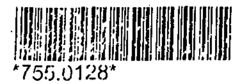
State of California

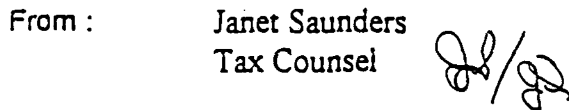


Memorandum

To: Mr. Ramon J. Hirsig, Chief
Valuation Division

Date: January 9, 1998

From: Janet Saunders
Tax Counsel



Subject: Utility Property Tax Ordinance
Southern California Edison and Tribal Council of the Bishop Pauite Reservation

You have inquired as to continued state assessment of Southern California Edison's (SCE's) property located within reservation boundaries and subject to taxation by the Tribal Council of the Bishop Pauite Reservation (Council). SCE asserts that it should not continue to be subject to assessment by the Board and local property taxation. It is our opinion that SCE is subject to taxation by both the Council and by California government entities.

SCE received notification from the Council that a Utility Property Tax Ordinance was adopted by the Council. In a letter to you dated October 6, 1997, SCE writes:

> . . . Our Law Department has determined that the Council has acted within its power as a sovereign nation and that the Ordinance is legal. Accordingly, we have paid the property taxes to the Council for fiscal year 1996-97 and an estimated first installment for fiscal year 1997-98.
>
> Because of the tribe sovereignty, we believe that they have jurisdiction with regard to property taxation and should be the sole entity to levy such taxes. We therefore, recommend that all of [SCE's] property located on the Bishop Paiute reservation be excluded from future filings with the State Board of Equalization (Board) or local county assessors. We believe that this exclusion is necessary to avoid further double taxation of our property. . . .

SCE raises the question of double taxation in that it is now obliged to pay taxes to the Council and also to pay taxes as assessed pursuant to the California state constitution; both the Council and the state of California are sovereign entities. It is a well known axiom in the law that double taxation is not allowed. Thus, SCE poses a question as to its obligation under state law.

We have previously considered this issue and concluded that both taxes are valid. Attached is a copy of my February 28, 1995, memo to Jim Levinson to that effect. There is no federal or California case specifically on point. However, we find the reasoning of the Montana Supreme Court in *Northern Border Pipeline Co. v. State of Montana* (1989) 772 P.2d 829 to be persuasive. That case held that both state and tribal entities had the right to collect a utility tax; in that case, the tribes instituted a tax on utility assets on tribal lands after the state tax was in place and had been levied and collected without protest. In the SCE/Council matter at hand, the Council's right to tax is not in dispute.

Regarding the question of double taxation, it is well settled that more than one taxing authority may assess a particular tax (e.g., personal income is taxed by both the state and federal governments). Double taxation occurs only when two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority, within the same jurisdiction, and during the same taxing period.

In the SCE/Council matter at hand, one taxing authority is the Council and the second taxing authority is pursuant to the state constitution. Thus, the prohibition against double taxation is inapplicable herein as the taxing authorities differ.

JS:jd
precednt/valuadiv/1998/98001.js

Attachment

cc: Mr. Richard Johnson, MIC:63
Ms. Jennifer Willis, MIC:70

RECEIVED
JAN 12 1998
PROP. TAX ADMIN.
State Board of Equalization

Memorandum

To : Mr. Jim Levinson
Professional Advisor to Mr. Dronenburg

Date: February 28, 199

From : Janet Saunders
Tax Counsel

Subject: **Indian Property Tax Assessments**
Memo to Richard Ochsner Dated January 9, 1995

You have inquired regarding utility property assessed by Indian tribes. Some state assesses asked if there is a basis to remove the property assessed by Indian tribes from the Board's unitary property assessments. We will consider that you have raised a two part question: one, is there a legal basis for tribal assessment of utility property on tribal land and second, if property is so assessed, is there any exemption from an additional assessment by the state. Based upon the authorities discussed below, we conclude that the answer to the first part is affirmative and the answer to the second part is a qualified negative.

In Burlington Northern Railroad Company v. Blackfeet Tribe (9th Cir. 1991), 924 F2d 899, the court held that the tribal authority had the right to tax Burlington's on-reservation rights-of-way. A review of cases cited since Burlington shows that the case was not overruled or distinguished as to this point. Thus, case authority presently authorizes tribal assessment of utility property on tribal land.

In Montana, a 1989 state supreme court case held that both state and tribal entities had the right to collect a utility tax; in that case, the tribes instituted a tax on utility assets on tribal lands after the state tax was in place and had been levied and collected without protest. See Northern Border Pipeline Co. v State of Montana (1989), 772 P.2d 829. This case was not appealed. Thus, case authority recognizes that state assessment of utility property on tribal lands may continue even though tribes also assess the portions of that property traversing their lands.

