



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
GENERAL DYNAMICS CORPORATION)

Appearances:

For Appellant: R. C. Brockway
For Respondent: Burl D. Lack, Chief Counsel
Hebard P. Smith, Associate Counsel

O P I N I O N

This appeal was made pursuant to Section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying a claim of Consolidated Vultee Aircraft Corporation for a refund of franchise tax in the amount of \$38,959.15 for the income year ended November 30, 1944. Pursuant to a stipulation filed herein, General Dynamics Corporation, the successor by merger to Consolidated Vultee Aircraft Corporation, has been substituted as Appellant.

Before proceeding to the merits of this appeal it is necessary to dispose of the contention by the Franchise Tax Board, made for the first time at the hearing of this matter, that the claim for refund is barred because not made within the period provided by statute. The basis of its contention is the decision of this Board in the Appeal of Calmar Steamship Corporation, issued December 18, 1952.

During the year in question, Section 25 of the Bank and Corporation Franchise Tax Act provided that if a taxpayer agreed with the United States Commissioner of Internal Revenue for an extension of time within which to issue a proposed deficiency assessment of Federal tax, the time to issue a notice of additional tax proposed to be assessed under the Act shall "(unless otherwise agreed between the Franchise Tax commissioner and the taxpayer)" be automatically extended until six months after expiration of the Federal waiver, Section 27 of the Act provided that the period within which a claim for refund may be made shall be the period within which the Franchise Tax Commissioner may make an assessment,

In Calmar the taxpayer had issued waivers both to the United States Commissioner of Internal Revenue and to the

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Franchise Tax Commissioner. The Federal waiver extended the time for assessment of Federal tax to June 30, 1949. Subsequent to the execution of the Federal waiver, and after having been informed of its existence, the Franchise Tax Commissioner requested of and obtained from the taxpayer a waiver which extended the time for assessment of the State tax to a date several months earlier than the Federal extension.

Based upon the above quoted parenthetical phrase contained in Section 25 of the Act, the Board held that the Franchise Tax Commissioner, in requesting and accepting from the taxpayer the State waiver for a period shorter than the pre-existing Federal extension, had "otherwise agreed" with the taxpayer as to the period within which a proposed notice of additional State tax might be issued.

Turning now to the facts in this appeal, it appears that Consolidated executed a Federal waiver for the year in question which extended the time for assessment of Federal tax to June 30, 1950. In accordance with its customary practice, the Franchise Tax Board thereafter procured from Consolidated a State waiver extending the time for State tax purposes to December 31, 1950, the same period within which, under the statute, it could have proposed an additional assessment of State tax because of the Federal waiver. Before the expiration of the period as extended, another Federal waiver was executed which extended the time for Federal purposes to June 30, 1951. No further State waiver was requested or received by the Franchise Tax Commissioner. The claim for refund in question was filed after the expiration of the State waiver but prior to the expiration of the period as extended by the second Federal waiver, if that waiver was effective for State tax purposes.

Contrary to the situation in Calmar, the State waiver here did not extend nor decrease the period within which, by virtue of the pre-existing Federal waiver, additional State tax could have been assessed or a claim for refund filed. Under these circumstances the rationale of the Calmar decision has no application and we conclude that by its execution of the State waiver Consolidated did not "otherwise agree" with the Franchise Tax Commissioner as to the period within which additional tax might be assessed, or a claim **for** refund filed. The filing of the claim for refund, accordingly, was timely.

Consolidated was a Delaware corporation engaged in the manufacture of airplanes and airplane parts. Its principal manufacturing establishment and general offices **were** located at San Diego, California. During the war years it had numerous contracts with the Federal Government for the manufacture of airplanes and airplane parts on a cost-plus-fixed-fee contracts. It kept its books and filed its tax returns on the accrual

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basis. As a result of its war contracts Consolidated became subject to renegotiation under the Federal Renegotiation Act and by agreement with the Federal Government repaid excessive profits and certain costs to the government for the income year ended in 1944, in the aggregate amount of \$17,424,007.46. As a result of this repayment of excessive profits Consolidated became entitled to a refund of federal income and excess profit taxes under the provisions of Section 3806 of the Internal Revenue Code,

