



STATE BOARD OF EQUALIZATION

March 9, 1994

Re: REQUEST FOR ABATEMENT OF INTEREST AND PENALTY

This office has received your letter dated December 30, 1993 in which you requested that the State Board of Equalization abate the penalties and interest totalling \$247.00 billed for the late filing of --- September 30, 1993 sales tax return.

In your letter, you state that --- was closed by the California Commissioner of Corporations on November 5, 1993 and the Federal Deposit Insurance Corporation was appointed receiver on that date. You state that --- tax return was filed after the due date of October 31, 1993 as the result of the negligence of one of --- former employees. On the night of closing (November 5, 1993), you state that you discovered the uncompleted form and source data in a desk drawer. You completed and filed the return as soon as possible with payment by a check drawn on FDIC's account.

You also state in your letter that the Financial Institution Reform, Recovery and Enforcement Act exempts receivers from all state and local charges in the nature of penalties or fines, including those arising from the failure of a person other than the receiver to pay any tax or fee when due.

A review of the Board's file in this case reveals that the seller's permit issued to --- in 1984 remains in effect. The Federal Deposit Insurance Corporation has not requested a seller's permit in its own name as receiver of ---. The disputed penalty and interest has been billed to ---.

12 U.S.C. § 1825 (b) (1) provides that, when acting as a receiver, the Federal Deposit Insurance Corporation "shall be exempt from all taxation imposed by a State" with an exception not applicable here. 12 U.S.C. § 1825 (b) (2) states that the Federal Deposit Insurance Corporation -

"shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any ... personal property ... tax ... when due."

California Revenue and Taxation Code section 6591 provides that any person who fails to pay any tax to the 'state within the time required shall pay a penalty of 10 percent of the tax plus interest from the date on which the tax became due until the date of payment.

In Irving Independent School District v. Packard Properties... (1992) 970 F.2d 58, the court stated that the plain language of 12 U. S. C. § 1825 "means no involuntary lien attaches to property held by' the FDIC when the FDIC is acting as a receiver. The wording of the statute is inherently prospective in scope. It does not exclude liens attached to the property before the FDIC owned it" (970 F.2 at 61).

The court also stated that 11 U.S.C. § 1825(b) (3) "prevents local taxing authorities from forcing the FDIC to pay penalties for the failure of previous owners to pay taxes. Nevertheless, Congress chose to leave property acquired by the FDIC in the same condition as the FDIC found it" (970 F.2d at 62).

The court also stated that the FDIC will not be responsible for the payment of interest if it can be shown that the interest imposed by the local taxing authority was in the nature of a penalty and was not "to compensate the taxing unit for not having such tax money available to pay its obligations" (970 F.2d at 65). Since the State Board of Equalization collects interest on late payments at the same rate as applicable in other instances of non-payment, the interest charge cannot be deemed to be a penalty.

It is our opinion that as long as the seller's permit remains in the name of --- the lien that arose on --- property by operation of law can remain and the billing in --- name for the penalty and interest is proper.

It is also our opinion that 12 U.S.C. § 1821 (d) (2) (H) requires the Federal Deposit Insurance Corporation to pay the interest incurred for the late payment of taxes but FDIC is not responsible for the payment of the penalty.

Very truly yours,

Thomas Cooke
Staff Counsel

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