

M e m o r a n d u m**135.0600**

To: Mr. Robert Nunes
Chief, Annotations Project

Date: December 21, 1995

From: David H. Levine
Supervising Staff Counsel

Subject: Proposed Annotation on Treaties

Attached is a letter from John Waid regarding immunity from tax by treaty. John notes that annotations 250.0095 and 445.0060 discuss the results of the existence of a treaty, but that they do not explain the reason for exemption based on that treaty. I agree with John that we should annotate an explanation. Please annotate John's letter as follows:

The terms of a treaty immunized the operations of a bank from tax and also immunized it from tax collection duties. In addition, the terms of the treaty were specifically made part of the law of the land by Congress. Section 6352 exempts from sales and use taxes the gross receipts from the sale of and the storage, use, or other consumption in this state of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the California Constitution. When the United States enters into a treaty with another country, its provisions become part of the laws of the United States. Thus, if such a treaty prohibits the states from imposing certain taxes, this state is prohibited from imposing such taxes. The treaty must, however, grant immunity from the particular tax at issue. For example, a treaty giving immunity from taxes on property does not provide immunity from excise taxes.

Here, the treaty provided the bank immunity from all taxation and tax collection duties. Thus, under section 6352, sales of tangible personal property by or to the bank are not subject to tax. Consequently, when purchasing from California retailers, the bank may issue them exemption certificates conforming to the requirements of Regulation 1667. Although the bank is not subject to the duty to collect use tax on any of its sales of tangible personal property to California residents which are not subject to sales tax, the use tax still applies to such sales, and the purchasers will have to self-report their liability.

DHL/cmm
Attachment



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December 19, 1995

[X]

RE: [No Permit Number]
Exemption by Treaty

Dear Ms. [X],

I am responding to your letter to Mr. David Rosenthal of our District Compliance Section, which it received on October 31, 1995. You requested an opinion as to whether sales of tangible personal property by or to the [N] Bank ([N]) are subject to sales or use tax. You describe [N]'s operation as follows:

“The [N] Bank is a development organization whose legal and financial structure is similar to that of the World Bank and the Inter-American Development Bank; it is not a state or federally chartered commercial bank.

“The [N] Bank was established by the governments of the United States and Mexico to finance environmental infrastructure projects in the U.S.-Mexico border region.”

You attached copies of several documents. The “Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a [N] Bank” (the “Agreement”) was apparently executed on November 18, 1993, to implement some of the provisions of the North American Free Trade Agreement (NAFTA). As you note, Chapter II, Article VIII, Section 9 reads, in part, as follows:

“(a) The Bank, its property, other assets, income, and the operations it carries out pursuant to this [treaty] shall be immune from all taxation and from all customs duties. The Bank shall also be immune from any obligation relating to the payment, withholding or collection of any tax or customs duty.”

Public Law 103-182, Section 542, authorized the President to accept membership in [N] Bank. Section 542 reads as follows:

“Article VIII of Chapter II of the Cooperation Agreement shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon entry into force of the Cooperation Agreement.”

(See, 2 U.S. Code Congressional and Administrative News, 103rd Cong., 1st Sess. (1993), 107 Stat. 2165-2167.) Finally, you attached a copy of Executive Order 12904 which designated [N] Bank, among other organizations, “as public international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act.” You also attached a copy of that Act (P.L. 79-291 (22 U.S.C. 288-288f-4)).

OPINION

A. Tax Consequences to [N] Bank.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) Likewise, section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for use, storage, or other consumption in this state, unless otherwise exempted from taxation by statute, purchased for use in this state in a transaction not subject to sales tax. The sales tax is imposed upon the retailer for the privilege of selling tangible personal property in this state while the use tax is upon the purchaser who uses, stores, or otherwise consumes such property here. The retailer must collect the use tax from the purchaser if engaged in business in this state. (Bank of America v. St. Bd. of Equalization (1962) 209 Cal.App.2d 780, 792-793 [26 Cal.Rptr. 348]; § 6303.)

[N] Bank appears to be a corporation which issued stock (Agreement, Art. II, §1), has a Board of Directors (Ibid. at Art. VI, § 1) and a Manager appointed by the directors (Ibid. at Art. VI, § 3.) We conclude it is thus a “person” under section 6005. Assuming that it will engage in the business of selling tangible personal property in California, it will be a retailer for sales and use tax purposes. Thus, its sales and purchases of tangible personal property in California are subject to sales or use tax (whichever is applicable) under the above authority unless a statutory exemption applies.

One possibility is section 6352, which reads as follows:

“There are exempted from [sales and use taxes] the gross receipts from the sale of and the storage, use, or other consumption in this state of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is

from taxing under the Constitution or laws of the United States or under the Constitution of this State.”

“It is, of course, well recognized that international law is a part of our law and as such is the law of all states of the Union.” (Opn. Cal. Atty. Gen. (February 26, 1942) NS-4136.) We have previously determined that treaties are a part of international law and so incorporated into the law of the land under the United States Constitution. The treaty at issue must, however, grant immunity from the incidents of the tax at issue. For example, a treaty giving immunity from taxes on property does not provide immunity from excise taxes.

Does the Agreement immunize [N] Bank from sales and use taxes? We have assumed [N] Bank will make retail sales of tangible personal property as part of its [California] operation. It would thus, absent a statutory exemption, incur a sales tax liability for such sales. It would also be a retailer engaged in business in California, and it would have a duty to collect use tax from purchasers in transactions not subject to sales tax. (§ 6203(a).) The portion of the Agreement quoted above immunizes the operations of the bank from tax and also immunizes it from tax collection duties. In addition, the terms of the agreement were specifically made part of the law of the land in the portion of Public Law 103-182 quoted above. Section 6352 thus applies to the bank’s transactions.

As a result, we conclude that sales of tangible personal property by or to [N] Bank are not subject to tax. Consequently, when purchasing from a California retailer, the bank should issue its vendor an exemption certificate conforming to the requirements of Regulation 1667. We also conclude that [N] Bank is not subject to the duty to collect use tax on any of its sales of tangible personal property to California residents which are not subject to sales tax. Please note, however, that, even though [N] Bank is immune from the duty to collect California use tax, the use tax will still apply to such sales, and the purchasers will have to self-report it. If [N] Bank decides to voluntarily collect California use tax, it may obtain a Certificate of Registration-Use Tax from the District, [X].

For your information, I have included a copy of Regulation 1667. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely

John L. Waid
Senior Staff Counsel

JLW:sr

cc: Mr. David Rosenthal