

## Memorandum

700.0212

To : Administrator (MIC:32)  
Ret. Anal. & Alloc. Div.

Date: August 9, 1996

From : John L. Waid  
Senior Tax Counsel

Subject: **[No Permit Number]**  
**City of San Francisco**  
**Gross Receipts Tax on Gun Sellers**  
**Preemption by State**

I am responding to Ms. Joan Albu's memorandum dated April 11, 1996, to Assistant Chief Counsel Gary J. Jugum. She asked for advice as to whether or not the Sales and Use Tax Law preempts the business license tax imposed by the City and County of San Francisco on gun dealers which is measured by the dealers' gross receipts. We do not comment on the Proposition 62 issue.

She attached to her memorandum an article from the March 18, 1996 San Francisco Daily Journal regarding a ruling by a San Francisco Superior Court judge that Proposition 62 did not apply to charter cities. The article indicated that the gun dealers were subjected to a business tax which had been raised from 1.5% of gross receipts to 3%.

The article does not discuss the tax structure in detail. Our research has fleshed out the particulars. The tax is levied by the City and County of San Francisco Municipal Code, Part III, Revenue and Finance, Business Regulations, Article 12-B, Business Tax Ordinance ("the Ordinance"). Section 1002.2 defines "business tax" as follows:

"The term 'business tax' shall mean the tax imposed upon persons engaged in the businesses or occupations described [in the Ordinance] for engaging in such businesses or occupation. . . ."

Section 1002.5 defines “engaging in business” as follows:

“Commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.”

Section 1002.6 defines “gross receipts” as follows:

“[T]he total amount of the sale price of all sales (except retail merchandise service charges), the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, whether such service, act or employment is done as a part of or in connection with the sale of goods, wares, merchandise or not, for which a charge is made or credit allowed, including all receipts, cash, credits and property of any kind or nature, any amount for which credit is allowed by the seller to the purchaser without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses (except bad debts and uncollectables) or any other expense whatsoever; provided, that cash or trade discounts, promotional allowances, quantity discounts, advertising allowances, or advertising discounts allowed or taken on sales shall not be included.”

Certain taxes are also included.

The Ordinance thus shows that the tax is not limited to retail businesses but applies to wholesale businesses as well. Likewise, the tax applies to service businesses as well as to those that sell tangible personal property.

A business tax certificate, showing the tax is paid, is to be obtained annually in October. (§§ 1003 & 1007(c).) The taxes themselves are to be reported and paid on or before the last day of February succeeding each annual period. (§ 1009(a) & (b).) The Tax Collector may suspend or revoke a registration for failure to pay taxes. A refund program for taxes erroneously paid is also provided. (§ 1017.)

Tax is imposed at set amounts on the first \$10,000 of gross receipts and on each additional \$1,000 of gross receipts or fractional part thereof. (See, e.g., §§ 1004.08 & 1004.13, for taxes on retail sellers and wholesale sellers, respectively.) Section 1004.18, the section at issue herein, sets the tax at \$300 per year or fractional part thereof on the first \$10,000 of gross receipts, plus \$30 per year for each additional \$1,000 of gross receipts or fractional part thereof in excess of \$10,000, “for selling firearms or firearms ammunition or from any other activity which is subject to tax under the provisions of this Article.” (§ 1004.18(a).) We note that the tax amount on the first \$10,000 of a firearms seller’s gross receipts is ten times the next lowest rate

and is the highest of all the businesses listed in the ordinance save for no-profit garages, which are about eight times higher. (§ 1004.17.)

### OPINION

Section 7203.5 provides, in part, as follows:

“The State Board of Equalization shall not administer and shall terminate its contract to administer any sales or use tax ordinance of a city, county, redevelopment agency, or city and county, if such city, county, redevelopment agency, or city and county imposes a sales or use tax in addition to the sales and use taxes imposed under an ordinance conforming to the provisions of Sections 7202 and 7203. [¶¶] Nothing in this section shall be construed as prohibiting the levy or collection by a city, county, redevelopment agency, or city and county of any other substantially different tax authorized by the Constitution of California or by statute or by the charter of any chartered city.”  
[Emphasis added.]

The California Supreme Court has discussed the purpose of a business license tax as follows:

“A business or occupation tax is usually defined as a revenue-raising levy upon the privilege of doing business with the taxing jurisdiction. [Citations.] The tax or ‘license fee’ is often measured by gross receipts [citations], and payment is ordinarily a condition precedent to continued exercise of the privilege made subject to tax. [Citation.]

“The *gross receipts occupation tax* has a venerable history as a revenue-raising measure for California cities. (...; *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 831 [271 P.2d 5] [privilege of engaging in the activity of selling];...)” (Italics in original.)

(Weekes v. City of Oakland (1978) 21 Cal.3d 386, 394.)

