In the Supreme Court of the State of California

MICHAEL McCLAIN, et al.,

Plaintiffs and Appellants,

v.

SAV-ON DRUGS, et al.,

Defendants and Respondents.

Case No. S241471

Second Appellate District, Div. Eight, Case Nos. B265011 and B265029
Los Angeles County Superior Court, Case Nos. BC325272 and BC327216
John Shepard Wiley, Judge

RESPONDENT CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION IN SUPPORT; PROPOSED ORDER

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 8.252(a) of the California Rules of Court, Defendant and Respondent the California Department of Tax and Fee Administration moves this Court to take judicial notice of two documents—Board of Equalization operations memos from 1978 and 1983, each explaining then-recent changes to the Revenue and Taxation Code—cited in CDTFA's Consolidated Answer to Amici and in this Court's decision in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, to the extent the Court finds them helpful in ruling on this matter.

This motion is made on the following grounds: (1) Evidence Code sections 452 and 459 authorize this Court to take judicial notice of the documents set forth in this motion; and (2) the documents are relevant to the issues presented in this matter and may assist to the Court in construing relevant provisions of the Revenue and Taxation Code and understanding the intent of the Legislature.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, and the Declaration of Janill L. Richards. A proposed order follows.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CDTFA'S MOTION FOR JUDICIAL NOTICE

CDTFA requests that the Court take judicial notice of two State Board of Equalization operations memos that provide a contemporaneous account of the motivation for, and intended function of, various amendments to the Revenue and Taxation Code that pertain to sales tax reimbursement.[1]

State Board of Equalization, operations memo No. 611 (Oct. 23, 1978) (Richards Decl., Ex. A) explains certain amendments made to the Revenue and Taxation Code in the wake of the U.S. Supreme Court's decision in *Diamond National Corp. v. State Board of Equalization* (1976) 425 U.S. 268 (per curiam). The repeal of sections 6052 and 6054.5 (both of which pertained to sales tax reimbursement), and the addition of 1656.1 to the Civil Code (which provides that payment of sales tax reimbursement by consumers is a matter of contract), are discussed at pages 3-4 of the memo. In *Loeffler*, this Court cited operations memo 611, observing that after the 1978 amendment repealing former section 6054.5, the agency has "no statutory duty to police the retail trade to ensure that only the correct amount of tax reimbursement is collected from the customers on retail sales." (*Loeffler*, *supra*, 58 Cal.4th at p. 1117.)

State Board of Equalization, operations memo No. 754 (Jan. 12 1983) (Richards Decl., Ex. B) discusses the operation of section 6901.5 (added by Stats. 1982, ch. 708, p. 2867, § 2, eff. Sept. 8, 1982, operative Jan. 1, 1983). It explains that under section 6901.5, a taxpayer/retailer has not collected excess sales tax reimbursement from a consumer where the amount collected does not exceed the amount of the retailer's own tax-related liabilities on the same transaction—in the form of sales or use tax owed to

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[1] All references are to the Revenue and Taxation Code unless otherwise specified.

the State, or sales or use tax reimbursement owed to another. (Operations memo No. 754, pp. 1-3.) Operations memo 754 is discussed generally in *Loeffler*, *supra*, 58 Cal.4th at p. 1119.

This Court may take judicial notice of any matter specified in Evidence Code section 452 (Evid. Code, § 459, subd. (a)), which includes official acts of public entities. (Evid. Code, § 452, subd. (c); see *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374, fn. 4 [transcripts of public hearings before San Francisco Airports Commission].) "Official acts include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518.)

The operations memos are not essential to determining this matter, but may be helpful to the Court, and are proper subjects of judicial notice.

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Dated: July 13, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Principal Deputy Solicitor General

/s/ *Janill L. Richards*

JANILL L. RICHARDS
Principal Deputy Solicitor General
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Senior Assistant Attorney General
LISA W. CHAO
Supervising Deputy Attorney General
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Assoc. Deputy Solicitor General
NHAN T. VU
Deputy Attorney General
Attorneys for Defendant and Respondent California Department of Tax and Fee Administration

DECLARATION

I, Janill L. Richards declare:

1. I am the Principal Deputy Solicitor General, employed by the Office of the Solicitor General in the California Attorney General's Office, California Department of Justice. I am one of the attorneys representing the California Department of Tax and Fee Administration.

