

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
) No. 93R-0700
First Pacific Bank;) 93R-0699
First Pacific Bancorp, Inc.)

Representing the Parties:

For Appellants: Thomas H. Hughes, Attorney
Willard D. Horwich, Attorney

For Respondent: Debra Petersen, Counsel
Craig Swieso, Counsel

Counsel for Board
of Equalization: Jefferson D. Vest,
Staff Counsel

OPINION

These appeals are made pursuant to section 19324, (formerly section 26075), subdivision (a),¹ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of First Pacific Bank (Bank) and First Pacific Bancorp, Inc. (Bancorp)² for refund of

¹ Unless otherwise specified, all section references hereinafter in the text of this opinion are to sections of the Revenue and Taxation Code as in effect for the income years in issue.

² The two appellants, First Pacific Bank and First Pacific Bancorp, Inc., brought separate appeals concerning a denial of the same claim for refund. Therefore, their appeals have been consolidated.

franchise tax in the amount of \$123,723³ for the income year ended December 31, 1988.

The issue in this case is whether appellant First Pacific Bank and/or appellant First Pacific Bancorp, Inc., should receive a refund.

In this appeal respondent has conceded that a refund is due; therefore, the only issue before this board is which appellant is entitled to the refund. Bancorp and its subsidiaries filed a California combined unitary group single tax return. The return included a Schedule R-7, Affiliated Corporations Subject to California Bank and Corporation Tax. The schedule lists Bancorp, Bank, and Beverly Hills Reconveyance Corp. (Beverly Hills) as the three corporations included in the combined report. The schedule also shows that Bancorp made payments of tax for 1988 totaling \$125,000, and that Bank and Beverly Hills made no payments. The return also included a consolidated income and expense summary, reflecting the following taxable income:

Bancorp	\$(51,381)
Bank	943,158
Beverly Hills	<u>(5,971)</u>
Total	\$ 885,806

On December 28, 1989, Bancorp and its subsidiaries filed an amended corporation franchise tax return, form 100X, for income year 1988, increasing deductions by \$282,169 and requesting a refund of \$123,723. On November 8, 1990, a representative for Bancorp wrote respondent encouraging a quick resolution of the examination of its claim. This correspondence also noted that the Superintendent of Banks seized Bank on August 10, 1990. On May 9, 1991, a representative from the Federal Deposit Insurance Corporation (FDIC), as receiver for Bank, wrote to respondent, requesting the refund for income year 1988. This correspondence stated that the refund was generated 100 percent by Bank, and should be paid to Bank. Later, in May 1991, Bank, under the direction of the FDIC, filed an amended corporation franchise tax return, form 100X, for income year 1988, increasing deductions by \$1,272,635, and requesting a refund of \$123,723.

On February 2, 1993, respondent considered the conflicting claims for refund and denied each claim, stating that if there was an agreement between the two corporations as to the disposition of the

³ Respondent indicates that after completing an audit of income years ended 1986 and 1987, the correct amount of the refund claim should be \$123,102 for the appeal year.

refund, such refund would be paid. However, respondent has not received such an agreement and has, therefore, left the matter for this board to resolve.

Bank argues that it is entitled to the refund because the income giving rise to the taxes was generated entirely by Bank, the funds used to pay the tax came from the tax accrual accounts of Bank, and the deductions giving rise to the refund resulted from the operations of Bank. Additionally, Bank contends that under Title 12 of the United States Code, sections 1821(d)(2) and 1823(e), upon appointment of the receiver, FDIC, Bancorp's rights and interests in, and power and authority over, Bank and its assets were ipso facto terminated, and all assets of Bank became, by operation of federal law, the property of the receiver.

Bancorp argues that the refund is not an asset of Bank and therefore, sections 1821 and 1823 do not apply. Bancorp contends that the combined unitary return shows that Bancorp, not Bank, actually made the payment of tax for 1988, and that if respondent were to refund the tax to Bank it would deprive Bancorp of its property without due process of law.

Respondent originally provided five alternative courses of action to resolve the matter, which are as follows: pay the refund to Bancorp; pay the refund to Bank; pay the refund to Bancorp as agent for Bank; divide the refund between Bancorp and Bank; or pay the refund to Bancorp and Bank. Subsequent to the filing of this appeal by appellants, respondent has formulated a policy for this type of matter in the future which is reflected in Franchise Tax Board's Legal Ruling 95-2, dated July 7, 1995. Respondent now takes the position that where a group of corporations have filed a combined state tax report with a Schedule R-7, and where an adversary relationship now exists between such corporations, refunds will be credited on the basis of intrastate apportionment of the original self-assessed tax of the group. Using this approach, respondent has determined that in the matter presently before this board, the following apportionment of the refund would result:

Bancorp	\$ 49
Bank	123,053
Beverly Hills	<u>none</u>
Total	\$123,102

Respondent maintains that the above method of apportionment is consistent with the unitary method of accounting used to determine the correct tax in California, the statutory obligation of each taxpayer to pay tax attributable to its portion of the California source income of the group, and the facts of this appeal.

We approve of and will follow Franchise Tax Board's Legal Ruling 95-2. Therefore, we find that First Pacific Bank is entitled to a refund in the amount of \$123,053, and we find that First Pacific Bancorp, Inc., is entitled to a refund in the amount of \$49.

ORDER

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 19333 of the Revenue and Taxation Code, that the Franchise Tax Board refund the amount of \$123,053 to First Pacific Bank and refund the amount of \$49 to First Pacific Bancorp, Inc.

Done at Culver City, California, this 9th day of November, 1995, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Sherman, and Mr. Halverson present.

Johan Klehs _____, Chairman

_____, Member

Dean Andal _____, Member

Brad Sherman _____, Member

Rex Halverson* _____, Member

*For Kathleen Connell, per Government Code section 7.9.