



## Appeal of Norman W. Busse

The facts giving rise to this appeal are not in dispute. Upon graduation from the United States Naval Academy in 1951, appellant was assigned to active duty in Korea, where he remained until the spring of 1953. From the spring of 1953 until the summer of 1957, while stationed on the East Coast, appellant occasionally visited California during short leave periods. At some time prior to 1964, California personal income taxes and penalties were assessed against appellant for the years 1951 through 1957. Although appellant questioned his liability for the assessment imposed upon income earned while he was on continuous out-of-state military assignment, he paid the taxes and penalties without formal protest. In December 1963, this board held that a career serviceman on continuous out-of-state military assignment was not a California resident for purposes of income taxation. (Appeal of Harold L. and Miriam Jane Naylor, Cal. St. Rd. of Equal. , Dec. 11, 1963 ) Upon learning of that decision, appellant offset the amount of taxes and penalties which he had paid for the years 1951 through 1957 against his 1968 income tax liability.

Respondent denied the claimed offset on the basis of Revenue and Taxation Code section 19053, which provides, in part, that "[n]o credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later. .." Appellant, under protest, paid the proposed deficiency for 1968 and filed a claim for refund. Respondent denied the claim and this appeal followed.

Taxes and penalties were assessed against appellant for the years 1951 through 1957 pursuant to a prevailing administrative interpretation of existing law. Appellant had ample opportunity to formally challenge the interpretation within the applicable statutory period. A subsequent decision by this board in an independent case, even though a significant change of law is involved, does not operate to suspend the statute of limitations with respect to prior assessments. (Appeal of Robert A. and Nancy R. Jacobs, Cal. St. Rd. of Equal. , Aug. 3, 1965. )

Appellant acknowledges, that the applicable statute of limitations governing his claim for refund had expired prior to 1968. However, appellant asserts that, as a matter of equity, he should be allowed to recoup the taxes and penalties erroneously collected for the years 1951 through 1957.

Appeal of Norman W. Busse

Appellant contends that the doctrine of equitable recoupment, as defined in Bull v. United States, 295 U. S. 247 [79 L. Ed. 1421], should be **applied** to circumvent the statutory bar against his claim for refund. The doctrine of equitable recoupment is narrowly limited in application to situations where a single transaction, or taxable event, has been subjected to tax on inconsistent legal theories. (Rothensies v. Electric Storage Battery Co., 329 U. S. 296 [91 L. Ed. 296].) The doctrine is not applicable where the taxpayer seeks to offset taxes overpaid in a previous year against a subsequent unrelated assessment. (Hall v. United States, 43 F. Supp. 130, cert. denied, 316 U. S. 664 [86 L. Ed. 1740]; Appeal of James T. King, Cal. St. Bd. of Equal., Oct. 27, 1964.)

In the instant case two entirely different periods and two entirely different funds or transactions are involved. Appellant seeks to offset alleged income tax overpayments for the years 1951 through 1957 against a tax properly imposed on income earned during 1968. The doctrine of equitable recoupment is not applicable under these circumstances. (Appeal of James T. King, supra.) Furthermore, to allow **appellant** to recover under these facts would seriously undermine the legislative mandate contained within section 19053 of the Revenue and Taxation Code. Any taxpayer, so long as he is paying current taxes, would be able to recover by way of recoupment for taxes overpaid in any year, however long past.

Appellant also maintains that, since his payment of taxes and penalties for the years 1951 through 1957 was based upon respondent's erroneous interpretation of the law, respondent should now be estopped from asserting the statute of limitations. Estoppel will be invoked against a government agency only in rare and unusual circumstances. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865 [3 Cal. Rptr. 675, 350 P. 2d 715].) It must be shown that the agency acted in an **unconscionable** manner or deliberately set out to take unfair advantage of the claimant. (See, e. g., Driscoll v. City of Los Angeles; 67 Cal. 2d 297 [61 Cal. Rptr. 661, 431 P. 2d 245].) Appellant has not established that respondent's action involved anything other than a good faith interpretation of the applicable law. Accordingly, there is no basis for an estoppel.

For the above reasons respondent's action must be sustained.

Appeal of Norman W. Busse

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Norman W. Busse for refund of personal income tax in the amount of \$180.68 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 19th day of November, 1975, by the State Board of Equalization.

John W. Lynch, Chairman  
Hallamby B. Bandy, Member  
George P. Pfeiffer, Member  
Paul A. Stein, Member  
\_\_\_\_\_, Member

ATTEST: W. W. Dunlop, Executive Secretary