2. I execute this declaration pursuant to California Rules of Court, rules 8.252 and 8.54, subd. (a)(2), which require a motion for judicial notice of matters outside the record to be accompanied by a supporting declaration.

3. Operations memos—issue by the Department and by its predecessor agency the Board of Equalization—serve the following functions: "An Operations Memorandum is a source of information and an advisory resource used by Taxes and Fees Program management to communicate new or modified policies and procedures to be followed by staff. Operations Memorandums may provide detailed technical guidance and instructions on the effective interpretation, implementation and administration of taxes and fee programs administered by the BOE. Operations Memorandums generally become obsolete after their provisions are incorporated into the appropriate manuals, publications, or when the purpose of their release has been satisfied." (See <http://www.boe.ca.gov/transparency/opsmemos/> [as of July 10, 2018].) Operations memo can serve as useful, contemporaneous accounts of changes in law even after they have served their initial informational purposes.

4. Attached to this declaration as Exhibit A is a true and correct copy of State Board of Equalization, operations memo No. 611 (Oct. 23, 1978). It discusses the repeal of Revenue and Taxation Code sections 6052 and 6054.5 (both of which pertained to sales tax

reimbursement), and the addition of 1656.1 to the Civil Code (which provides that payment of sales tax reimbursement by consumers is a matter of contract). This operations memo is located in CDTFA's files.

5. Attached to this declaration as Exhibit B is a true and correct copy of State Board of Equalization, operations memo No. 754 (Jan. 12 1983, revised May 7, 1984). It discusses the operation of section 6901.5 (added by Stats. 1982, ch. 708, p. 2867, § 2, eff. Sept. 8, 1982, operative Jan. 1, 1983), which pertains to excess sales tax reimbursement. This operations memo is located in CDTFA's files.

6. In CDTFA's view, these two operations memos are not essential to determining this matter, but may be helpful to the Court, and are proper subjects of judicial notice.

* * * * *

I declare under penalty of perjury that the foregoing is true and correct and that I executed this declaration on July 13, 2018, in Oakland, California.

/s/ *Janill L. Richards*

Janill L. Richards

EXHIBIT A

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State Board of Equalization
Department of Business Taxes

OPERATIONS MEMO

No. 611
October 23, 1978

SUBJECT: Passage of Senate Bill 472

GENERAL

Senate Bill 472 was recently signed by the Governor and becomes operative on January 1, 1979. This bill is a Board-sponsored bill and has major impact on the operations of the Board, particularly in the areas of excess tax reimbursement and leases of tangible personal property to the United States Government. This bill was introduced primarily to establish clearly that the sales tax is imposed on the retailer for the privilege of doing business in this state and is not imposed on the purchaser.

The bill specifically states that because of recent court cases which provided that for federal purposes the incidence of the California sales tax was on the purchaser, it was necessary to change the California Sales and Use Tax Law to make it clear that for both federal and state purposes, the imposition of the sales tax is on the retailer.

The purpose of this operations memo is to provide the staff with an understanding of the issues involved as a result of this legislation. Further information will be provided as procedures and policy are developed.

WHAT THE BILL DOES

Sections 6052, 6052.5, 6053, 6054, and 6054.5 of the Sales and Use Tax Law are repealed. These sections pertain to tax reimbursement, preparation of reimbursement schedules, excess tax reimbursement, separation of tax charges, and unlawful advertising pertaining to the absorption of the sales tax by the retailer.

Section 1656.1 has been added to the Civil Code. This section provides that whether a retailer may add sales tax reimbursement to the sales price of tangible personal property

sold at retail depends upon the terms of the agreement of sale. It then sets forth certain rebuttable presumptions to determine the intent of the parties to the agreement of sale and requires the Board to prepare tax reimbursement schedules. The section is silent as to the responsibility of policing retailers to see that the schedules are used.

UNITED STATES GOVERNMENT

One effect of this legislation is that, effective January 1, 1979, leases of tangible personal property to the United States, which are "sales" as defined by Section 6006, will be subject to sales tax measured by the amount of rentals/leases payable.

No grandfather clause was provided in this bill; consequently, all new or existing leases of tangible personal property to the United States will become subject to sales tax on January 1, 1979.