The Belridge Oil case, cited above, came out five years before Section 7203.5 was enacted. Did that statute preempt cities’ ability to impose a business license tax on sellers measured by gross receipts?

The nature of a tax is not determined from the legislative designation but rather from its incidents, although the designation is of some weight. “It has been long established that the *measure*, or *mode of ascertaining* a particular tax is not conclusive as to its type or nature.” (Ibid. at 392, 396. Italics in original.)

There appears to be no case describing when a business license tax is considered substantially similar to a sales and use tax. The Court in Rivera v. City of Fresno (1971) 6 Cal.3d 132, however, discussed the evolution of Section 7203.5 (SB 58, Stats. 1968, Ch. 1265) as follows:

“When Senate Bill 58 was considered by the Legislature in 1968 business license taxes were being imposed by certain cities which were measured in part by the gross receipts from the sales of merchandise .... As amended on July 9, 1968, Senate Bill 58 undertook in section 1 thereof to prohibit local sales or use taxes not in conformity with Bradley-Burns, but also specified that ‘Nothing in this section shall be construed as prohibiting the levy or collection of any otherwise authorized license tax upon a business measured by, or according to, gross receipts.’

“The next amendment to Senate Bill 58, on July 16, 1968, added after ‘gross receipts’ the words ‘or as prohibiting any tax on public utility services.’ As amended in the Assembly on July 23, 1968, section 1 of the bill also added the language ‘or as prohibiting ... any otherwise authorized excise tax upon the purchase of alcoholic beverages for consumption on the premises where sold.’

“By amendment on July 25, 1968, the language undertaking to prohibit nonconforming local sales and use taxes was deleted, and the bill simply declared that the State Board of Equalization should not administer a nonconforming local ordinance. The language of the paragraph commencing with the words ‘nothing in this section shall be construed as prohibiting . . .’ was not substantially changed.

“By amendment on July 30, 1968, slightly modified on July 31, the above paragraph was changed to the form in which it was finally enacted as the third and final paragraph of section 7203.5 of the Revenue and Taxation Code. ... Thereby, the language ‘substantially different tax’ was substituted for the earlier specific enumeration of taxes which were not intended to be prohibited. It thus appears that the Legislature chose to employ the expression ‘substantially different tax’ to refer to the taxes excluded from the restrictions of Bradley-Burns, rather than to attempt to specifically name such excluded taxes, lest the specification lead to the view that the prohibitions of section 7203.5 encompassed other permissible forms of local taxation not intended to fall within its scope.”

In dicta, the Supreme Court has further distinguished the two taxes as follows:

“[T]he tax is not levied on selling, as in the case of a sales tax, but rather on the privilege of engaging in a business....”

(Carnation Co. v. City of Los Angeles (1966) 65 Cal.2d 36, 39; See also City of Los Angeles v. Moore Bus. Forms (1966) 247 Cal.App.2d 353, 358.) We also note that while the sales and use tax is measured by a percentage of gross receipts, business license taxes tend to be measured, as here, by specified amounts of gross receipts.

It appears from the above that it would be the conclusion of the Supreme Court that Section 7203.5 was not intended to encompass business license taxes on the privilege of engaging in the business of selling within a jurisdiction merely because they were measured by gross receipts. Is this tax, then, "substantially similar" to a sales and use tax? It is our opinion that it is not. The tax is levied on all businesses within the city and county for the privilege of engaging in business there, whether or not tangible personal property is transferred. (§ 1002.6.) The tax is levied on the business and must be paid in order to engage in business in the city and county. (§ 1002.2 & 1003.) Of critical importance, the categories of businesses listed in Section 1004.17 include purely service businesses as well as businesses selling property. Likewise, as we have noted, the tax is imposed on wholesalers as well as retailers. It is not levied at a percentage of gross receipts but rather is imposed at set amounts on specific portions of gross receipts with different business classes having different tax burdens. (§ 1004.17(a).) Finally, and most significant, there is no authority to pass the tax directly through to the affected businesses' customers. As shown by the above quotes from the Rivera case, this tax appears to be the kind of tax contemplated by the Legislature when it put the savings clause into Revenue and Taxation Code Section 7203.5.

We thus conclude, that the San Francisco City and County business license tax is not a tax on the consumption of tangible personal property. It is also not a tax "passed through" to the customers. Therefore, it is not "substantially similar" to a sales and use tax so as to trigger the provisions of Section 7203.5. It is, of course, possible, that some businesses are passing the tax on to their customers, although the Ordinance does not give authority to do so. If, upon investigation, it is shown that this is happening, then appropriate action should be taken.

JLW:sr

cc: Mr. E. L. Sorensen, Jr. (MIC:73)  
Mr. Glenn A. Bystrom (MIC:43)  
Ms. Judy Agan (MIC:69)  
Mr. Larry Micheli (MIC:27)  
Mr. Robert Wils (MIC:39)