

NO. S173972

IN THE SUPREME COURT OF CALIFORNIA

KIMBERLY LOEFFLER, et al.,
Plaintiffs and Appellants,

v.

TARGET CORPORATION,
Defendant and Respondent.

**Request for Judicial Notice in Support of Answering Brief in
Response to *Amicus Curiae* Briefs Filed in Support of Target**

On Appeal from an Order by the Court of Appeal,
Second Appellate District, Division Three, Case No.
B199287, Affirming Order Sustaining Demurrer

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Counsel for Plaintiffs/Appellants

In connection with Appellants' Answering Brief in Response to *Amicus Curiae* Briefs Filed in Support of Target, Appellants hereby request that this Court take judicial notice of the following document pursuant to California Evidence Code sections 452 and 459:

(1) A true and correct copy of an April 18, 1997, letter issued by the State Board of Equalization ("Board"), attached hereto as Exhibit A.

The attached letter is relevant to rebut the Board's argument in its *amicus* brief that Plaintiffs' consumer protection claims against Target are barred by the California Constitution and Tax Code. It shows that the Board's legal counsel came to the opposite conclusion 13 years ago in an opinion letter to the attorney for a retailer, and therefore that its present position is entitled to no judicial deference.

Judicial notice of Exhibit A is appropriate here because under Evidence Code section 452, subdivision (c), a court may take judicial notice of "[o]fficial Acts of the legislative, executive, and judicial departments of the United States and any state of the United States." California courts have applied this section broadly to take judicial notice of a wide variety of administrative and executive acts, including those performed by the Board. *See, e.g., People v. Hyung Joon Kim* (2009) 45 Cal.4th 1078, 1106 fn. 19, 90 Cal.Rptr.3d 355 (taking judicial notice of an information bulletin issued by the California Attorney General); *In re Social Servs. Payment Cases* (2008) 166 Cal.App.4th 1249, 1271, 83

Cal.Rptr.3d 434 (holding that trial court properly exercised its discretion in taking judicial notice of letters from the California Department of Social Services because said letters disclosed practices of the Department); *Michels v. Watson* (1964) 229 Cal.App.2d 404, 407, 40 Cal.Rptr. 464 (judicial notice taken of the Board's annual reports).

Dated: May 5, 2010

Respectfully Submitted,

By:

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Attorneys for Petitioners

Exhibit A



STATE BOARD OF EQUALIZATION
450 N STREET - SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
TELEPHONE: (916) 445-3723
FAX: (916) 323-3387

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

ERNEST J. DRONENBURG, JR.
Third District, San Diego

KATHLEEN CONNELL
Controller, Sacramento

JOHN CHIANG
Acting Member
Fourth District, Los Angeles

E. L. SORENSEN, JR.
Executive Director

April 18, 1997

RECEIVED

State Board of Equalization

APR 21 1997

Glenn A. Bysnon
Deputy Director
Sales and Use Tax Department

Mr. Matthew Kilroy
Price Waterhouse LLP
555 California Street
San Francisco, CA 94104

Dear Mr. Kilroy:

This is in response to your request of January 27, 1997, by facsimile transmission, that we review our letter to you of December 20, 1996.

The question is whether, and to what extent, a lessor who has purchased property and paid sales tax reimbursement to his vendor may collect reimbursement for his tax cost from his lessee. In the circumstance described, the lease transaction itself would be nontaxable.

We understand that your client intends to recoup its tax cost by computing reimbursement based upon the rental charges to the lessee and identifying this amount as tax.

You point to our Regulation 1700, "Reimbursement for Sales Tax," which provides in paragraph (b)(5)(D) as follows:

"A lessor purchases property and pays sales tax reimbursement to the vendor. The property is leased in the same form as acquired and tax reimbursement is collected on the rental receipts. Tax reimbursement collected on rental receipts must be returned to the lessee or paid to the state to the extent that it exceeds the liability measured by the purchase price. (See Regulation 1660 (18 CCR 1560) for application of tax to leases, generally.)"

In view of the rather plain language of the regulation as it now reads, we would not make an assessment in the circumstance under consideration, except to the extent that the reimbursement collected exceeded the tax liability measured by the purchase price. Any change in the regulation to apply the excess

April 18, 1997

reimbursement concept to the entire amount charged the lessee would be applied on a prospective basis only.

The State Board of Equalization has jurisdiction with respect to the excess tax provisions of the Sales and Use Tax Law. The local district attorney's office has jurisdiction over consumer protection laws found in the Business and Professions Code. Whether the consumer fraud provisions would be applicable where tax reimbursement is collected on a nontaxable transaction would be a matter of local determination. Without regard to the language of Regulation 1700, we cannot authorize any practice which might violate consumer protection laws. Our recommendation would be that you seek further advice as to this matter from the consumer protection division of your local district attorney's office.

Very truly yours,



Gary J. Jugum
Assistant Chief Counsel

GJJ:sr

bc: Mr. Glenn A. Bystrom - MIC:43
Mr. Dennis Fox - MIC:92
Mr. David H. Levine
Mr. Ronald L. Dick
Mr. Warren Astleford