FEDERAL INSTRUMENTALITIES

Effective January 1, 1979, sales tax applies to sales to such corporations as federal reserve banks, federal credit unions, and federal land banks, which are not wholly owned by the United States, or which are not wholly owned by other corporations wholly owned by the United States.

The exemption from use tax will continue to apply to the sale of, and the storage, use, or other consumption of tangible personal property sold to federal reserve banks, federal home loan banks, federal credit unions, or other federal instrumentalities exempted from direct taxation by federal law.

FOREIGN CONSULS

It is the staff's opinion that, effective January 1, 1979, all sales of tangible personal property sold to foreign consular officers, employees, or members of their families will once again become subject to the sales tax. The tax exemption cards that have been issued to these individuals will be collected by the Board commencing on January 1, 1979. A procedural memorandum pertaining to this will be issued shortly.

The exemption from use tax will continue to apply to the sale of, and the storage, use, or other consumption of tangible personal property sold to foreign consular officers, employees,

or members of their families that are immune from tax pursuant to treaties or other diplomatic agreements with the United States.

INDIANS

It is the staff's opinion that effective January 1, 1979, sales of tangible personal property by an off-reservation retailer to an Indian residing on the reservation will be subject to sales tax even if the retailer delivers the property to the Indian on the reservation. However, use tax will continue not to apply to the sale of, and the storage, use, or other consumption of tangible personal property purchased by an Indian from an off-reservation retailer and delivered to the Indian on a reservation unless, within the first six months following delivery, the property is used off a reservation more than it is used on a reservation.

Sales tax, but not the use tax, will also apply on leases of tangible personal property made by an off-reservation retailer to Indians residing on the reservation even though the property is used on a reservation.

UNITED STATES CONSTRUCTION CONTRACTORS

United States construction contractors will continue to be considered consumers of materials and fixtures which they furnish and install in the performance of their contracts with the United States Government. Either the sales tax or the use tax will continue to apply to sales of such items to United States construction contractors. Effective January 1, 1979, where the contractor purchases the property as the agent of the United States, the sales tax, but not the use tax, will apply to such sales to United States construction contractors.

EXCESS SALES TAX REIMBURSEMENT

Currently, under Section 6052.5, the Board is required to enforce the provisions of this section pertaining to sales tax reimbursement. Section 6054.5 provides that, under certain circumstances, the Board can require a retailer to return excess reimbursement to the customer or pay it to the Board. With the recent court decision of *Javor v. State Board of Equalization,* this section took on added importance. Effective January 1, 1979, Sections 6052.5 and 6054.5 will be repealed. Section 1656.1 of the Civil Code will provide that the collection of sales tax by the retailer from the purchaser will be a contractual one between the two parties. There will be, however, situations in which too much sales tax is collected

by the retailer and either retained by him or paid to the state. Section 1656.1 of the Civil Code establishes certain rebuttable presumptions pertaining to the imposition of the sales tax on sales by a retailer of tangible personal property but is silent as to the enforcement provisions should a retailer overcollect an amount designated as sales tax.

In this setting, the Board will have no statutory duty to police the retail trade to ensure that only the correct amount of tax reimbursement is collected from the customers on retail sales. The repeal of Section 6054.5 removes the statutory authority for the Board to reqire the retailer to either refund the excess reimbursement to the customer or pay it to the Board.

However, in situations where the retailer has paid excess reimbursement to the Board and then seeks a refund, the legal staff believes the Board would be justified in refusing to refund the excess tax unless the retailer agrees to refund the tax to his customers. This is the *Decorative Carpets, Inc. v. State Board of Equalization* fact situation, which was decided on the law as it read prior to the addition of Section 6054.5.

HEADQUARTERS ACTIONS

The legal staff has identified the regulations that will require revision as a result of passage of SB 472. The proposed regulations are scheduled to be heard by the Board on November 16. A notice to interested parties will be sent out shortly, and a summary of all the regulation changes will be mailed to the affected taxpayers on or before October 31, 1978. The Chief of Field Operations provided a copy of this summary to all districts and subdistricts on October 6, 1978. Because of the voluminous amount of paperwork involved and the exorbitant mailing costs, copies of the proposed regulation changes will not be mailed to the majority of the taxpayers. They have been instructed, however, that if they are interested in a particular regulation change to contact their nearest Board office and a copy will be supplied. Each district office will be sent an initial supply of 100 copies of each of the affected regulations. If more are required, they will be sent upon request.