Our inquiry disclosed that Montana state tax authorities routinely assess and calculate an ad valorem tax on utility assets on tribal lands; the tribes are provided with information regarding the assessed values and the utilities are billed by both the state taxing authority and the tribal taxing authorities for the corresponding taxes.

In Northern Border Pipeline Co., Northern Border's challenge rested on three basic grounds: (a) preemption of federal law, (b) violation of the United States Constitution and (c) violation of the Montana State Constitution.

a. The court concluded that the challenged tax is not preempted by federal statutes or regulations, notwithstanding that Indian activities and property on a reservation generally come within the sphere of federal authority. The U.S. Supreme Court test in White Mountain Apache Tribe v. Bracker (1980), 448 U.S. 136, 100 S.Ct. 2578, calls for inquiry into the nature of the state, federal and tribal interest at stake, which are then balanced to determine whether the state law is preempted; in Northern Border Pipeline Co., the balance of competing interests was narrowed to the question of providing services. The court found that because the state revenues were used in substantial part to fund services (such as school districts, road maintenance and law enforcement) to the tribes and to others, including Northern Border, the state's interest in providing services outweighs the federal/tribal interests that would support federal preemption. It rejected Northern Border's argument as speculative that the imposition of a double tax burden would interfere with federal legislation designed to promote economic tribal interests.

   Related to the question of federal preemption, it is noted that in a concurring opinion, one justice writes that justice has been denied: the economic interests of the tribes are definitely impacted by the double tax in that non-Indians will not construct taxable property on an Indian reservation if it is possible to place that property outside a reservation boundary. Nevertheless, the tribes were not parties to this action and Northern Border lacks standing to make this argument in the state judicial system because the state court lacks jurisdiction to consider such matters related to tribal lands.

b. Northern Border's next claim is that the challenged tax violated the United States Constitution, i.e., the provisions related to the due process and equal protection clauses of the Fourteenth Amendment, and the Indian commerce clause. The court rejected these claims after brief discussion.

In terms of property tax law, due process requires some definite link, some minimum connection, between a state and the person, property, or transaction the state seeks to tax. The court found that a sufficient link was shown because the pipeline crossed trust lands located within the boundaries of Montana, the tax was based on the value of the pipeline found within the state, and the revenues obtained were used to provide government services.

The aspect of the equal protection clause applicable herein is one of the fundamental and basic principles of taxation. A tax, to be valid, must be equal in its burdens and uniform in its operation; a state is precluded from laying any greater burdens on one than are laid on others in the same calling and condition. Absent any argument by Northern Border in support of its claim that it was denied equal protection, the court declined to address that claim.

The Indian commerce clause limits those laws which would result in undue discrimination against, or a burden on, Indian commerce. It is well-settled, however, that this clause does not bar all state taxation that might affect tribal interests. The Montana court found that Northern Border's allegations of future injury to tribal revenues in this instance did not rise to the level of undue discrimination or burden on Indian commerce.

c. The court also rejected the claim that the tax was violative of the Montana State Constitution, holding that the U.S. Supreme Court test established in White Mountain Apache Tribe established Montana's jurisdiction to assess the subject tax. While the state surrendered its proprietary interests in tribal lands, it did not surrender its governmental or regulatory authority.

A related question could involve state tax levies on fee lands owned by non-tribe members within the exterior reservation boundaries. While we believe the result would be the same, we

do not address that question herein. Further, that there is a tax imposed by both the state and a tribal entity is not in itself a basis to find an exemption. It is well settled that more than one taxing authority may assess a particular tax (e.g., personal income is taxed by both the state and federal governments). Double taxation occurs only when two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority, within the same jurisdiction, and during the same taxing period. Thus, the prohibition against double taxation is inapplicable herein as the taxing authorities differ.

In conclusion, please note that the concurring opinion in Northern Border Pipeline.Co. prompts the question of whether the state tax would be held invalid if a tribe were a party to an action challenging a unitary property assessment on the basis of interference with the tribe's economic interest. It may be that in another fact situation in this or another jurisdiction, there could be a different result. We can only say at this point that current case authority supports the conclusion that utility property on tribal land is not exempt from state taxation.

The following cases are attached: Burlington and Northern Border Pipeline Co.

JS:jd
precednt/valuadiv/95002.js

Attachments

cc: Mr. John Hagerty, MIC:62
Mr. Gene Mayer, MIC:61 (w/attachments)
Ms. Jennifer Willis, MIC:70
Mr. Richard Ochsner