STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
Petitioner	)	

The Appeals conference in the above-referenced matter was held on October 1, 1991, by Staff Counsel Janice M. Jolley in _____, California.

Appearing for Petitioner:

Appearing for the
Sales and Use Tax Department:

Protested Item

The protested tax liability for the period October 1, 1985 through December 31, 1988 is measured by:

Item	State, Local and County
Ex-tax cost of donated property	$1,787,331

Petitioner's Contentions

1. The use tax exclusion provided by Revenue and Taxation Code section 6009.1 applies to donated items shipped to donees out of state.

2. Donated property shipped to American Indian reservations is exempt from use tax under Revenue and Taxation Code Section 6009.1 and 6017, as well as Sales and Use Tax Regulation 1616.

Summary

Petitioner is a wholly owned subsidiary of _____ of _____, New Jersey (hereinafter "the parent company"). The parent company's principal business involves the design and

marketing of a wide variety of gift products, including stuffed toys, greeting cards and stationery, picture frames, custom buttons and pins, etc.

The parent company owns sister-brother corporations each of which operates a facility in California. The Los Angeles subdistribution center is operated by a separate subsidiary of the parent and is not subject to this notice of determination. The _____ California, warehouse is operated by petitioner as the center for receipt of goods purchased from out of state and foreign vendors. These purchases are subsequently shipped from [CA] to subdistribution centers of the parent company in Denver, Colorado, Seattle, Washington, and Los Angeles. The [CA] warehouse also serves a separate function as a subdistribution center for the _____ California region.

During the audit period, petitioner made numerous charitable donations to tax-exempt organizations throughout the United States. Donees included numerous Indian tribes both within and outside California, the _____ in _____, and the _____. Petitioner estimates that approximately 80 percent of its charitable donations were made to entities located outside California.

Petitioner states that the donation of goods to the American Indian tribes and reservations generally occurred through the cooperation and assistance of _____, which is a New Jersey exempt charitable organization founded by prisoners in the New Jersey State Prison at _____. _____ locates children in economically depressed areas and then finds donors willing to assist. Petitioner's parent company arranged for the donation of goods to the recipients on the East Coast directly from its New Jersey stores and facilities. Donations to West Coast and Midwest entities were shipped from petitioner's [CA] warehouse. All decisions regarding the type and quantity of items to be donated were made by the parent company at its New Jersey headquarters. Petitioner stated that all goods donated by petitioner prior to shipment had either been (1) already stored in the [CA] warehouse facilities of petitioner or (2) located in the Seattle, Los Angeles, or Denver subdistribution center of the parent company and then shipped to [CA] for reshipment to the charitable recipients. In all cases, the donated goods were in the form originally purchased and were not processed, fabricated, or altered in any manner by petitioner or the parent company. None of the donated goods had been ever subject to either sales or use tax in this State.

Petitioner alleged that in most instances, the donated goods were shipped by common carrier trucking companies to out-of-state destinations. The donees contacted the common carrier and referred them to petitioner to arrange for shipment. Petitioner prepared a bill of lading as shipper, which allegedly was in each instance signed by the common carrier, and affixed a seal to the trailer after loading the donated items in it. Petitioner stated that the common carrier was obligated to it to deliver the designated goods to their ultimate destination. Petitioner also stated that in some instances, donees located in California would pick up goods at Petitioner’s [CA] facility or that petitioner's employees would deliver goods to the donees using facilities of the petitioner.

Petitioner contends that no taxable use or storage occurred for those goods originally brought into the state for resale which were subsequently shipped to out-of-state donees.

Petitioner refers to Business Taxes Law Guide Annotation 570.1165 which states “[where property is purchased outside the state for use here, is brought here and later transported for use solely outside the State, and nothing is done with the property while it is here except to store it, such property is exempt from use tax under section 6009.1.” (August 24, 1970)]. Petitioner alleges that under Revenue and Taxation Code section 6009.1 the donated goods were not used nor stored in this state in a manner subjecting them to use tax because they were held and retained by petitioner for the purpose of subsequently transporting them to destinations outside the State for exclusive use there. Petitioner alleges that it is appropriate to look to the donee's out-of-state use of the items as complying with this statute.