Additionally, each district office has recently been sent two copies of the chaptered version of Senate Bill 472.

Changes that will be required in the field audit manuals, compliance manuals, operations memos, reporting forms, etc., are currently being identified and will be changed as quickly as possible in order to be in compliance with the provisions of this bill.

In addition, a training class is being prepared to provide training for the districts' staff pertaining to the effects that this bill will have on the Board's operations and the operational changes necessary to comply with the provisions of this legislation.

TAXPAYER ADVICE

Because of the controversial nature of the issues involved with this legislation, questions should be answered in a helpful manner; but, their tentative nature should be explained. It should be emphasized that the recommended changes in the regulations are proposals only and will require approval by the Board prior to their adoption.

J. D. Dotson

J. D. Dotson
Asst. Executive Secretary
Business Taxes

DISTRIBUTION: 1-D

EXHIBIT B

State Board of Equalization
Department of Business Taxes

OPERATIONS MEMO

No. 754
January 12, 1983

SUBJECT: Excess Tax Reimbursement (AB 2619)

GENERAL

Assembly Bill 2619, effective September 7, 1982, added Section 6901.5 to the Sales and Use Tax Law. This section provides that tax reimbursement collected on a transaction shall be offset against any tax liability of the taxpayer on the same transaction. Any excess tax reimbursement remaining after the offset must be refunded to the customer or paid to the State. These provisions are retroactive to the extent that they affect pending proceedings.

OFFSETS

The primary legislative intent in enacting AB 2619 was to allow a taxpayer to satisfy his or her tax liability on a transaction by paying to the State an equivalent amount of tax reimbursement collected from a customer on the same transaction. Such offsets can be made only on a transaction by transaction basis. Tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction. The "same transaction" means all activities involved in the acquisition and disposition of the same property. The "same transaction" may involve several persons, such as a vendor, a subcontractor, a prime contractor, and the final customer; or a vendor, a lessor, and a series of sublessors.

The offset can be made when returns are filed, when an audit is conducted, or when a refund is claimed. If tax reimbursement equal to the tax liabilty on a transaction is collected and paid to the State, the taxpayer has no further tax liability. If tax reimbursement in excess of the tax liability on a transaction is collected and paid to the State, the taxpayer has no further tax liability and any refund will be limited to the amount paid to the State in excess of the tax liability. If an audit discloses that tax reimbursement was collected in excess of the tax liability on the transaction, and that no tax has been paid to the State on the transaction, the tax liability will be assessed and the tax reimbursement in excess of that amount must be returned to the customer or paid to the State.

A taxpayer may offset against tax reimbursement collected on a transaction his or her tax liability on the transaction whether the liability was satisfied by paying sales tax reimbursement to a vendor, paying use tax to a vendor, or paying use tax to the State. Tax reimbursement collected from a customer on a transaction is excessive only to the extent that it exceeds the taxpayer's own tax liability on the same transaction.

An offset of a taxpayer's own tax liability against tax reimbursement collected from a customer can be made only with respect to transactions in which possession of the property upon which the taxpayer's liability is based is transferred, either permanently or temporarily, to the customer, as in the case of construction contracts or leases. A taxpayer, such as a repairman, who uses shop supplies in performing a job for a customer cannot offset his or her tax liability arising from the use of the supplies against tax reimbursement collected from the customer.

A person who claims that his or her tax liability should be offset against tax reimbursement paid to the State by another person has the burden of proving that tax reimbursement was in fact paid on the same transaction by the other person. In the absence of such proof, no offset will be allowed.

EXCESS TAX REIMBURSEMENT

Tax reimbursement greater than the amount of tax imposed upon a transaction is excess tax reimbursement to the extent that it exceeds the taxpayer's own tax liability on the transaction. If the taxpayer has no tax liability on the transaction, the entire amount of reimbursement collected in excess of the tax imposed on the transaction is excess tax reimbursement. Such excess tax reimbursement must be returned to the customer. If the taxpayer fails or refuses to return such excess tax reimbursement to the customer, it must be paid to the State whether it was mistakenly computed or knowingly computed. Tax reimbursement greater than the amount of tax imposed upon a transaction is collected when reimbursement is computed on a transaction which is not subject to tax, when reimbursement is computed on an amount in excess of the amount subject to tax, when reimbursement is computed using a tax rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the reimbursement on a billing.