On October 29, 1945, by proclamation of the President the war was officially declared to be ended for the purpose of amortization of emergency facilities. Thereafter Consolidated recomputed its amortization schedules to account for the termination of the amortization period prior to the normal sixty months and claimed a Federal tax refund pursuant to the provisions of Internal Revenue Code Section 124(d). To the extent that costs of Consolidated for the income year ended in 1944 were increased, it also became entitled to a renegotiation rebate under the provisions of Sub-section (a)(4)(d) of the Renegotiation Act of 1943. Consolidated filed an application for the rebate in the amount of \$2,258,587.99. The rebate was allowed in 1950 in the amount of \$1,897,206.19 and that amount was paid to Consolidated on November 23, 1951.

The Franchise Tax Board states that upon audit of Consolidated's return for the income year in question, the amount of excess profits returned to the Federal Government as a renegotiation payment and **excludible** from income for that year under Section 9.1 of the Bank and Corporation Franchise Tax Act (now Sections 24181 et seq. of the Revenue and Taxation Code) was **reduced** by the amount subsequently claimed as a **renegotiation** rebate because of accelerated amortization. The effect of this adjustment was to include in income for that year the full amount of the claimed rebate. The Franchise Tax Board now concedes that if the claim for refund was timely it should be allowed to the extent of the difference between the amount claimed as a rebate and the amount received.

Appellant takes the position that no portion of the amount received as a renegotiation rebate was accruable as income in the year 1944 since the events which gave rise to the claim for rebate did not occur until the year 1945. We are in agreement with this contention.

The Franchise Tax Board does not dispute the well settled rule that items of income are **includible** by a **taxpayer** on the accrual basis only when the events which establish the right to the income have occurred. Spring City Foundry Co, v. Commissioner, 292 U.S. 182; Security Flour Mills Company v.

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Commissioner, 321 U.S. 281; Freihofer Baking Co. v. Commissioner, 151 Fed. 2d 383; Bartlett v. DeLaney, 173 Fed. 2d 535; Equinox Mill, 16 T.C. 267; Cramp Shipbuilding Co., 17 T.C. 516. It argues, however, that there are many exceptions to the general rule. Such exceptions as it has directed our attention to, however, are provided for by statute and we have been unable to find any departures from the general rule in the absence of specific statutory authority.

Subsection (a)(4)(D) of the Renegotiation Act provides, in substance, that the amount of the renegotiation rebate payable to the contractor shall be reduced by that portion of the Federal tax for the renegotiated year attributable to the gross amount of the rebate and thereby, in effect, returns the amount of the gross rebate to income for the renegotiated year, for Federal tax purposes. The Franchise Tax Board has attempted to reach the same result for State tax purposes without benefit of statutory authority.

In Equinox Mill v. Commissioner, supra, the taxpayer had returned to the Federal government excessive profits earned in 1942 and had received a tax benefit thereon for that year. On February 25, 1944, an amendment to the Renegotiation Act entitled the taxpayer to a refund of a portion of its renegotiation payment for the year 1942. As did the Franchise Tax Board here, the Commissioner of Internal Revenue, in the absence of statutory authority, adjusted income for the renegotiated year by relating back the amount of the renegotiation refund. In determining the issue adversely to the Commissioner, the Court stated, at page 270, that "The difficulty with the Commissioner's position is that although section 3806 requires the reduction of a contractor's excess profits taxes for an earlier year by reason of repayment of 'excessive profits' through renegotiation, it contains nothing which authorizes an upward revision of the taxes for the earlier year in the event that such excessive profits are restored to the contractor in a still later year." Since Section 9.1 of the Bank and Corporation Franchise Tax Act is substantially similar to Section 3806 of the Federal Code, the Franchise Tax Board is confronted with the same insurmountable difficulty in supporting its position in this appeal.

Since the question is not before us, we do not decide in which subsequent year the amount of the renegotiation rebate is includible in income.

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O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Consolidated Vultee Aircraft Corporation for a refund of franchise tax in the amount of \$38,959.15 for the income year ended November 30, 1944, be and the same is hereby reversed.

Done at Sacramento, California, this 1st day of February, 1956, by the State Board of Equalization.

Paul R. Leake, Chairman

Robert E. McDavid, Member

J. H. Quinn, Member

Geo. R. Reilly, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary