

January 3, 1996

Ms. Martha Shell
Administrative Assistant
Treasury Department FCU
Treasury Annex, Room 126
P.O. Box 27301
Washington, D.C. 20038-7301

Re: Tax Exemption for a Federal Credit Union
(Your November 28, 1995, Letter)

Dear Ms Shell:

You have asked that we review a letter that the Treasury Department FCU ("FCU") received from the Arizona Department of Revenue (the "Letter") regarding the applicability of Arizona's "transaction privilege tax" to FCUs. Arizona Administrative Code rule R15-5-2002. The Arizona Department of Revenue sent the Letter after your FCU inquired about certain charges a Phoenix hotel billed to two FCU employees.

Analysis

Section 122 of the FCU Act, 12 U.S.C. §1768, exempts FCUs from all federal, state and local taxes except for nondiscriminatory taxes on real property and tangible personal property. Also, FCUs, as federal instrumentalities, have the same immunity from state and local taxes as the United States government. *See, United States v. State of Michigan*, 851 F. 2d 803, 805-7 (6th Cir. 1988); *United States v. Maine*, 524 F. Supp. 1056, 1058 (D.Me. 1981).

While FCUs are generally exempt from taxes, the Letter correctly states that these exemptions do not apply when a state imposes the tax on a seller or vendor who passes the cost of the tax on to the federal instrumentality that purchases the goods or service. Several court cases have established that in order for these exemptions to apply to a particular tax, the legal incidence of that tax must fall directly on the FCU. *See*, enclosed letter from Hattie M. Ulan, Assistant General Counsel to Joseph Macala, US Air FCU, Re: Transient Occupancy Tax, dated June 29, 1989. "[T]he legal incidence of a particular tax is determined by looking to the intent of the legislative body that established the tax as to how the tax is to operate in practice and by looking at the practical operation and effect of the entire scheme." *Id.*

The Letter, quoting Arizona rule R15-5-2002, states, "[t]he transaction privilege tax is imposed directly on the person engaging in a taxable business within Arizona. The vendor shall be liable for the tax, regardless of whether or not the vendor passes on the economic burden of the tax to the customer." Since vendors rather than purchasers are required to pay the tax, it appears that the exemption provided by section 122 of the FCU Act does not apply. Please note that our opinion is not binding on the FCU or the State of Arizona and you may wish to have private legal counsel review this issue.

You have also asked that we provide you with our views on Arizona Administrative Code Rule 15-5-1003 ("Rule 15-5-1003"), which purports to tax transient lodging by United States government employees. Based on our reading of Rule 15-5-1003 and the Letter, it is not clear whether Arizona is attempting to tax the U.S. government and vendors jointly or just vendors. If Rule 15-5-1003, like the transaction privilege tax, is only a tax on vendors, then the tax may be passed on to the U.S. government.

Sincerely,

Richard S. Schulman
Associate General Counsel
GC/JSM:bhs
SSIC 3500
95-1152
Enclosure