RETROACTIVE APPLICATION

This change in the law is retroactive to the extent that it affects all pending proceedings. "Pending proceedings" include petition and refund cases upon which final action has not been taken, accounts receivable which have not been paid, and determinations issued after September 7, 1982. Consequently, the guidelines provided in this memorandum must be applied in resolving all petition and refund cases, and with respect to all periods covered by audits in process or future audits. However, it should be noted that this change in the law has no effect on the statute of limitations.

"Pending proceedings" do not include any taxes which have been paid, either with returns or as a result of a determination, with respect to which no claim for refund or petition for redetermination has been or is filed.

Since there was no requirement after January 1, 1979, that "excess tax reimbursement" be paid to the state, it is unlikely that any significant amount of tax has been paid which would be subject to refund as a result of this change in the law, or that any significant accounts receivable remain unpaid which should be adjusted. Consequently, no special effort will be made to identify such items. However, an article explaining this change in the law will be published in the December Tax Information pamphlet.

SPECIFIC APPLICATIONS

The following examples illustrate the application of tax to certain transactions engaged in by taxpayers.

Construction Contractors. A contractor furnishes and installs materials under a lump sum construction contract for the improvement of real property, and collects tax reimbursement on the total contract price. He must pay use tax, or sales tax reimbursement to the vendor, on the purchase price of the materials consumed in performing the contract. This tax or tax reimbursement may be offset aginst the tax reimbursement collected from the contractor's customer. The balance of the tax reimbursement collected from the customer must be returned to the customer or paid to the state.

A subcontractor furnishes and installs extax materials under a lump sum contract to improve real property. The prime contractor collects tax reimbursement from his customer on the total contract price and pays all of the tax reimbursement collected to the State. The subcontractor's use tax liability on the materials consumed in performing the contract will be offset against the tax reimbursement paid to the state by the prime contractor, and the subcontractor has no further tax liability on the transaction. The tax reimbursement paid to the State by the prime contractor in excess of the use tax liability of the subcontractor will be refunded to the prime contractor only if it is returned to the customer.

Lessors of Mobile Transportation Equipment. A lessor of mobile transportation equipment purchases such equipment extax under a resale certificate and collects tax reimbursement on the rental receipts, but pays no tax to the State. The lessor must pay tax on the purchase price of the equipment since a timely election to measure the tax by fair rental value was not made. However, the tax reimbursement collected on rental receipts is excess tax reimbursement only to the extent that it exceeds the tax liability measured by the purchase price. Such excess tax reimbursement must be returned to the lessee or paid to the State.

Other Lessors of Tangible Personal Property. A lessor purchases property and pays sales tax reimbursement on the purchase to the vendor. The property is leased in the same form as acquired and tax reimbursement is collected on the rental receipts. To the extent that the tax reimbursement collected on rental receipts exceeds the tax reimbursement paid on the purchase price it must be returned to the customer or paid to the State. The law applies in

this manner whether the property is leased to a single lessee or a series of lessees.

OBSOLESCENSE

This operations memo will be obsolete when appropriate revisions have been made to Regulation 1700.

J. D. Dotson
Assistant Executive Secretary
Business Taxes

DISTRIBUTION:

State Board of Equalization
Department of Business Taxes

OPERATIONS MEMO

No. 754
January 12, 1983
Revised: May 7, 1984

SUBJECT: Excess Tax Reimbursement (AB 2619)

GENERAL

Assembly Bill 2619, effective September 7, 1982, added Section 6901.5 to the Sales and Use Tax Law. This section provides that tax reimbursement collected on a transaction shall be offset against any tax liability of the taxpayer on the same transaction. Any excess tax reimbursement remaining after the offset must be refunded to the customer or paid to the State. These provisions are retroactive to the extent that they affect pending proceedings.

