

170.0008.900**Memorandum**

To: Ms. Mary Armstrong

Date: November 20, 1995

From: Thomas J. Cooke

Subject: REDACTED TEXT

You have asked me to review the REDACTED TEXT District Office's request for a subpoena for records of the above taxpayer in the possession of REDACTED TEXT.

On April 8, 1993, REDACTED TEXT and REDACTED TEXT entered into a Purchase and Sale Agreement for the assignment and sale of accounts receivable which were owned by REDACTED TEXT and were to be assigned or sold to REDACTED TEXT. This agreement was renewed and amended pursuant to a new agreement dated March 31, 1995. The taxpayer and REDACTED TEXT executed various UCC-1's which were filed with the California Secretary of State's Office on April 8, 1993. The financing statement provided for a security interest by REDACTED TEXT in all of the taxpayer's accounts receivable as of that date. As of June 14, 1995, the taxpayer owed REDACTED TEXT the amount of \$1,141,343.65. These funds were lent to the taxpayer by REDACTED TEXT.

The taxpayer's liability to the Board arises from a deficiency discovered by audit in 1991. Apparently, no Notice of State Tax Lien for this liability was recorded in the Secretary of State's Office until June of 1995. The taxpayer's present liability is approximately \$450,000. The taxpayer is currently in Chapter 11 bankruptcy.

The REDACTED TEXT District Office has been attempting to require the taxpayer's customers to comply with its levies directed to the taxpayer's account receivables and to require REDACTED TEXT to turn over to the Board the sales tax reimbursement that REDACTED TEXT collects when it is paid by the taxpayer's customers on the assigned or sold account receivables.

Government Code section 7172(c) provides that a state tax lien is not valid as to personal property against the holder of a security interest in the property whose interest is perfected pursuant to section 9303 of the Commercial Code prior to the time the notice of state tax lien is filed with the Secretary of State pursuant to Government Code section 7171.

Assuming no Notice of State Tax Lien was filed with the Secretary of State's Office prior to April 8, 1993, the date that REDACTED TEXT filed its UCC-1's, it is our opinion that REDACTED TEXT has a security interest in the taxpayer's accounts receivable assigned to it that is senior to the Board's lien and that any accounts receivable sold to REDACTED TEXT

prior to the Board's filing of the Notice of State Tax Lien in the Secretary of State's office are not subject to the Board's lien.

The taxpayer, as a seller of tangible personal property, becomes liable for the sales tax. The taxpayer's customers are responsible for the payment of sales tax reimbursement solely by the terms of the sales contract between buyer and seller. If the taxpayer assigns his accounts receivables to REDACTED TEXT, the payment of the sales tax reimbursement to REDACTED TEXT by the taxpayer's customers is indistinguishable from the payment of that other assigned contract right -- the right of REDACTED TEXT to receive the payment for the goods sold by the taxpayer that was originally due to the taxpayer.

It is our opinion that unless the Board can show that its Notice of State Tax Lien was filed in the California Secretary of State's Office prior to the UCC-1's filed by REDACTED TEXT, the Board has no right to any portion of the account receivables due REDACTED TEXT.

The taxpayer filed bankruptcy on June 23, 1995. The Board can conduct an audit of the taxpayer for pre-petition and post-petition liabilities and make a demand for any tax returns that have not been filed.

REDACTED TEXT contends that the Board has no right to issue it a subpoena since it is not a seller or "consumer" of tangible personal property purchased from a retailer. Government Code section 7480(f)(3) would appear to permit the Board to issue a subpoena to REDACTED TEXT for the records requested by the district.

Please contact me if any additional information is needed.

TJC/cmm

cc: Mr. Gary Jugum
Ms. Susan Bennett