior to July 18, 2006, when the Environmental Fee was imposed only on corporations, it was determined that, according to the supremacy clause of the United States Constitution, the federal government was not subject to the fee. So, turning to the definition of "person" (R&TC, § 43006), which includes a "government corporation," the combined term "U.S. Government Corporation" took form.

Now that the imposition of the Environmental Fee is no longer limited to corporations, we suggest that the term be replaced with the broader term "United States and its agencies and instrumentalities." Based on the discussion above, we concur that, regardless of the term used, the federal government, et al. is exempt from liability for the fee.

4. Identification of agencies and instrumentalities of the federal government

You have asked how staff may properly identify an entity as a U.S. Government Corporation that would be exempt from the Environmental Fee. However, based on case law and the discussion above, whether or not an entity is a "U.S. Government Corporation" is not relevant to whether or not the entity may be immune from state taxation. An entity included in the list of United States "government corporations" in 31 U.S.C. section 9101 is not necessarily an agency or instrumentality of the federal government that is exempt from state taxation. Similarly, entities that constitute federally chartered corporations, which are described in part B (commencing with

⁹ We have previously determined that Congress has expressly waived federal immunity with respect to other solid and hazardous waste fees (e.g., the California solid waste disposal facility fee, Public Resources Code section 48000, and the California hazardous waste facility fee, Health and Safety Code section 25205.2) under the Resource Conservation and Recovery Act of 1976 (RCRA), specifically 42 U.S.C. section 6961(a). However, it is our opinion that the RCRA waiver of immunity does not apply to the Environmental Fee because the Environmental Fee imposed under Section 25205.6 is not a "reasonable service charge" as defined in section 6961(a), in that the fee is deposited into the Toxic Substances Control Account, the funds from which may be appropriated for purposes other than a California "solid waste or hazardous waste regulatory program." (Health & Saf. Code, §§ 25173.6, subds. (a)-(c) & 25205.6, subds. (d) & (g); 42 U.S.C. § 6961(a) [reasonable service charges include "any other nondiscriminatory charges that are assessed in connection with a . . . State . . . solid waste or hazardous waste regulatory program" (emphasis added)].)

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section 20101) of subtitle II of title 36 of the United States Code (pertaining to patriotic and national organizations), may or may not be federal instrumentalities. The American Red Cross is expressly a federal instrumentality (36 U.S.C. § 300100); the Civil Air Patrol is expressly not (36 U.S.C. § 40301; 10 U.S.C. § 9441).

So, the question more accurately is how the staff may properly identify an entity as the "United States" or as an "agency" or "instrumentality" of the United States for purposes of immunity, not only from the Environmental Fee but from any tax the BOE administers. Generally, identification of an entity as the United States government, itself, or as a federal agency may be reasonably easy to make by going to the entity's Web site. Federal instrumentalities may also be easily identified from express statutory language or an entity may be easily eliminated as an instrumentality, such as are the American Red Cross and Civil Air Patrol, respectively. However, where there is no statutory language expressly indicating that an entity is or is not a federal instrumentality, the entity must be analyzed as the Job Corps center operators and service providers have been here. Legal Department staff is available to assist you and your staff in making these determinations.

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

CDJ:mcb


cc:  Department of Toxic Substances Control