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Voluntary Payments

The Board can accept the voluntary payment of taxes that have been underreported for periods which the Board is barred by the statute of limitations from issuing a deficiency assessment. The Board may also retain any interest voluntarily paid with respect to those taxes. The basis for retaining such interest would be its voluntary payment. The Board cannot affirmatively attempt to collect interest on voluntarily-paid taxes in any manner, whether by deficiency assessment or billing. Any claim for refund of voluntary payments on taxes that are barred by the statute of limitations, is governed by Revenue and Taxation Code section 12978. 11/15/90. (Am. 2003-3).

Mr. Clarence E. Ward
Excise Tax Division

November 15, 1990

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(Redacted) Company underreported tax for 1984 and 1985. Since (redacted) had filed returns for those years and there is no evidence of fraud, section 12432 bars the Board from issuing a notice of deficiency assessment for those years. However, in a letter dated September 30, 1990, (redacted) disclosed that it had underreported the tax because of an error in its automated processing system and it paid the amount of tax it ascertained was owing.

You believe that we can accept payment for 1984 and 1985 based upon the case of Owens-Corning Fiberglass Corp. v. State Board of Equalization (1974) 39 Cal.App.3d 532. However, since the facts in that case are not identical to the facts here, you ask confirmation of your opinion. Your specific questions are:

- "1. Can the payment received for the outlawed periods of 1984 and 1985, be accepted? (Effective dates of payment 9-28-90).
- "2. Can interest be charged for 1984 and 1985, since the taxpayer voluntarily paid the tax? Can that question even be approached?
- "3. Can the outlawed periods be included on a deficiency assessment to show credit for the payment made for the outlawed periods?
- "4. Since the payment was made on September 28, 1990, does §12978 govern any claim for refund for the paid outlawed periods, i.e., 6 months?"

We believe that we can accept the voluntary payment of taxes that had been underreported for periods which the statute of limitations bars the Board from affirmatively collecting even though the Owens-Corning case is not directly on point. The plaintiff in that case was seeking a refund of amounts that it paid during periods which the Board still had the right to issue deficiency assessments, but the Board did not get around to issuing the applicable deficiency assessments until after the statute of limitations barred the issuance of those assessments. The court upheld the Board's denial of plaintiff's claim for refund since at the time of the payment the amount of tax due exceeded the amount actually paid.

The court in Owens-Corning distinguished the case of Marchica v. State Board of Equalization (1951) 107 Cal.App.2d 501. In that case, the Board issued a deficiency assessment that would have been barred by the statute of limitations unless the taxpayer were guilty of fraud. The taxpayer paid the assessment and filed a claim for refund which was denied. The court concluded that the Board did not establish fraud and that it therefore could not retain the tax that had been paid pursuant to a deficiency assessment issued after it was barred by the statute of limitations.

The facts you present are between the facts in Owens-Corning and the facts in Marchica. Although the Marchica case states that the Board cannot retain tax paid after it is barred by the statute of limitations in the absence of fraud or an intent to evade, that conclusion was in the context of a tax paid pursuant to the Board's affirmative collection actions, that is, by issuance of a deficiency assessment. Although the tax at issue here was paid after the statute of limitations barred the Board's affirmative collection actions, we do not believe that Marchica bars the Board from retaining the tax. Although the Owens-Corning case allowed the Board to retain tax that was paid before the Board would have been barred from affirmatively collecting it, we believe that the Owens-Corning case stands for the general proposition that the Board may retain taxes which are voluntarily paid even if the Board did not have the power to issue a deficiency assessment. Therefore, in answer to your first question, we believe that we can retain the taxes paid with respect to the outlawed periods.

Since we have concluded that the Board can retain taxes voluntarily paid, we believe that the Board can also retain interest paid with respect to those taxes if that interest is voluntarily paid. However, the basis for retaining such interest would be its voluntary payment. We believe that the Board cannot affirmatively attempt to collect interest on such voluntarily-paid taxes in any manner, whether by deficiency assessment or billing.

We believe that the outlawed periods should not be included on a deficiency assessment to show a credit for the payment made for the outlawed periods. We recommend some other method be used to balance our books.

We agree that section 12978 governs any claim for refund for payments with respect to the outlawed periods. That is, the applicable statute of limitations is the latest of those provided in the statute, which would be six months from the date of payment.

If you have further questions, please contact me.

David H. Levine

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