

M e m o r a n d u m**135.0271**

To: Mr. Glenn A. Bystrom
Principal Tax Auditor

Date: Sept. 11, 1987

From: David H. Levine
Tax Counsel

Subject: [X]

This is in reference to a letter dated August 11, 1987 from [X] regarding the application of use tax to tangible personal property used by [X]. [X] believes that [X] is not subject to the use tax because it is an insurer.

Insurers pay a gross premiums tax on their insurance business done in this state. (Cal. Const. Art. XIII, § 28; Rev. & Tax. Code § 12001 et seq.) That tax “is in lieu of all other taxes and licenses, state, county, and municipal, upon such insurers and their property” [with certain exceptions not relevant here]. (Cal. Const. Art. XIII, § 28(f).) Thus, use tax is not assessed against such insurers on their use of tangible personal property in the course of their insurance operations. (Rev. & Tax. Code § 6352, Reg. 1567(b).)

[X] is licensed by the Department of Insurance as a nonprofit hospital service corporation pursuant to Division 2, Part 1, Chapter 11A of the Insurance Code. (Ins. Code § 11491 et seq.) However, though licensed and regulated by the Department of Insurance, [X] as a nonprofit hospital service corporation, is not an insurer within the meaning of California Constitution Article XIII, section 28. I discussed this with Ms. [Y], attorney for the Department of Insurance. She explained that since nonprofit hospital service corporations are not regarded as insurers, they are not required to pay the gross premiums tax on insurers.

A review of Chapter 11A confirms this analysis. The statutory provisions do not refer to nonprofit hospital service corporations as insurers. Rather, they are declared to be charitable and benevolent institutions. (Ins. Code § 11493.5.) Insurance Code section 11493.5 provides an exemption from tax on such corporation’s funds and assets except taxes on real estate and office equipment. This exemption would not be necessary if these corporations were subject to the gross premiums tax since that tax is in lieu of all others. Also, Insurance Code section 11517 provides that nonprofit hospital service corporations are not subject to Division 1, Part 2, Chapter 1, Article 12, inter alia, of the Insurance Code. That article provides for the deposit of a bond for payment of all state taxes. (Ins. Code § 970 et seq.) Since these corporations are not insurers subject to the insurance gross premiums tax, a bond to secure payment of such taxes is not necessary.

The exemption provided by Insurance Code section 11493.5 was at issue in *Hospital Service of California v. City of Oakland* (1972) 25 C.A.3d 402. The city assessed a utility user’s

tax on Blue Cross, a nonprofit hospital service corporation. Blue Cross argued that section 11493.5 exempted it from the utility user's tax. The court stated:

“Pertinent to our consideration is the concession of Blue Cross that throughout its corporate life it has paid, without protest, ‘use taxes’ (see Rev. & Tax. Code, §§ 6201-6207) assessed against it; also that the State Board of Equalization regularly assesses such use taxes against nonprofit hospital service corporations. The use tax is an ‘excise tax’ imposed on the use or other consumption of tangible personal property. (Rev. & Tax. Code § 6201.) It is obviously closely akin to the City’s Utility Users Tax, and it would seem that if the exemption of section 11493.5 applied to one it would also apply to the other.

“In the context of a statutory interpretation by the State Board of Equalization it was said: ‘Although not necessarily controlling, as where made without the authority of or repugant [sic] to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.’ (Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918,921 [156 P.2d 1].)” (25 C.A.3d 407 (footnote omitted).)

Based on the authorities discussed above, we believe that [X] is not exempt from our use tax under either California Constitution Article XIII, section 28, or Insurance Code section 11493.5. In your draft of a letter to [X], you conclude that certain car seats purchased out of state are consumed by [X] in the performance of a service. (I note that you state that the service is “of providing health insurance.” I recommend changing this to “health care” and omitting the reference to insurance.) Since [X] is not an insurer, it is not exempt from use tax. Rather, if the out-of-state retailer is engaged in business in this state it must collect the use tax from [X] and remit it to this state. (Rev. & Tax. Code § 6203.) Otherwise, [X] must pay the tax directly to this state. (Rev. & Tax. Code § 6202.)

DHL:ss

cc: Mr. E. Leslie Sorensen, Jr.