OFFSETS

The primary legislative intent in enacting AB 2619 was to allow a taxpayer to satisfy his or her tax liability on a transaction by paying to the State an equivalent amount of tax reimbursement collected from a customer on the same transaction. Such offsets can be made only on a transaction-by-transaction basis. Tax reimbursement collected on a specific transaction can be used only to satisfy a tax liability arising from the same transaction. The "same transaction" means all activities involved in the acquisition and disposition of the same property. The "same transaction" may involve several persons, such as a vendor, a subcontractor, a prime contractor, and the final customer; or a vendor, a lessor, and a series of sublessors.

The offset can be made when returns are filed, when an audit is conducted, or when a refund is claimed. If tax reimbursement equal to the tax liability on a transaction is collected and paid to the State, the taxpayer has no further tax liability. If tax reimbursement in excess of the tax liability on a transaction is collected and paid to the State, the taxpayer has no further tax liability and any refund will be limited to the amount paid to the State in excess of the tax liability. If an audit discloses that tax reimbursement was collected in excess of the tax liability on the transaction, and that no tax has been paid to the State on the transaction, the tax liability will be assessed and the tax reimbursement in excess of that amount must be returned to the customer or paid to the State.

A taxpayer may offset against tax reimbursement collected on a transaction his or her tax liability on the transaction whether the liability was satisfied by paying sales tax reimbursement to a vendor, paying use tax to a vendor, or paying use tax to the State. Tax reimbursement collected from a customer on a transaction is excessive only to the extent that it exceeds the taxpayer's own tax liability on the same transaction.

An offset of a taxpayer's own tax liability against tax reimbursement collected from a customer can be made only with respect to transactions in which possession of the property upon which the taxpayer's liability is based is transferred, either permanently or temporarily, to the customer, as in the case of construction contracts or leases. A taxpayer, such as a repairman, who uses shop supplies in performing a job for a customer cannot offset his or her tax liability arising from the use of the supplies against tax reimbursement collected from the customer.

A person who claims that his or her tax liability should be offset against tax reimbursement paid to the State by another person has the burden of proving that tax reimbursement was in fact paid on the same transaction by the other person. In the absence of such proof, no offset will be allowed. The person is not required to obtain a release from the person who paid the tax reimbursement to the State. If an offset has been made pursuant to Section 6901.5, the amount offset is no longer considered excess tax reimbursement paid to the State on the original transaction

N

EXCESS TAX REIMBURSEMENT

Tax reimbursement greater than the amount of tax imposed upon a transaction is excess tax reimbursement to the extent that it exceeds the taxpayer's own tax liability on the transaction. If the taxpayer has no tax liability on the transaction, the entire amount of reimbursement collected in excess of the tax imposed on the transaction is excess tax reimbursement. Such excess tax reimbursement must be returned to the customer. If the taxpayer fails or refuses to return such excess tax reimbursement to the customer, it must be paid to the State whether it was mistakenly computed, or knowingly computed. Tax reimbursement greater than the amount of tax imposed upon a transaction is collected when reimbursement is computed on a transaction which is not subject to tax, when reimbursement is computed on an amount in excess of the amount subject to tax, when reimbursement is computed using a tax rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the reimbursement on a billing.

RETROACTIVE APPLICATION

This change in the law is retroactive to the extent that it affects all pending proceedings. "Pending proceedings" include petition and refund cases upon which final action has not been taken, accounts receivable which have not been paid, and determinations issued after September 7, 1982. Consequently, the guidelines provided in this memorandum must be applied in resolving all petition and refund cases, and with respect to all periods covered by audits in process of future audits. However, it should be noted that this change in the law has no effect on the statute of limitations. "Pending proceedings" do not include any taxes which have been paid, either with returns or as a result of a determination, with respect to which no claim for refund or petition for redetermination has been or is filed.

Since there was no requirement after January 1, 1979, that "excess tax reimbursement" be paid to the State, it is unlikely that any significant amount of tax has been paid which would be subject to refund as a result of this change in the law, or that any significant accounts receivable remain unpaid which should be adjusted. Consequently, no special effort will be made to identify such items. However, an article explaining this change in the law will be published in the December Tax Information pamphlet.

The change in the law provides no authority to require that excess tax reimbursement collected prior to September 7, 1982, be paid to the State. Therefore, where excess tax reimbursement exists during the period January 1, 1979, through September 7, 1982, no action should be taken in the audit. However, excess tax reimbursement collected on or after September 7, 1982 must be returned to the customer or returned to the State.

