



### Summary

Claimant is a corporation engaged in the manufacture and sale of optical character recognition and audio response equipment. The claim at issue here relates to an audit conducted for the period from April 1, 1984 through March 31, 1987. In an audit report dated February 18, 1988, tax was asserted on an amount of \$XXX,XXX. The total tax was \$XX,XXX.XX.

Claimant entered into an installment payment plan with the Board. Three payments of \$XX,000 each were made on September 19, 1988, October 20, 1988 and December 30, 1988. The Board credited all three of these payments to the tax amount due to minimize the accrual of interest on the balance. A fourth and final payment was made on February 9, 1989 in the amount of \$XX,XXX.XX. Of this, \$XX,XXX.XX was credited to the Board to tax, \$XX,XXX.XX to interest, and \$X,XXX.XX to penalty.

On August 9, 1989, claimant filed a claim for refund of \$XX,XXX.XX plus related interest and penalty. The basis for the claim was additional documentation which had been located which supported a reduction in the amount upon which the tax deficiency had been based. The auditor verified that the documentation supported a reduction in the amount subject to tax as claimed by petitioner. However, the claim was allowed only to the extent of \$XX,XXX.XX in tax which had been credited on claimant's final payment. The auditor concluded that no refund could be made on the earlier payments because the claim was not timely as to them, and that only the tax portion of the last payment could be refunded.

Claimant contends that the limitation period does not start to run until the liability is paid in full. Therefore, since the claim was filed timely as to the last payment, it applies to the entire amount paid. Claimant cites State Board of Equalization v. Superior Court (O'Hara & Kendall Aviation, Inc.) 39 Cal.3d 633 as support for this contention. Claimant contends in the alternative that the Board is estopped from raising the statute of limitation issue because of a letter dated August 19, 1985, which it received from Board employee C. W. Philpot. The letter contains the following:

“Your legal recourse is that (1) upon full payment of the liability or (2) for each partial payment made against the amount due; you should file a claim for refund within six months from the date payment was made for any amount believed to be overpaid.”

Claimant believes that the use of “or” in the letter gave claimant a choice of times for filing a claim for refund.

Claimant contends that even if the statute of limitations has run against the first three payments, it is entitled to a full refund of the last payment. It did not specify the application of the earlier payments. If they were applied first to interest and then to tax, the tax amount subject to refund in the final payment would have been larger.

### Analysis and Conclusions

Section 6902 of the Revenue and Taxation Code provides that no refund shall be approved by the Board with respect to determinations after six months from the date the determination becomes final or after six months from the date of overpayment, whichever expires later, unless a claim is filed with the Board within that period. Section 6905 provides that the failure to file a claim within the prescribed period constitutes a waiver of any demand against the state on account of overpayment. The statute does not speak in terms of final payment or partial payment, only of payment. I see nothing that would authorize the Board to base the limitation period on the date of the final payment. The claim can apply only to the last payment. The O'Hara & Kendall case cited by petitioner deals solely with suits for refund, holding that there must be full payment before a suit for refund can be considered.

Claimant would have a problem only if the Board had denied a claim with respect to an earlier partial payment before full payment had been received by the Board. Claimant would in that hypothetical case been forced into a situation in which there would be a limitation period for filing a refund suit at the same time there was a prohibition against filing the same suit until full payment had been received. That did not occur here.

The Board is not estopped from asserting the statute of limitations in defense. The paragraph cited by claimant is not ambiguous nor does it offer two choices. It gives instructions for two different situations. If a claim could be filed for all partial payments, at the time the final payment is made, only one instruction would be necessary, i.e., file a claim upon full payment. It is clear that the second instruction applies only if full payment is not made in a single payment. Secondly, if the instructions were actually in error, the Board could not be bound by an error of an employee. See Market Street Railway Co. v. State Board of Equalization, 117 cal.App.3d 627.

It is a general rule that when payments are made against a debt, allocation between principal and interest may be specified by the debtor. Where debtor does not make an allocation, the creditor is free to allocate the payment according to the creditor's own desires. The Board has an established policy of applying payments first to tax. The purpose of this policy is to minimize the interest cost to taxpayers inasmuch as there is not interest on interest or penalties.

Since the purpose of the Board's policy is to benefit taxpayers, it is unreasonable to use the mechanics of the policy in a manner which is to a specific taxpayer's detriment. In this case, the most beneficial treatment of claimant is to apply the partial payments to interest and penalty first as this would maximize the refund which would be made to claimant from the last payment. The application of payments should be recalculated so that the maximum amount of the final payment is allocated to tax which can be refunded to claimant.

One other adjustment must be made. Section 6902 provides, in addition to the above-cited portion, that claims for refund must be filed within three years after the last day of the month following the close of the quarterly period for which an overpayment was made. The Sales and Use Tax Department has recently taken the position that the three-year limitation period applies not only to payments made with returns but also to payments made as a result of a determination. Since

petitioner's claim was filed August 9, 1989, it applies to payments made for periods beginning July 1, 1986, even if such payments were made as a result of the determination.

Recommendation

Recalculate the allocation of payments as described herein and refund an additional amount to claimant.

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H. L. Cohen, Hearing Officer

6-6-91

Date

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