

170.0280**Memorandum**

To: Mr. Ralph Valencia, Jr. (MIC:35)
Return Review Section

Date: March 1, 1994

From: John L. Waid
Tax Counsel

Subject: REDACTED TEXT
San Francisco Educational Authority (SFEA) Tax

I am responding to your memorandum dated January 18, 1994, to the Legal Division. You attached a copy of a letter to B. H. Watson, Supervisor of Return Review, dated November 12, 1993, from REDACTED TEXT, the taxpayer's manager responding to Mr. Watson's letter to the taxpayer dated September 3, 1993, a copy of which you also attached, noting that it had failed to remit SFEA tax for the Second Quarter 1993 and requesting it to remit the balance due. REDACTED TEXT replied that the taxpayer relied upon the recent superior court decision in Hoogasian Flowers, Inc. v. S.B.E., Sacramento Superior Court No. 530342, which declared the SFEA tax unconstitutional. He further indicated that the taxpayer did not collect reimbursement for the tax and stated the taxpayer's position as follows:

"Based upon the outcome of the case, we believe that the tax is not legally owed if the tax was not collected."

OPINION

California Constitution Article III, section 3.5, prohibits the Board from failing or refusing to enforce any tax ordinance on the ground that it is unconstitutional until an appellate court has so ruled. Hoogasian Flowers was a superior court case that is now on appeal to the Third District Court of Appeal. Thus, the tax is valid and enforceable until the appeals court rules otherwise. Retailers owe sales tax whether or not they collect reimbursement therefor (§ 6051.) As a result, the taxpayer owes the transactions tax and/or a debt equivalent to the use tax.

We expect an opinion from the appeals court on this case within the next few months.

JLW:es