

170.0067**Memorandum**

To: Ms. Jennifer L. Willis
Taxpayers' Rights Advocate

Date: December 14, 1994

From: Thomas J. Cooke
Staff Counsel

Subject: Revenue and Taxation Code Section 7097
REDACTED TEXT

Mr. E. L. Sorensen, Jr. has requested that I respond to your memorandum to him dated November 16, 1994 concerning liens filed against REDACTED TEXT.

On September 28, 1984, the Board issued a determination to REDACTED TEXT for use tax applicable on the purchase of a helicopter. REDACTED TEXT did not petition for redetermination within the statutory period and the liability became "final" on October 29, 1984. After the Board mailed a Demand for Immediate Payment to the corporation, REDACTED TEXT contacted the Consumer Use Tax Division and submitted its records to the Division. After review of those records, the Consumer Use Tax Division decided to "cancel" the "billing" because it believed that the purchase of the helicopter came within the common carrier exemption. The Consumer Use Tax Unit then sent a Statement of Account to REDACTED TEXT showing a one-cent credit balance and containing the notation -

"The above liability based on the purchase of aircraft 2757M is canceled. Credit awaiting final approval. When approved by this Board, notice of credit will follow."

The Board's Petitions Section subsequently notified the Consumer Use Tax Section that the "billing" should not be canceled. The Petitions Section requested that the Consumer Use Tax Section obtain additional records from REDACTED TEXT to verify the exemption. Little action was taken on the account thereafter until 1988 when a \$650 refund due to REDACTED TEXT by the Franchise Tax Board was forwarded to SBE to be applied to the use tax liability. In 1989, the Board notified REDACTED TEXT that it intended "to re-establish liability" and re-billed REDACTED TEXT for the tax, penalty and interest. In 1991, the Board accepted a petition from REDACTED TEXT as a "protest" of a final determined tax.

The liability is still in petition status with a Board Hearing pending.

In the summer of 1994, the Board became concerned that the ten-year period of the

statutory lien provided by Revenue and Taxation Code section 6757 and Government Code section 7172 would soon expire. The Board decided that liens would be filed and recorded. In your memorandum, you state that the Board staff called the taxpayer's representative, REDACTED TEXT, on August 2, 1994 to notify him of the reason for the planned lien filings. You state that two days later, on August 4, 1994, that the first of two liens were filed. Our review of the REDACTED TEXT file indicates that the two liens were dated August 4, 1994, but the Secretary of State lien was not filed until August 8, 1994 and the Los Angeles County lien was not recorded until August 17, 1994. Recently, REDACTED TEXT has requested that the liens be removed because the Board did not give the 30-day notice specified in Revenue and Taxation Code section 7097(a) prior to the filing or recording of the liens.

REDACTED TEXT's liability became final on October 29, 1984. The Board's notification to REDACTED TEXT in 1984 that it would cancel the liability never resulted in cancellation because the State Board of Control did not approve the intended cancellation as required by Revenue and Taxation Code section 6981. There is no estoppel in the collection of tax liabilities (Market Street Railway Co. v. SBE (1955) 137 Cal.App.2d 87). Therefore, the liability became "due and owing" on October 29, 1984 and the statutory state tax lien arose on that date - (see Rev. & Tax. Code §§ 6757 and 6561). The Board's acceptance of a late "protest" of a finally determined tax does not "toll" any limitations period.

Government Code section 7172(a) provides that a state tax lien continues in effect for ten years from the date of its creation and is extinguished unless a Notice of State Tax Lien is filed or recorded within that period. Generally, the Board loses enforcement power to collect a tax liability ten years after a state tax lien arises unless a Notice of State Tax Lien is filed or recorded within that period - (see Rev. & Tax Code §§ 6702, 6711 and 6776).

Government Code section 7174 and Revenue and Taxation Code section 6740 provide the statutory authority to the Board to release a recorded lien. These sections provide that if the Board determines that the liability is sufficiently secured by a lien on other property, that if the release of a state tax lien will not jeopardize the collection of the liability, that if the liability is legally unenforceable, or if the liability is satisfied in full, the Board may release the lien. In addition, Revenue and Taxation Code section 7097 provides that if the Board determines that a filing of a lien was in error, the Board may release the lien. It is our opinion that none of these factors are present in the REDACTED TEXT situation. The REDACTED TEXT lien was not filed or recorded "in error" because REDACTED TEXT was not given the 30-day statutory notice. It is our opinion that the Board may not under applicable law remove a filed or recorded lien solely on the basis that the taxpayer was not given the 30-day statutory notice. It is also our opinion that there is no provision in the Taxpayer's Bill of Rights (Rev. & Tax. Code § 7080 et ff.) which authorizes the Taxpayers' Rights Advocate to release a lien solely because a taxpayer was not given the 30-day notice prior to "filing or recording" the statutory lien.

In your memorandum, you state that you are concerned that "the Board staff can violate the law with no consequences and no means to correct the violation" (i.e. by release of the lien). We believe that your characterization is unjustified. The Board gave REDACTED TEXT

advance notice that it would be imposing the liens (albeit not the 30-day statutory notice). REDACTED TEXT could have requested a delay at that time before the liens were filed and recorded. However, apparently REDACTED TEXT did not believe that a delay was necessary because no request for a delay was made to the Board. It is only now that the ten-year statutory lien period has expired that REDACTED TEXT claims the liens should be removed on the basis that he did not receive 30 days notice. In my recent telephone conversation with REDACTED TEXT, I indicated to him that the Board was willing to remove the liens at this time if his client agreed to waive the limitations period for the filing or recording of new liens should the Board sustain the liability. REDACTED TEXT indicated that his client was unwilling to do this.

In Market Street Railway Co. v. SBE (1955) 137 Cal.App.2d 87, 103, the court stated:

“The general rule is that the state cannot be estopped because of acts of its employers from collecting the tax from the taxpayer. If the taxpayer is a mere collection agency the state may be estopped, but not where the tax is imposed on the complaining taxpayer. The public policy behind this rule is self-evident.”

We do not believe that the Legislature intended to enforce any provision of the Taxpayer's Bill of Rights by affording a taxpayer an opportunity to avoid a tax as a remedy for a violation of the act. The 30-day notice provision is to allow a taxpayer to take steps to avoid the “filing or recording” of a lien, not to void the lien or evade the delinquent tax that gave rise to the lien.

TJC:plh

cc: Mr. Burton Oliver - MIC:73
Mr. Glenn Bystrom - MIC:43
Mr. Gary Jugum - MIC:82
Ms. Sue Coty - MIC:46
Mr. Rick Slater - MIC:55
Mr. Jeff McGuire - MIC:70
Mr. Gordon Adelman - MIC:82