SPECIFIC APPLICATIONS

The following examples illustrate the application of tax to certain transactions engaged in by taxpayers.

Construction Contractors. A contractor furnishes and install materials under a lump-sum construction contract for the improvement of real property, and collects tax reimtursement on the total contract price. He must pay use tax, or sales tax reimbursement to the vendor, on the purchase price of the materials consumed in performing the contract. This tax or tax reimbursement may be offset against the tax reimbursement collected from the contractor's customer. The balance of the tax reimbursement collected from the customer must be returned to the customer or paid to the State.

A subcontractor furnishes and installs extax materials under a lump-sum contract to improve real property. The prime contractor collects tax reimbursement from his customer on the total contract price and pays all of the tax reimbursement collected to the State. The subcontractor's use tax liability on the materials consumed in performing the contract will be offset against the tax reimbursement paid to the State by the prime contractor to the extent that the subcontractor can show that the prime contractor paid the tax reimbursement to the State on the same transaction. The subcontractor has the burden of proving, for each transaction, that the prime contractor paid the tax reimbursement to the State. No offset will be allowed for those transactions where no such proof has been provided. The tax reimbursement paid to the State by the prime contractor in excess of the use tax liability of the subcontractor will be refunded to the prime contractor only if it is returned to the customer. N

In audits of the prime contractor, the prime contractor should be given an opportunity to choose among the following options.

1. Refund excess tax reimbursement to the customer. Under this alternative, the subcontractor would owe tax on the cost of the materials and no offset would be available. If the prime contractor had issued a resale certificate to the subcontractor, the prime contractor could also be held liable for the subcontractor's use tax liability pursuant to Section 6094.5 of the Revenue and Taxation Code. N

2. Take no further action. Under this alternative, the subcontractor may offset its use tax liability against the tax reimbursement paid to the State by the prime contractor.

3. Refund to the customer the difference between what the prime contractor collected as tax reimbursement and the subcontractor's use tax liability. However, in order to choose this option the prime contractor must establish the subcontractor's tax cost for each transaction. Under this alternative, the subcontractor may offset its use tax liability against the tax reimbursement paid to the State by the prime contractor to the extent that such amounts have not previously been refunded.

In all cases, once an offset has been made pursuant to Section 6901.5, the amount offset no longer represents excess tax reimbursement paid to the State on the original transaction. Therefore, a prime contractor is not entitled to a refund of amounts originally remitted to the State by the prime contractor but later offset against the subcontractor's use tax liability arising out of the same transaction.

Lessors of Mobile Transportation Equipment. A lessor of mobile transportation equipment purchases such equipment extax under a resale certificate and collects tax reimbursement on the rental receipts, but pays no tax to the State. The lessor must pay tax on the purchase price of the equipment since a timely election to measure the tax by fair rental value was not made. However, the tax reimbursement collected on rental receipts is excess tax reimbursement only to the extent that it exceeds the tax liability measured by the purchase price. Such excess tax reimbursement must be returned to the lessee or paid to the State.

Other Lessors of Tangible Personal Property. A lessor purchases property and pays sales tax reimbursement on the purchase to the vendor. The property is leased in the same form as acquired and tax reimbursement is collected on the rental receipts. To the extent that the tax reimbursement collected on rental receipts exceeds the tax reimbursement paid on the purchase price, it must be returned to the customer or paid to the State. The law applies in this manner whether the property is leased to a single lessee or a series of lessees.

J. D. Dotson
Assistant Executive Secretary
Business Taxes

DISTRIBUTION: 1-D

PROPOSED ORDER

The People's motion for judicial notice is granted. The Court takes judicial notice of the following:

(1) State Board of Equalization, operations memo No. 611 (Oct. 23, 1978); and

(2) State Board of Equalization, operations memo No. 754 (Jan. 12 1983).

Dated: _____

_____
Presiding Justice

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Michael McClain v. Sav-On Drugs, et al.**
Case No.: **S241471**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 13, 2018, I served the attached **RESPONDENT CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION'S MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION IN SUPPORT; PROPOSED ORDER** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, Oakland, California, 94612, addressed as follows:

[See attached service list]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 13, 2018, at Oakland, California.

Debra Baldwin
Declarant

Debra Baldwin
Signature

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