

**M e m o r a n d u m****465.0064**

To: Ms. Margaret H. Howard

Date: August 17, 1979

From: Susan M. Wengel

Subject: M--- L. G---

SF -- XX-XXXXXX

Collections has requested an opinion as to whether a surety is entitled to receive reimbursement from the Board in the following situation:

On April 10 demand is made on the surety for \$2,000. On April 17 the Board after being notified of a foreclosure sale submits a surplus letter to the trustee. On April 13 the surety issues a check for \$2,000, which the Board receives on April 23. On July 25 the trustee sends the Board a check for \$3666.90, which is the total amount of the tax plus interest.

The question now arises as to who is entitled to receive the overpayment.

In a prior situation involving refunds of overpayments it was the opinion of Tom Putnam and myself that the party making the overpayment was the party entitled to the refund. This decision was based on the language of Revenue and Taxation Code Section 6901, which provides, in part, that:

If the board determines that any amount, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of the amount legally due and the person from whom it was collected or by whom paid. If approved by the State Board of Control the excess amount collected or [--- --- ---] the board on any amounts [--- --- ---] the person from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his successors, administrators, or executors."

As the overpayment in the present situation did not occur until the title insurance company/trustee paid the \$3666.90, it is the trustee to whom the Board has the authority under Section 6901 to pay the refund. There is no statutory authority to pay a surety unless it is the surety's payment which causes the overpayment.

The surety company has argued that under Civil Code Section 2848 the Board must refund \$1,000 to the surety. This section provides that:

“A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.”

This section clearly gives the surety the right to make demand on the surplus of the foreclosure sale as this is a remedy available to the Board. However, the Board cannot give a surety the right to a payment it has no statutory authority to take. Likewise, Civil Code Section 2849 does not apply as the Board is not holding any “security.”

Imposing this policy against sureties and successors can be justified by the fact that sureties have contracted and are paid to take this responsibility and successors can protect themselves against the liability by obtaining a release. Sureties, and often successors, also have a right under contract to obtain reimbursement from the taxpayer.

Obviously the Board should always try to obtain payment from the taxpayer first and should not take action against a surety or successor unless it appears all avenues of collection from the taxpayer have failed. In this particular situation, the surplus letter should have been amended once the surety had paid the \$2,000. If this claim would have been amended there would be no overpayment problem. It should be noted that if the trustee had paid the Board only \$1,666.90 no refund would have been available to the surety. Surety would have paid \$2,000 and the taxpayer would have paid \$1,666.90. This result will be identical to the current policy of refunding the excess to the trustee. (\$2,000 by surety, \$1,666.90 by taxpayer.) (Under no circumstances should the Board keep the overpayment.)

To continue the current policy will mean that sureties and successors will delay payment as long as possible. However, payment to a surety may subject to the Board to subsequent lawsuits if the taxpayer had previously reimbursed the surety.

Finally, none of our statutes make any reference to “primary” liability and I am unaware of any case law going contra to our current policy.

Please see me if you wish to discuss this further.

SMW/at