

CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 360

June 11, 1973

USE TAX ON LEASED PROPERTY: FINANCIAL CORPORATION'S RIGHT TO OFFSET

Syllabus:

Since August 1, 1965, a use tax has been assessed on leases of tangible personal property. The use tax is assessed against the buyer or lessee. In cases where the lessee is exempt from use tax, as are banks, a sales tax is assessed against the lessor (Reg. 1660, Dept. of Business Taxes).

Revenue and Taxation Code § 23184(a)(4) provides:

(a) Financial corporations may offset against the franchise tax the amounts paid during the income year to this state or to any county, city, town, or other political subdivisions of the state as personal property taxes, or as license fees or excise taxes for the following privileges:

. . .

(4) Storing, using or otherwise consuming in this state of tangible personal property by savings and loan associations.

. . .

Both banks and savings and loan associations lease equipment. Savings and loan institutions have been deducting use tax paid on such leases as an offset against the franchise tax based upon the above noted code language.

Banks, not being subject to the use tax, lease equipment which is subject to sales tax. The sales tax, however, is imposed upon the seller or lessor. In most cases the lessor recovers the amount of the tax from the lessee bank in some manner. The seller or lessor is entitled to recover the use tax, "in so far as it can be done," from the purchaser pursuant to Revenue and Taxation Code § 6052.

The following questions are presented:

1. May savings and loan institutions deduct use tax paid by way of offset against franchise tax?
2. By indirect payment of sales tax on leased property, are banks being discriminated against where no offset is provided?

Decision:

1. Yes.

2. No.

1. Revenue and Taxation Code § 6201 specifically describes a use tax as an "excise tax." Further, that section utilizes language identical to that of subdivision (4) of Revenue and Taxation Code § 23184(a) in describing the nature of a use tax. Clearly, then, Revenue and Taxation Code § 23184(a)(4) permits savings and loan institutions to offset use tax paid on leased tangible personalty against franchise tax.

2. With regard to banks, there is no specific exculpatory provision comparable to § 23184. The tax on banks is set forth in Revenue and Taxation Code § 223181, and Revenue and Taxation Code § 23182 provides that such tax is in lieu of all other taxes, thus conforming to a constitutional requirement.

However, a sales tax is imposed upon the retailer or seller by the specific language of Revenue and Taxation Code § 6051. The retailer is permitted to recover the tax ". . . in so far as it can be done" from the purchaser. The sales tax here imposed on leased tangible personalty raises a similar relation between lessor and lessee.

In the case Western Lithograph Company v. State Board of Equalization, 11 Cal.2d 156, 78 Pac.2d 738 (1938), the California Supreme Court was faced with a nearly identical question. In that case the petitioner had sold tangible personal property to the Bank of America. A sales tax (imposed under the Retail Sales Act, Stats. 1933) which was based on statutes very similar to those in issue here was to be charged. The sales tax was not paid by the bank on the bases of its exemption. The petitioner sought to recover a refund of the tax.

The Court held flatly that the sales tax in issue is imposed upon the retailer, not upon the bank. Therefore, in reality, the sales tax, like many other taxes, absorbed by a business and passed on to the consumer, is part of the price paid for the goods and is part of the consideration advanced by the consumer to get the goods. But it is in no way imposed upon the consumer.

Therefore, in this case, banks are not being taxed by the fact that a sales tax is imposed upon those who lease tangible personalty to them.

Speaking directly to the question of discrimination the Supreme Court in Western Lithograph Co., supra, stated:

Unquestionably the act is non-discriminatory. It operates upon all alike in the same class, and does not result in exacting more from the federal instrumentality than is paid by other individuals. To conclude that the

bank may come into the open market and purchase goods at a price less than other buyers merely by insisting that the amount of a non-discriminatory tax imposed upon sellers should first be deducted therefrom, is to accord to federal instrumentalities some favor or grace which is not necessarily within the contemplation of the principle of immunity here asserted. It cannot be said that the principle embraces the inherent right in either government to come into the open market and purchase goods at a lower price than paid by other consumers by clipping therefrom the equivalent of non-discriminatory taxes validly imposed on the seller by the other government, and consequently reduce that government's revenues to a proportionate extent.

In view of the above, it is concluded that, under the present statutory scheme, banks are suffering no discrimination due to their leasing of equipment.