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An insurance company which is subject to taxation under the California Constitution, Article XIII, Section 28 is exempt from the Energy Resources Surcharge.

An insurance company is the sole owner of four buildings in this state and contracts with a property realty group to manage the buildings. The electric utility bills are in the name of the fictitious business name in care of the property realty group and the bills are paid by the property realty group. The buildings are occupied by both the insurance company staff and third-party lessees.

The identity of the party who writes the checks for the utility bill is not the issue. The issue is who is legally responsible for the utility services for the buildings. In other words, who is the consumer of the utility services? If the lease contract includes the utility service, the landlord is the consumer and if it does not, the tenant is the consumer. Since the utility bills are paid by the realty property manager, who is acting as an agent for the insurance company, the amounts are exempt from the surcharge. 4/8/94.

Memorandum

To: Mr. Monte Williams (MIC: 56)

Date: April 8, 1994

From: Robert W. Lambert, Staff Counsel
Legal Division – MIC: 82

Subject: (Redacted) “AS MANAGER FOR (REDACTED);
REQUEST FOR UTILITY STATE EXEMPTION – (redacted)

You have requested our opinion with regard to the following facts:

1. (Redacted) is the sole owner of four buildings in (redacted).
2. (Redacted) does not, however, manage these four buildings. Instead the buildings are managed by (redacted). Electric utility bills are in the name of (redacted), and are paid by checks written by the property manager, presumably on its “property management” account.
3. The buildings are occupied by both (redacted) staff and third-party lessees.

Pursuant to section 40041.5 of the Revenue and Taxation Code, (redacted) has requested that the Board confirm the validity of the claimed tax exemption from the Energy Resources Surcharge tax for these properties under section 28 of article XIII of the California constitution.

Subdivision (f) of that section of the constitution provides as follows:

The tax imposed on insurers by this section is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property, except (real estate taxes, etc.)

Section 40041 of the Revenue and Taxation Code provides a conforming statutory exemption with specific reference to the Energy Resources Surcharge. That statute provides an exemption from excise taxes on the “consumption of electrical energy” under the Energy Resources Surcharge Law where there is a constitutional impediment to imposing the tax. Regulation § 2316 is to the same effect providing that:

The surcharge does not apply to the consumption of electrical energy by the following persons:

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- (4) Insurance companies, including title insurance companies, subject to taxation under California Constitution, Article XIII, Section 28;

Under the circumstances of this case, the issue has arisen as to whether or not the exemption provided by section 28 of article XIII of the California constitution is available in the case of insurer-owned buildings when (1) the office space is leased to third parties and (2) the electric utility bills are being paid by checks written by a property manager.

In Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal. 3d 402, MONY, an insurance company, “ ‘paid the charges made for the electricity used by its tenants in the two office buildings owned by it.’ During this period ‘MONY did not occupy or use any of the office space in either of the two office buildings owned by it’ ”. Yet regardless of the fact that the insurer did not occupy the buildings, the court nevertheless held that it was exempt from the tax, finding that:

[T]he “in lieu” provision was intended to preclude the state or any of its subdivisions from exacting any other revenue from the specified corporations (except local taxes on real estate) and was granted in exchange for the payment of a tax of gross, rather than net, premiums, and at an adjustable rate higher than would otherwise be applied.

Based upon this analysis, the court was not persuaded that it should read an “active” investment exception into the constitutional exemption. To the contrary, the court held that: “The Constitution not having provide such an exception, it is not within our province to do so.” Thus, the court found that the insurer-owned, non-insurer-occupied buildings were exempt from the tax.

The only difference between the facts in this case and the facts in the Mutual Life decision is that, in this case, the insurer partially occupies the premises and a property manager (and not the owner) is writing the checks to pay the utility bills.

The identity of the party who writes the checks for the utility bills, however, is not the real issue. Agents may write checks for expenses for which their principals are legally obligated. The issue is: who is legally responsible for the utility services and the charges thereon for these four buildings? In other words, who is the consumer of the utility services? Clearly, under Mutual Life, if (redacted) is legally responsible for and making the utility payments for these buildings, then it is the consumer and the exemption thus applies.

There are different kinds of leases that assign the responsibility for property expenses in different ways. For instance, there are both “gross” and “net” leases. In gross leases, the owner pays the bills and charges a higher rent to the tenants. In net leases, other the other hand, the tenant may be responsible

for property taxes, insurance payments, maintenance expenses, etc. In those cases, the rent, so to speak, is "net" of the excluded property expenses. Office building leases are typically gross and shopping center leases are typically net.

Likewise, buildings may have one meter for measuring utility use, with the tenants obligated under their leases to reimburse the landlord's aggregate utility costs pursuant to a floor-space ratio or similar proportion. Other buildings, however, may have individual meters for each leased unit, with the tenants individually responsible for contracting (and paying) for their respective utility costs.¹

In this case (redacted) has stated that the utility bills are to (redacted). Based upon this statement, the utility expenses so not appear to be the responsibility of the tenants. Instead, the utility expenses appear to be paid in the aggregate by (redacted). As to (redacted), it appears to be merely acting as a billing agent for (redacted). Like (redacted) in the February 16, 1989 memo from David Lavine, (redacted) neither owns, leases, occupies, nor has the right to occupy the buildings. It, therefore, does not appear to be the consumer of the electrical energy; the owner, (redacted), for our purposes appears to be the "consumer."

In order to conclusively confirm this, however, you should inquire as to whether or not (redacted) can provide evidence proving that (redacted) has complied with the fictitious business name law in establishing (redacted) as its fictitious business name. If so, then we can safely conclude that (redacted) is the consumer and, thus, that the exemption applies.

Based upon the above, I would recommend that you write (redacted) and request additional information with regard to the filing and publishing of the (redacted) fictitious business name statement.

In conclusion, you are correct in asserting that, in this case, it is the property manager and not the owner who has requested the ruling. Section 40041.5 provides that a ruling may be requested by the "electric utility" or the "consumer." However, since (redacted) appears to be acting as the consumer's agent as to these buildings and, in that capacity, writing the checks for the utility payments, I can see no problem in addressing your response to (redacted) in care of (redacted).

¹ In cases where non-insurer tenants are responsible for and paying their own respective utility costs in an insurer-owned building, the exemption would not seem to apply. In those cases, the tenants are the consumers.

Mr. Monte Williams

-4-

April 8, 1994

RWL:plh

Cc: Mr. William Kimsey - MIC: 56
Mr. Al Michel - MIC: 56
Mr. Gary Jugum - MIC: 82
Mr. Gordon Adelman - MIC: 82