

**STATE BOARD OF EQUALIZATION**

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Executive Director

June 5, 1997

Mr. R--- W. C---
XXXXX --- Boulevard, Suite X S.E.
--- ---, California XXXXX

Re: F--- N. S---
SR -- XX-XXXXXX

Dear Mr. C---:

As you were advised by letter dated May 6, 1997 from the Board's Petitions Section, your letter dated February 20, 1997 has been referred to the Legal Division for response. Your client, F--- S--- (S---), was issued a determination dated October 13, 1988 for tax in the amount of \$598,757.82 for the period dated July 1, 1983 through September 30, 1986. By Notice dated August 8, 1995, the tax for that period was redetermined against S--- for the original amount of the determination, that is, \$598,757.82. You object to the manner in which the amount of the redetermination was calculated.

In making its original determination, the Board included some transactions in the measure of tax and omitted others. The full process of administrative appeals resulted in the Board's eventual determination that some of the transactions originally thought to be taxable were not, and that one transaction originally thought not to be taxable was taxable. The Board's final determination (i.e., the Board's Notice of Redetermination to S---) therefore reflected these conclusions, except that the total tax determined was limited to the amount of the original determination because the statute of limitations for increasing the assessment had passed.

A determination is issued to a taxpayer which indicates the amount the Board believes that the taxpayer owes *for a particular period*, not for particular transactions to the exclusion of others. If the taxpayer files a timely petition for redetermination, the Board reviews its original determination to ascertain whether the *amount of tax* is correctly assessed. If the *amount* is correct, the matter will be redetermined without adjustment. If the amount is too low, the amount will be redetermined without adjustment unless the statute of limitations permits increasing the assessment. If the amount is too high, the tax will be redetermined to reflect the correct amount due.

The problem in this matter appears to have been the use of the term “offset.” There has been no offset in the formal sense. That term had been used solely in the attempt to explain, mathematically, how the correct amount of tax due for the audit period would be calculated. In the present matter, the audit resulted in a determination that S--- owed tax in the amount of \$598,757.82 *for the audit period*. After administrative review and appeals, the Board determined that the amount S--- actually owed for the audit period was more than had been originally determined. The amount of the determination was not increased under Revenue and Taxation Code section 6563 because such increase would have been barred under that provision. Therefore, the final determination was in the amount of the original determination without adjustment.

I note that this is consistent with the result of many audits. For example, the Board conducts an audit of a grocery store using a test period in which some transactions are regarded as taxable and some are not. The results of that test are then applied to the entire period uniformly to ascertain the underpayment of tax and a determination is issued on that basis. Through the review and appeals process, it is ascertained that there were seasonal variations and a new test should be performed. The new test shows that the tax due for part of the audit period was more than the original test determined (that is, some transactions originally considered as nontaxable were, in fact, taxable), and that the tax due for other parts of the audit period was less than the original test determined (that is, some transactions originally considered as taxable were, in fact, nontaxable). The final determination (i.e., the redetermination), does not simply reduce the measure of tax by the transactions determined by the reaudit to have been nontaxable without any consideration of the transactions that the reaudit determined to have been taxable. Rather, the decrease is “offset” against the increase, and the correct assessment *for the audit period* is issued (subject to the provisions of section 6563).

The rule is well established that “a plaintiff who challenges the validity of a tax may recover only if it be shown that more has been exacted than in equity and good conscience should have been paid.” (*Goodwill Industries v. County of L.A.* (1953) 117 Cal.App.2d 19, 27.) The audit period is taken as a whole and the determination is issued on that basis. If the taxpayer thereafter files a claim for refund of amounts paid pursuant to the determination, it must establish that it over paid tax for the period of the claim, not that it paid more tax than was due on a particular transaction. (*Sprint Communications Co. v. State Bd. of Equalization* (1995) 40 Cal.App.4th 1257, 1259-60; *Owens-Corning Fiberglas Corp. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 532. See generally *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633.) Since S--- will not have paid more tax for the period in question than he owed, even if S--- litigates this issue, there will be no basis for any refund.

I hope I have adequately explained why the Board's actions in this matter were in accordance with law.

Sincerely,

David H. Levine
Supervising Tax Counsel

DHL/cmm

cc: Mr. Jerry Cornelius (MIC:40)
Mr. Vic Anderson (MIC:49)
Supervisor, Petitions Section (MIC:38)