The Sales and Use Tax Department (hereinafter, "the Department") contends that petitioner's donation of the property within this State was an act of ownership inconsistent with holding property for resale. It was therefore a taxable use by petitioner. Petitioner contends that the donation did not occur until the time of actual delivery of the goods to the donees at out-of-state destinations because the property was delivered by petitioner to a common carrier for transportation outside the State to the donee. Petitioner contends that title to the goods did not pass to the charitable recipients until delivery at the ultimate destination by the common carrier. Alternatively, petitioner submits that the common carriers were agents for petitioner while performing transportation services. Petitioner relies on Sales and Use Tax Regulation 1620(a)(3)(B) for the proposition that delivery to a common carrier for transport out of the State of California does not constitute a taxable event in this state even if the carrier is furnished by the purchaser. In support of this proposition, petitioner also cites Business Taxes Law Guide Annotations 325.0280, 325.0480, and 325.0640.

Petitioner contends that the Department has erroneously asserted Revenue and Taxation Code Section 6244(a) as a ground upon which to tax the donations which were initially brought into this State for purposes of resale but were subsequently given away. Petitioner contends that the definition of storage and use in Revenue and Taxation Code Section 6009.1 was amended in 1953 to remove a limiting reference to any right or power over property "shipped or brought into this State" which petitioner contends therefore extended the exemption to property which had previously been purchased and stored in this State for resale.

Petitioner cites Revenue and Taxation Code Section 6017 and Sales and Use Tax Regulation 1616(d) (4) (A) and (E) as authority for the proposition that donation of property to American Indians whose reservations are located within the geographical boundaries of California is also exempt from use tax.

Attached as Exhibit A is a copy of the Department's October 11, 1991, memorandum responding to numerous bills of lading and shipping slips presented by petitioner at the October 1, 1991, conference. The Department's ground for disallowing these documents as substantiation of non-use are set forth at page 3 of Exhibit A. On October 25, 1991, petitioner submitted eleven additional bills of lading, all of which were marked "charity load" and one additional shipping slip also bearing that same annotation. The Department has also disagreed with petitioner's contention that these documents prove the donations qualify for an exclusion from tax under Revenue and Taxation Code Section 6009.1. (Exhibit B.)

On November 29, 1991, petitioner filed a post-conference brief in which it contended that documentation previously submitted at the hearing proved that its donations were exempt from California use tax, including property transferred to the _____ Indian Reservation located near _____, California. Petitioner contends that the reservation is "located outside of California for use tax purposes." In the brief, petitioner contends that "all property shipped out of California by common carrier for actual delivery to out-of-state organizations is exempt from use tax under the commerce clause and section 6009.1 of the Code. Petitioner cites Stockton Kenworth, Inc. v. State Board of Equalization (1984) 157 Cal.App.3d 334 as its authority for this conclusion. That case involved a truck dealer who acquired nine trucks for lease to out-of-state carriers and drove those trucks, without payloads, to points outside the state for delivery to the lessees. At the time, Sales and Use Tax Regulation 1620 (b) (5) contained a provision, based on that Revenue and Taxation Code section 6009.1, that items transported for use exclusively out of the state had to be "passively carried out of the state" to be exempt. That particular provision was stricken as an unlawful and improper limitation on the statutory exemption. (Id. at pp. 336-338.)

Petitioner raises numerous other constitutional arguments involving the commerce clause, equal protection, and due process. Petitioner also challenges the legality of the Department's prospective application of Revenue and Taxation Code section 6403. Revenue and Taxation Code § 6403 was added by Stats. 1988, Ch. 905 in effect September 14, 1988, operative January 1, 1989. It provided, in pertinent part, for an exemption from use tax for the donation by a retailer of property to a qualified California charity which had been stored in this state. It was further amended by Stats. 1989, Ch. 1387, in effect October 2, 1989, to substitute "seller" for retailer and to address donations to museums. Petitioner's alternative contention to prospective application of the statute is that limiting the donation exemption only to local charities is a federal constitution violation.

The Department requested and received approximately 60 days to refer the constitutional issues raised by petitioner in its post-conference brief to the Board's legal staff. Exhibit C is the Department's response to those allegations raised by petitioner in its post-conference brief.

