



## STATE BOARD OF EQUALIZATION

PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001  
TELEPHONE (916) 327-3400

December 20, 1990

Mr. D--- N---  
XXXXX S. --- - --- Rd.  
---, California XXXXX-XXXX

Re: SR -- XX-XXXXXX

Dear Mr. N---:

I am writing in response to your August 27, 1990 letter to our San Jose Office which was forwarded to the legal unit for reply.

You have asked whether sales tax at auction by N--- and S---, Inc. (N---) on behalf of the federal government are subject to California sales and use tax. Specifically, N--- will sell personal property of various financial institutions, e.g., banks, and savings and loans, which are in receivership of the Federal Deposit Insurance Corp. (FDIC) and/or the Resolution Trust Company (RTC). The FDIC/RTC has supplied N--- with a tax exempt status identification number, which you enclose with your letter.

Unless specifically excluded or exempted from taxation by statute, all gross receipts from retail sales or purchases for use within this state of tangible personal property are subject to either sales or use tax. (Rev. & Tax. Code § 6051.) Although the legal obligation to pay sales tax is on the retailer, Civil Code Section 1656.1 provides that the retailer may seek sales tax reimbursement from the purchaser.

The use tax is imposed upon the storage, use or other consumption in this state of tangible personal property purchased from any retailer. (Rev. & Tax. Code § 6201.) The legal obligation to pay use tax is on the purchaser rather than the retailer. However, the retailer is required to collect and remit the use tax provided that the retailer is engaged in business in this state. (Rev. & Tax. Code § 6203.) Auctioneers, like N---, making sales in this state of property owned by others, are "retailers." (Rev. & Tax. Code § 6015(a).)

Revenue and Taxation Code section 6402 provides an exemption from payment of use tax for purchases made "from any unincorporated agency or instrumentality of the United States." There is no exemption for purchases from an unincorporated agency of the United States. Thus, N--- is required to collect use tax on its sales on behalf of incorporated agencies of the federal government such as the RTC and the FDIC without regard to its "tax exempt" status.

Mr. D--- N---

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December 20, 1990  
560.0100

Please feel free to contact us again if you have further questions.

Sincerely,

Stella Levy  
Tax Counsel

SL:cs  
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**560.0100**

## Memorandum

To : Mr. Gary Jugum

Date: February 1, 1993

From : Don Fillman

Subject: **RTC and FDIC Transactions**

This memorandum is prompted by the December 21, 1992 memo to you from Glenn Bystrom, concerning use tax liability on sales by the RTC and FDIC. He observed that the following three items appear to provide conflicting information: the new Annotation 560.0100, the new Annotation contained in CLD 486 (last item on p. 3), and the May 6, 1992 memo from Compliance Planning and Evaluation to District Administrators (copies attached).

The U.S. is immune, under Art. VI of the U.S. Constitution, from all state and local taxation. The U.S. Supreme Court has consistently interpreted this "supremacy clause" to be absolute, since *McCulloch v. Maryland* (1819) 17 U.S. 316. State and local taxing authorities may only tax a U.S. entity which consents to such taxation, by waiver of the immunity. Congress has expressly waived this immunity with respect to the FDIC (12 U.S.C. § 1825) and FSLIC (12 U.S.C. § 1725(e), for state and local *ad valorem* real property taxes. Both the immunity and the waiver were made applicable to the FDIC and FSLIC, not only in their corporate role, but also in their role as a receiver for a failed bank or thrift.

The RTC was created in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), to replace FSLIC as receiver for failed thrifts. The context and language of its creation, to act in the place of FSLIC, makes it clear that RTC shall be treated the same as the FDIC and FSLIC (12 U.S.C. § 1421 et seq.).

The act is silent about the immunity of FDIC and RTC when acting in the role of conservator. Although both corporations believe the act must be read to give them immunity as conservators, they have both chosen not to "assert" the immunity when, as conservators, they continue to operate the entities as going businesses. Nor will the immunity be asserted, at this time, for subsidiaries of failed institutions.

As a part of the immunity, State and local taxing authorities may not sell or foreclose against property in which RTC and FDIC hold an interest without fully protecting that interest. *New Brunswick v. U.S.* (1928) 276 U.S. 547.

When references are made to U.S. entities in the California Revenue and Taxation Code and in the Title 18 regulations, they attempt to fit within both the constitutional restraints and the

waivers by Congress. It is possible, however, to find fact situations in which it is necessary to also consult the federal law.

Revenue and Taxation Code section 6352 exempts from either sales or use tax the gross receipts for transactions which California is prohibited from taxing under the Constitution or laws of the U.S.

Revenue and Taxation Code section 6381 exempts from sales tax the gross receipts from the sale of tangible personal property to the U.S., its unincorporated agencies and instrumentalities, and to any incorporated agency or instrumentality of the U.S. owned by the U.S. or by a corporation wholly owned by the U.S.

Revenue and Taxation Code section 6402 exempts from the use tax the storage, use, or other consumption in California of property purchased from any unincorporated agency or instrumentality of the U.S. (except certain surplus property and contractor inventory). This section is silent regarding purchases from any incorporated agency or instrumentality of the U.S., such as the FDIC and RTC. In these cases, the immunity applies to at least their corporate and receivership roles.

Regulation 1614 covers sales to the U.S. and its instrumentalities, and provides that tax applies to sales to a nonexempt party (even if later reimbursed by the U.S.), and to sales with items covered by Part B of the medicare program.

Regulation 1618 provides that California sales and use taxes do not apply to certain direct consumable supplies and certain overhead materials sold to U.S. supply contractors if title passes to the U.S. prior to any use by the contractor.

After examining the various sources of advice within the BOE it appears that both the new Annotation 560.0100 and the one annotation appearing in CLD 486 accurately state the provisions of Revenue and Taxation Code section 6402. They may have been correct as applied to their unique fact situations, but are subject to being incorrect if applied to a different fact situation. Both annotations would be correct if the RTC were acting in the role of a conservator, but would be incorrect if the RTC were acting as a receiver, which is a more common likelihood. Both annotations should be revised to reflect the differing roles that may be played by U.S. entities.

The May 6, 1992 memo from Compliance Planning reaches correct conclusions for most fact situations. However, "bridge banks" are defined as U.S. instrumentalities, but are not presently asserting taxation immunity. And the FDIC, while not asserting a taxation immunity in its role as a conservator, does assert its immunity in its role as a receiver.