Exemptions-GA-Special

A special master appointed by the federal court to operate a corporation is not acting as an agent of the federal government. Any fees that would normally be due from the corporation would also be during the operation of the corporation by the special master. 5/19/95.

State of California **Board of Equalization**
Legal Division

Memorandum

To: Mr. Larry Augusta **Date:** May 19, 1995

From: Cynthia Spencer-Ayres

Subject: **Federal Special Master – (Redacted)**

The question raised pertains to the validity of fees imposed upon property in the hands of a special master. More specifically, the question is whether the government agency exemption set forth in Health and Safety Code (H&SC) section 25174.7(a) (1) applies to the clean-up of a site conducted by and under the control of the special master appointed by the federal district court. For the reasons set forth below, we conclude that although the special master is appointed by and acts on behalf of the federal district court under an order of reference, he is not an arm of the Federal Government for the purposed of an exemption from payment of the fees owed to the State; the fees in question are an administrative expense of the corporation, not the Federal Government. Even though the special master is conducting the clean-up operation of the corporation, he is subject to the same tax liability as the owner would have been if in possession and operating the business.

The federal district court appointed the special master to liquidate the assets of (redacted) (now insolvent) and clean up the site of the business in order to satisfy certain corporate debts. The special master conducts the affairs of the corporation on a day -to-day basis in the name of the corporation, has contracted for services in the name of the corporation, and is listed in the records of the Secretary of State as the President and agent of the corporation. The special master claims an exemption from the state hazardous waste fees under H&SC section 25174.7(a) (1) because he contends he is an arm of the Federal Government. The corporation is not in bankruptcy.

Federal Rules of Civil Procedure (Fed. Rules Civ. Proc.) Rule 53, 28 U.S.C.A. permits the district court to appoint special masters to which the district court may refer certain pending matters. Rule 53(a) provides in part that the court in which any action is pending may appoint a special master. The word "master" as used in these rules includes a referee, an auditor, an examiner, and an assessor. Masters are subject to the control of the court and the power and authority of a master is dependent upon the district court's order of reference. (Agricultural Services Ass'n., Inc. v. Ferry-Morse Seed Co., Inc. (1977)

551 F.2d 1057.) The district court also has inherent equitable power to appoint a person, with whatever title, to assist it in administering a remedy. The use of masters is permitted because they improve the judicial process by bringing to the court skills and experience which courts frequently lack. (Reed v. Cleveland Bd. of Ed. (1979) 607 F.2d 737, 747.) Masters are used to aid the judge in the performing of specific judicial duties as they may arise in a case and not to displace the court. They may be appointed because of the complexity of litigation and problems which occur when parties attempt to comply with district court orders.

Fed. Rules Civ. Proc. 53(c) discusses the powers of the master which are set forth in the order of reference. The order may specify or limit the master's powers. The special master is appointed to assist, and not replace the federal district court judge.

Title 28 USCA § 960, which is found in Chapter 57 – General Provisions Applicable to Court Officers and Employees, provides:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

The courts have held that, "Section 960 is an affirmation of tax liability and 'does not exclude liability for taxes otherwise validly imposed.'" (Brown v. Collector of Taxes for District of Columbia, 247 F.2d 786 as cited in United States v. Sampsell (1959) 266 F2d 631.) An assignee was held to have operated a business or property although there was an orderly liquidation of the property over the years by sale of parcels of land, and royalties for the removal of coal and timber were received. (Louisville Property Co. v. C.I.R., 140 F.2d 547.) Also, in Pinkerton v. United States 170 F.2d 846, it was held that the court-appointed receiver of the insolvent corporation was required to pay federal income taxes despite his claim that he was not operating the property or business. Furthermore, the imposition of California use tax on federal bankruptcy liquidation sales is not prohibited either by the doctrine of intergovernmental tax immunity or by Title 28 USCA § 960. (California State Board of Equalization v. Sierra Summit, inc. (1989) 490 US 844, 104 L.Ed.2d 910, 109 SCt. 2228.)

Absolute tax immunity is appropriate only when the tax is on the United States itself "'or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxes is concerned.'" (United States v. New Mexico, 455 US 720 (1982) as cited in Sierra Summit, Inc. supra, p.917.) It has been held that the bankruptcy trustee is not so closely connected to the Federal Government that the two cannot

realistically be viewed as separate entities. A bankruptcy trustee is not the representative of the estate of the debtor, and thus is not an arm of the Federal Government; and the tax is an administrative expense of the debtor, not the government. (Sierra Summit, Inc., supra, pp.917-918.)

It was further held that Title 28 USCA § 960 evinces Congress's "intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed, … and that, as a matter of federal law, 'a business in receivership, or conducted under court order, should be subject, to the same tax liability as the owner would have been if in possession and operating the enterprise,' Palmer v. Webster and Atlas Nat. Bank of Boston, 312 US 156, 163 (1941)" as cited in Sierra Summit, Inc., p.919. (Emphasis added.)

Property in the hands of a bankruptcy trustee was subject to taxation by state and municipal authorities in Swarts v. Hammer, 194 US 441 (1904) as cited in Sierra Summit, Inc., supra, p.920. The court stated that "'[b]y the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property, and that there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either.'" (Sierra Summit, Inc., supra, p.920.)

Although Bankruptcy Rule 9031 precludes the appointment of masters in cases and proceedings under the Bankruptcy Code (In the Matter of Interco, Inc. (1992) 139 B.R. 718), the functions of a bankruptcy trustee are very similar to those of a special master. Since, as described above, the courts have held that property in the hands of a bankruptcy trustee is subject to taxation by state and municipal authorities, the same result should apply to a cleanup of contaminated property conducted by a special master.

Tax exemptions are to be construed narrowly. (Swart v. Hammer, supra, p.1062.) The case law cited herein leads us to conclude that the exemption for a "government agency" set forth in H&SC section 25174.7(a) (1) does not apply to the special master. To suggest that equity and fairness requires otherwise, is to try to carve out an exemption where the law has neither expressed nor intended one.

Cynthia Spencer-Ayres

CSA:es

Cc: Ms. Janet Vining
Mr. Steve Rudd (MIC: 57)
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