Analysis and Conclusion

Before addressing petitioner's contentions, I wish to note two issues raised by my review of the files which were not addressed by either party. The first non-addressed issue involves whether the donated property was "unsalable." Business Taxes Law Guide Annotation 280.0660 (11/28/66) provides:

> "When merchandise purchased for resale has become unsalable and, thus, must be discarded, it may be given to charity or otherwise disposed of without incurring tax liability."

The tax auditor noted in the workpapers that "[d]onated merchandise consists of any type of non-mover or 'special request for donation' merchandise." In discussions with petitioner's representatives at the close of the audit, however, the District Principal Auditor was told that the donated merchandise was neither damaged nor otherwise unsalable. Therefore, the Department apparently concluded that the exclusion from use tax set forth in Business Taxes Law Guide

Annotation 280.0660 (11/22/66) was inapplicable. Petitioner may seek reconsideration on this issue if it can demonstrate that any of the donated items were damaged or otherwise nonsalable.

The second unaddressed issue involves whether the Department has properly identified the correct entity subject to use tax for these donations. Petitioner alleged at the conference that the donated items were carried as assets on the parent company's books of account. The audit workpapers reference the tax auditor's review of computerized records maintained at the parent company's New Jersey facilities. These records included sales and other journals "as well as extensive intercompany charges for forms…and general merchandise." I have presumed these entries are the sales of the donated items by the parent company to petitioner. If this conclusion is erroneous, petitioner may also seek reconsideration on this issue.

With reference to the issues actually raised by petitioner, Revenue and Taxation Code Section 6201 imposes a tax on any storage, use, or other consumption in this state of tangible personal property purchased from any retailer.

Revenue and Taxation Code section 6008 defines storage as follows:

> "'Storage' includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer."

Revenue and Taxation Code Section 6009 defines use as follows:

> "'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property and also includes the possession of, or the exercise of any right or power over tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business."

Revenue and Taxation Code section 6009.1 provides the following "storage" and "use" exclusions:

> "'Storage' and 'use' do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the State." (Emphasis added.)

In Stockton Kenworth, Inc. v. State Board of Equalization (1984) 157 Cal.App.3d 334, 336, the court, citing Flying Tiger Line v. State Board of Equalization (1958) 157 Cal.App.2d 85, 98, stated as follows:

> "The use tax applies to property purchased for use in this state wherever purchased, (emphasis added) unless the gross receipts from the sale have been

> included in the California sales tax (Rev. and Tax. Code section 6401) or unless the transaction is otherwise exempted by the statute or by the state or federal Constitution."

In Wallace Berrie & Co. v. State Board of Equalization (1985) 40 Cal.3d 60, 66, the court noted that the California Sales and Use Tax Laws embody a comprehensive system to impose an excise tax for the support of state and local government "on the sale, use, storage, or consumption of tangible personal property within the state. (Citations omitted.)" It further noted that "'[a] sales tax is a tax on the freedom to purchase . . . . [a] use tax is a tax on the enjoyment of that which was purchased' (Union Oil Co. v. State Board of Equalization (1963) 60 Cal.2d 441, 452…, quoting McLeod v. J. E. Dilworth Co., (1944) 322 U.S. 327, 330…)" (Id. at pp. 66-67.) Use tax generally applies where a particular transaction is exempt from sales tax, "such as one involving goods purchased in another state and stored or used in California (citations omitted)…However, unless a use tax is assessed if the goods are not subsequently resold but disposed of in another manner, the purchaser may well manage to avoid taxation altogether. Thus, the use tax insures that the basic excise tax will be levied on transactions which might otherwise inequitably escape taxation." (Berrie supra. at p.67.).

In American Airlines v. State Board of Equalization (1963) 216 Cal.App.2d 180, 187, the court noted:

"The use tax is based in part upon the philosophy that it is unfair to compel companies engaged solely in intrastate business to pay taxes where companies engaged in interstate activities within the state do not…'The solution is in no sense to grant special privileges to local businesses, but to remove the special privileges from interstate commerce.'...The use tax, if properly imposed,...'does not discriminate against interstate commerce or constitute or prohibited regulation or interference therewith.' See Chicago Bridge & Iron Co. v. Johnson (1941) 19 Cal.2d 162, 175."

