BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 92-239
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RULE 190: SALES TAX -- EXEMPTION -- CONTRACTOR --FEDERALLY CHARTERED CREDIT UNION. 12 USC §1768, which exempts federally chartered credit unions from most taxes imposed by states, does not exempt a contractor from taxes imposed on it. The fact that the economic burden may be borne by the credit union does not invalidate the taxes or alter the liability of the contractor for them.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

Taxpayer protests the assessment of use tax on materials used in electrical work for a federal credit union.[1]

FACTS:

Hesselholt, Chief A.L.J. -- Taxpayer's books and records were audited for the period January 1, 1987 to September 30, 1990, and an assessment was issued. The above-captioned partial audit relates only to use tax assessed on materials used by the taxpayer in electrical contracting work for a

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

credit union. The credit union is a federally chartered credit union organized under 12 U.S.C. §1751.

ISSUE:

Whether the assessment of use tax on the materials used in the contract is an imposition of taxes on the credit union.

DISCUSSION:

The Department agrees that a federally chartered credit union is a federal instrumentality and is itself immune from the imposition of sales tax. See WAC 458-20-190.

The use tax is imposed at RCW 82.12.020:

> There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail. . .

A "consumer" is defined, in relevant part, as

> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof. . . . Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person.

(Emphasis ours.)

RCW 82.04.190. The tax is imposed on the consumer; the instrumentality has no liability for the tax. In this case, the consumer is the taxpayer. The credit union has no direct liability to the state for the tax.

The taxpayer argues that the language of 12 U.S.C. §1768 has exempted federally chartered credit unions from the imposition of tax even on those who contract with them. We simply do not find any support for that position in the law or cases discussing the issue.

12 U.S.C. §1768 provides, in part:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such

> Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. . . .

The taxpayer argues extensively that the imposition of the use tax on it is a tax on the credit union and impermissible. It argues that Washington v. United States, 460 U.S. 536 (1983) does not change this result, as it believes that 12 U.S.C. §1768 provides it with an explicit exemption for all taxes, whether directly imposed or indirectly imposed. It cites United States v. Michigan, 851 F.2d 803 (6th Cir., 1988) to support its argument. The taxpayer points out that in Michigan, the Sixth Circuit Court of Appeals held certain portions of the Michigan Sales Tax Act to be unconstitutional to the extent that it imposed a sales tax on the credit union. In reviewing Michigan's tax, the court found that it was clearly intended that the tax be passed on to the purchaser. The statutes imposing the tax provided that it was to be "collected from all persons engaged in the business of making sales at retail. . . for the privilege of engaging in that business" and permitted the retailer to reimburse himself for his tax expense by passing on the burden to the buyer. Id, at 808. In reviewing that state's rules implementing the tax, the court clearly found that the tax was actually a consumer sales tax "the incidence of which falls on the purchaser." Id, at 808.

In another section of the opinion, the court went on to state that:

> [a] tax is not unconstitutional, however, if the legal incidence of the tax falls on a party who deals with the federal government and merely the economic burden of the tax is passed on to the United States by that party. For example, consistent with its constitutional obligations, a state may impose a tax on a federal contractor who subsequently recovers this tax payment by charging the United States a higher price. [citation omitted.] Therefore, if the legal incidence of Michigan's sales tax falls on the retailer,a s the state contends, then the law does not violate the Supremacy Clause.

(Emphasis ours.)

Michigan, at 807. So long as the tax is not imposed on the federal government or instrumentality itself, the fact that the economic burden of the tax is borne by the instrumentality or agency is irrelevant. In United States v. California State Board of Equalization, 650 F.2d 1127 at 1131 (Ninth Circuit, 1981) the court stated:

> The constitution only prohibits the state from levying a tax on the United States; it does not prohibit the state from enacting a taxing scheme whose effect is to increase prices paid by the United States. Therefore, there is no constitutional violation if the state levies a tax on the lessor to the United States and the lessor recoups this tax payment by raising the lease price--increasing the economic burden--to the United States. [citations omitted.]

In United States v. New Mexico, 455 US 720 (1982), the Supreme Court reviewed the history of the taxation of those contracting with the federal government at length. The court concluded that:

> . . . tax immunity [for the federal government] is appropriate in only one circumstance: when the levy falls 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 taxed is concerned.

455 US 720 at 737.

In this case, the tax liability falls on the one contracting with the credit union. The credit union has no direct liability for the tax, as did the credit union in the Michigan case. The exemption from tax provided by 12 USC §1768 is applicable only to direct taxes placed on federally chartered credit unions.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 31th day of August 1992.