

Annotate

Mr. Clarence E. Ward
Excise Tax Division

June 8, 1990

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This is in response to your mini-memo dated May 9, 1990. [redacted] has filed a petition for redetermination of a retaliatory tax assessment. You ask for our opinion regarding this petition.

[redacted] is incorporated under the laws of the United Kingdom and is licensed to do insurance business in California. Section 28(f)(3) of Article XIII of the California Constitution sets forth retaliatory tax provisions with respect to alien insurers doing business in California. That section includes the following provision:

"For the purposes of this paragraph (3) of subdivision (f) the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state in which is located its principal place of business in the United States.

"In the case of an insurer formed under the laws of Canada or a province thereof, its domicile shall be deemed to be that province in which its head office is situated."

The statutory repetition of the retaliatory provisions of the constitution are set forth in the Insurance Code. Insurance Code section 685 sets forth the basic application of retaliatory tax. Insurance Code section 685.2 restates that portion of the Constitution quoted above.

The principal office of [redacted] in the United States apparently is located in [redacted]. The retaliatory tax assessment issued against [redacted] was based on a calculation using [redacted] as [redacted] domicile. [redacted] argues that a tax treaty between the United States and the United Kingdom as well as the Equal

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Protection Clause and Supremacy Clause of the United States Constitution prohibit California's retaliatory tax assessment against it.

primary argument is that it does not receive the benefits of being a domiciled insurance company for purposes of taxation but suffers the burdens of being regarded as a domiciliary for purposes of California's retaliation. It believes that this violates the non-discrimination provisions of the tax treaty and, apparently, the Supremacy Clause of the United States Constitution by virtue of California's failure to honor the tax treaty. also argues that California violates the Equal Protection Clause of the United States Constitution by arbitrarily reclassifying it as a corporation.

has failed to discuss the retaliatory tax it would owe based on a calculation using the United Kingdom as its domiciliary. If a tax based on that calculation would be higher than the tax actually assessed against it, then all arguments must fail on their merits because would be receiving more favorable treatment by virtue of the alleged discrimination. I note also that cites the case of Western and Southern Life Insurance Company v. State Board of Equalization (1981) 451 U.S. 648 and states that the Supreme Court did not breathe constitutional life into otherwise faulty retaliatory tax statutes based on its holding. That decision specifically upheld the constitutionality of Insurance Code section 685. The retaliatory tax provisions have not been amended since the time of the Supreme Court's decision. Nevertheless, it is true that the alleged discrimination at issue here was not before the Supreme Court in that case.

As mentioned above, if retaliatory tax assessment is less by virtue of using as its domicile rather than the United Kingdom, arguments must fail. However, it is not necessary to determine that tax or to reach the merits of arguments. To hold in favor of on its petition would require directly contravening the specific provisions of section 28(f)(3) of Article XIII of the California Constitution and Insurance Code section 685.2. To do so, we would have to find these provisions unconstitutional. Section 3.5 of Article III of the California Constitution specifically provides that an administrative agency such as this Board has no power to declare a statute such as Insurance Code section 685.2 to be unenforceable, or to refuse to enforce it, on the basis of its being unconstitutional unless an appellate court has made such a determination. Of course, if the Board has no power to declare a statute unconstitutional, it certainly has no power to declare

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the California Constitution itself to be unconstitutional. Since to find in favor of § . would require a declaration of unconstitutionality of a statute and the California Constitution, and since we have no power to do so, we recommend that the petition be denied.

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L. J. H. [unclear]