As noted in Bank of America v. State Board of Equalization (1962) 209 Cal.App.2d 780, 791-793:

> "One of the chief purposes of the use tax is to help retailers in this State, who are subject to sales tax, to compete on an equal footing with their out-of-state competitors who are exempt from the sales tax. Thus it is intended to reach property purchased for use and storage in this state from retailers who, being outside the territorial boundaries of California, are not subject to its laws at all. It also seeks to reach such property where the taxable event of the sales tax, i.e., the sale, occurs outside this state or where the property is a immune from the sales tax because of the commerce clause. (Citations omitted.)"

Citing Douglas Aircraft Co., Inc. v. Johnson (1939) 13 Cal.2d 545, 551, the American Airlines decision (supra. at 190) noted as follows:

> "In the second place it is obvious, from a reading of the act, that the [use] tax here levied is not imposed on the ownership of the property as such. It does not apply

> to the use of property to be resold. It does not recur annually, but falls due only once. It is not imposed on a fixed day, although it is collectible quarterly -- in short, it does not fall upon the owner because he is the owner, regardless of the use or disposition he may make of the property. It is imposed on certain of the privileges of ownership, but not all of them."

The general rule is that storage of tangible personal property purchased from a retailer is a taxable use in this state. (Revenue and Taxation Code section 6008.) The exception is when the storage is "for the purpose of subsequently transporting it out of state." (Revenue and Taxation Code section 6009.1.) Petitioner never transported the donated property out of state. For reasons set forth more fully below, I find that petitioner delivered its gifts to the donees and/or their agents, the common carriers, within this state and that at the time the property was transported, petitioner no longer had any right, title, or interest in the property. Therefore, petitioner does not qualify for the exclusion from tax under Revenue and Taxation Code section 6009.1. Petitioner did not store the merchandise to transport it; it often shipped out-of-state inventory into California, not for purposes of resale, but specifically to facilitate making its donation from one place in one load. Petitioner's storage of the merchandise for donation was storage for a purpose other than "subsequently transporting it outside the state" (Revenue and Taxation Code section 6009.1) and was a taxable use under Revenue and Taxation Code section 6008.

In Parfums-Corday, Inc. v. State Board of Equalization (1986) 187 Cal.App.3d 630, 637, the perfume company made a similar argument that it was not liable for use tax on display packs, which were not separately billed and which did not increase the cost of the other merchandise sold therewith, because they were really gifts to the purchasers which were '"transported' through the state 'for use thereafter solely outside the state.'" That court noted:

> "If, however, the property has some 'functional purpose' in California other than to serve as a mere object in transit, there is a taxable use. This principle applies even where the property eventually is 'substantially consumed in interstate commerce outside of this state.
>
> "…Max Factor is liable for use tax on the promotional displays, regardless of their ultimate destination." (Emphasis added.) (Id. at p.638.)

The Department correctly asserts that petitioner engaged in a taxable use of the property by donating it within this State. Section 1146 of the California Civil Code defines a gift as a "transfer of personal property, made voluntarily, and without consideration." By definition, then, a gift cannot be a sale for purposes of imposition of sales and use tax because a sale is defined as "any transfer of title or possession, in any manner or by any means whatsoever, of tangible personal property for a consideration." (Emphasis added.) [Revenue and Taxation Code section 6006(a).]

Section 1147 of the California Civil Code describes how gifts are made. It states: "[A] verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolic delivery of the thing

to the donee." Since donations are not sales, provisions of commercial contract law under the California Uniform Commercial Code concerning when a sale occurs based upon transfer of title, e.g., FOB contracts, are inapplicable.

According to California Civil Code section 1147, a gift is complete upon delivery. Section 1148 of the California Civil Code provides "a gift, other than a gift in view of death, cannot be revoked by the giver." There is no evidence that petitioner ever attempted to revoke any of the donations. Petitioner alleged that the donations were made to _____ which determined who the beneficiaries were. It was _____ and/or its beneficiaries who arranged for the common carriers to pick up the merchandise. I find then that based upon Cal. Civ. Code Section 1147, the donations were complete at the time the items were loaded onto the common carriers and/or personal conveyances of the donee and/or those of the donee's beneficiaries. Petitioner was not the contracting party with the common carrier and was not in an agency relationship on behalf of the donee when dealing with the trucking firms; it legally had no right to revoke the gift after having transferred an item into the possession of the agent of the donee; and it had no enforceable right or authority to require the common carrier to return the donated merchandise after sealing the loads placed in the common carrier. Actual Delivery was complete. (Cal. Civ. Code section 1147.) Petitioner had no further ability to transport the merchandise for out-of-state use because it no longer owned it.

There can be no clearer exercise of ownership rights to personal property than the discretionary divestiture of all rights, title and interest therein. In Southern Pacific Equipment Co. v. State Board of Equalization (1971) 16 Cal.App. 3d 302, the court noted that "[a] state sales tax may be imposed upon an intrastate transaction, involving local activity, even 'though the article sold or delivered is to be forthwith shipped out of the state.'" (Citations omitted.) That local activity described was passage of title. It follows that divesture of title in this State is a similarly local act sufficient to allow the State to impose use tax on a donation. Numerous bills of lading provided by petitioner reflected "CPU," meaning "customer picked up." The annotation "charity load" reflected that no invoice was to be sent because this was a nonsale transaction. Since there was a transfer of title and actual delivery in this State, the local act or taxable or event creating nexus to tax petitioner occurred at the point of delivery to the donee and/or its agents. I therefore concur with the Department's analysis of the numerous bills of lading and shipping slips presented by petitioner as set forth in Exhibits A and B, that they do not prove the transfer of title within this State qualifies for any exemption or exclusion from use tax. (I will address delivery of donated goods to Indians in _____, California, via petitioner's trucks separately.)

Section 3.5 of Article 3 of the California Constitution serves as a bar to my rendering any decision or recommendation which would declare as invalid any existing regulation or statute. I note, however, that petitioner has not, in my opinion, stated sufficient constitutional limitations to bar imposition of use tax in this case. The tangible personal property donated by petitioner which was stored at its [CA] facility was acquired ex-tax and held for resale. In many instances, it was never subject to California sales tax because it was purchased in interstate or foreign commerce. The [CA] facility served two purposes; some of the inventory was held for resale within the state of California, and some of the inventory was held for shipment out of state to other subdistribution centers where it would be sold. Petitioner is a retailer in this type of

merchandise, not in the business of transporting merchandise for charitable institutions. A state may tax or exclude from tax the disposition of tangible personal property held by a seller in state without violating the federal constitution.

There is no possibility of this State subjecting petitioner to double taxation. The state did not impose sales tax at the time any of the donated items were acquired. Since petitioner no longer owned them after delivering them to the donees, there is no opportunity for the state to tax petitioner again unless the items are reacquired under circumstances allowing their further taxation.

Sales in interstate “commerce” are not implicated because there is no sale involved in a donation. Because donations do not implicate the statutes and regulations involving sales, petitioner's reliance on Sales and Use Tax Regulation 1620(b) (3) (B) and Business Taxes Law Guide Annotations 325.0280, 325.0480, and 325.0640 is also misplaced. Each of the aforementioned citations involves transportation of items under "contracts of sale" or invoices specifically requiring shipment as part of the sale.

Petitioner cites Flying Tiger, Inc. v. State Board of Equalization, supra., as imposing three barriers to taxing petitioner for its use of the donated items in this dispute. I find that all three barriers to imposition of use tax set forth in Flying Tiger have been overcome: (1) the donations were never subject to tax in California prior to petitioner's disposition by gift; (2) there are no constitutional barriers because the commerce clause is not implicated in these nonsale transactions; petitioner is not being treated dissimilarly to other donors in this state prior to enactment of Revenue and Taxation Code Section 6403; petitioner has been afforded statutory and procedural due process in this dispute; and (3) the criteria under Revenue and Taxation Code Section 6009.1 for exemption from use tax have not been met because petitioner divested itself of all right, title, and interest to the property within this state creating nexus to impose use tax. The Department correctly asserts that Revenue and Taxation Code Section 6244(a) imposes a liability on a purchaser for use tax on property acquired for resale when used for purposes other than retention, demonstration, or display. It reads as follows:

> "If a purchaser who gives a resale certificate or purchases property for the purpose of reselling it makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used." (Emphasis added.)

Application of this statute is not limited to instances where the inventory was acquired by issuance of a resale certificate in this state. [See also: Bank of America, supra.] It was clearly intended to reach the use of ex-tax inventory.

It is a long-standing Board policy to treat a donation or gift as a taxable consumption or use in this state. Gratuitous disposition of one’s property is unquestionably an exercise of one’s ownership rights inconsistent with holding property for resale. Business Taxes Law Guide Annotations 165.0040 (April 1, 1953) and 165.0060 (February 7, 1966, and July 5, 1989) have provided approximately 40 years of public notice of the Board's position on this issue. Although

not necessarily controlling, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight. (Coca-Cola Co. v. State Board of Equalization (1945) 25 Cal.2d 918, 921.) The Board's interpretations of a statute or regulation, as set forth in the Business Taxes Law Guide Annotations, will prevail unless they are arbitrary, capricious, or without rational basis, or are clearly erroneous or unauthorized. (American Hospital Supply Corporation v. State Board of Equalization (1985) 69 Cal.3d 1088.) Distinguishing between disposition of tangible personal property without passage of consideration to establish when use tax instead of sales tax applies is rational. The Business Taxes Law Guide Annotations 165.0040 and 165.0060 are clearly the correct statement of the law, and neither is arbitrary nor capricious. There is a well-established series of cases holding that where such agency interpretations were not overruled by subsequent legislation, they may be presumed to have been brought to the attention of and acquiesced in by the legislature. [See: Universal Engineering Co., Ltd. v. State Board of Equalization (1953) 118 Cal.App.2d 36.; El Dorado Oil Works v. McColgan (1950) 34 Cal.2d 731, 739.]

Many of petitioner's arguments are attempts to invalidate statutes based upon alleged conflicts with the commerce clause or on constitutional grounds such as equal protection. As noted by Principal Tax Auditor _____ at page 5 of Exhibit C, I am without jurisdiction to render a decision which would declare a code section or a regulation unenforceable or unconstitutional. (Cal. Const. Art. 3 section 3.5.) Only the Board can do so but not unless and until an appellate court had made such a determination. I find the Department's responses set forth in Exhibit C to be thorough and, for the most part, I concur with the Department's conclusions. For the reasons set forth above, I need not decide whether its conclusion that the out-of-state use under Revenue and Taxation Code Section 6009.1 cannot be determined by reference to acts of the donee in order to resolve this dispute and therefore I won't address that issue.

Revenue and Taxation Code Section 6244(a) is predicated upon a finding of nexus, i.e., doing an act in this State with regard to tangible personal property inconsistent with retaining it for resale, displaying it, or demonstrating it. Making a gift transfers title and possession of the property at the time the donor performs the last act necessary to divest himself/herself of possession and control of the item. Removal of property from inventory held for resale and disposal of it by gift precludes the property from ever being resold.

Petitioner alleges that its delivery of donated items by its own facilities to the Indian Reservation near _____, California, was not a use "within this State." I disagree that this was an "out-of-state" delivery. Revenue and Taxation Code Section 6017 provides that for purposes of application of the Sales and Use Tax Laws:

> "'In this State' or 'in the State' means within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States of America."

Sales and Use Tax Regulation 1616 (d) (1) states that except as provided in that regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use within this State. In Chemeheuvi Indian Tribe v.

State Board of Equalization (9th Cir. 1986) 800 F.2d 1446, 1450, the court found the Indian reservation to be part of this state.

The court has further determined that the State's cigarette tax may be imposed on transactions involving non-Indians even though the transfer of tangible personal property occurs on an Indian reservation located within the borders of this State. (California State Board of Equalization, et al. v. Chemehuevi Indian Tribe (1985) 474 U.S. 9, 106 S.Ct. 289, reh. den. 474 U.S. 1077, 106 S.Ct. 839.) Likewise, I also find that petitioner's reliance on Sales and Use Tax Regulation 1616(d) (4) (A) is misplaced since these transactions involved gifts to Indians, not sales to Indians or uses of property "sold" to Indians

Recommendation

Redetermine without adjustment.

_____ March 18, 1992

Janice M. Jolley, Staff Counsel Date

(w/Exhibits A, B, and C)