

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
SOLVAY USA, INC.) Account Number SR S OHB 97-498958
Petitioner) Case ID 812187
Cranbury, New Jersey)

Type of Business: Chemicals retailer
Audit period: 07/01/09 – 09/30/12

<u>Item</u>	<u>Disputed Amount</u>
Disallowed claimed "self-help" deduction ¹	\$3,922,441
Tax as determined	\$506,183.34
Less concurred	<u>- 123,745.47</u>
Balance, protested	<u>\$382,437.87</u>
Proposed tax redetermination	\$506,183.34
Interest through 08/31/16	<u>203,168.63</u>
Total tax and interest	<u>\$709,351.97</u>
Monthly interest beginning 09/01/16	<u>\$ 2,530.92</u>

This matter was scheduled for Board hearing in December 2015, but was postponed at petitioner's request to allow additional time to prepare its opening brief. This matter was rescheduled for Board hearing in January 2016, but it was deferred at the request of the Appeals Division to issue a Supplement Decision and Recommendation (SD&R).

UNRESOLVED ISSUE

Issue: Whether petitioner was entitled to claim a deduction on its third quarter 2009 return for amounts overpaid for the first and second quarters of 2009. We find that petitioner was not and that the Department properly disallowed the claimed deduction of \$3,922,441.

¹ A "self-help" deduction is where a taxpayer credits or recovers overpayments of tax from prior periods on subsequent sales and use tax returns. (See *Philips and Ober Electric Co. v. State Board of Equalization* (1991) 231 Cal.App.3d 723, 728.)

1 Petitioner is a retailer of chemicals, and it has held a California seller's permit since April 1999.
2 During the first quarter 2009 (1Q09) and 2Q09, before the audit under consideration here, petitioner
3 collected sales tax reimbursement totaling \$382,437.87 from its customer (Chevron Corporation) on
4 sales of \$3,922,441, and reported tax of that amount on its returns. The sales involved petitioner's
5 regeneration of sulfuric acid for Chevron in Chevron's tanks. Subsequently, petitioner discovered that
6 the sales totaling \$3,922,441 were not subject to tax. Accordingly, when petitioner filed its sales and
7 use tax return for 3Q09, it reduced the amount of tax due by \$382,437.87 and increased its claimed
8 deductions accordingly. Based on its review of the transactions, the Business Tax and Fee Department
9 (Department), formerly the Sales and Use Tax Department, concluded that petitioner had overpaid its
10 tax liability for 1Q09 and 2Q09 by \$382,437.87. However, the Department disallowed the claimed
11 deduction because such "self-help deductions" do not follow the claim for refund process established
12 by statute. In contrast, the Department accepted adjustments related to petitioner's 3Q09 return for tax
13 reimbursement that petitioner collected in error in July 2009 and refunded to its customer in August
14 2009, since the error in collecting tax reimbursement and the correction of the error occurred in the
15 same quarter.

16 Petitioner contends it is entitled to a credit or refund for the overpayments made for 1Q09 and
17 2Q09 because its collection of tax reimbursement from Chevron and remittance of the tax to the Board
18 was erroneous. According to petitioner, it recognized the overpayment in August 2009, and it took
19 immediate action to resolve the matter by attempting to take a credit on its 3Q09 return. Petitioner
20 argues that, if the credit is not allowed, the result will be tantamount to the assessment of a
21 "massive...self-help credit penalty" against petitioner. Petitioner states further that the State did not
22 suffer any tax loss as a result of petitioner taking the disputed self-help deduction, and that there will
23 be an unjust windfall to the State if the liability is upheld. Further, petitioner believes that the
24 deductions on the 3Q09 return for overpayments for 1Q09 and 2Q09 should be allowed, since the
25 adjustments for the transactions for which it collected sales tax reimbursement in error in July 2009
26 were allowed, and the earlier overpayments were made within the six months prior to July 2009.
27 Petitioner asserts that the Department's distinction between the overpayments, based on the periods for
28 which the tax was paid, simply penalizes petitioner based on "artificial time boundaries." Moreover,

1 petitioner contends it should be granted a refund based on the doctrine of equitable recoupment, for
2 which it identifies the following three requirements: (1) recovery of the tax for which recoupment is
3 being sought is otherwise barred by an expired statute of limitations; (2) the time-barred overpayment
4 arose out of the same transaction, item, or taxable event as the deficiency; and (3) the transaction at
5 issue has been inconsistently subjected to tax twice.

6 Petitioner made the overpayments at issue with its regularly filed tax returns for 1Q09 and
7 2Q09. In order to obtain a refund of those overpayments, petitioner was required to file a timely claim
8 for refund in writing, stating the specific grounds upon which the claim is based. (Rev. & Tax. Code, §
9 6904). In order to be timely, a claim for refund must be filed within six months from the date of
10 payment or within three years from the last day of the month following the quarter for which the tax
11 was overpaid. (Rev. & Tax. Code, § 6902, subd. (a)(1).) Thus, the latest date to file a timely claim for
12 refund was April 30, 2012, for 1Q09 or July 31, 2012, for 2Q09. Petitioner did not file a claim for
13 refund for the overpayments made in those quarters, but instead, simply adjusted the amount of tax
14 paid for the 3Q09 return.

15 The statutes explicitly describe the specific procedure for requesting a refund of overpaid tax.
16 Petitioner’s “self-help” remedy of silently netting the overpayments of tax for 1Q09 and 2Q09 from
17 the amount of tax due for 3Q09 does not meet the statutory requirements. Further, since petitioner
18 made the adjustments on the 3Q09 return without stating any basis for the credit it claimed, the
19 Department was not notified of the claimed credit and thus did not review the basis for the credits
20 taken, as it would have if a claim for refund had been filed, as required by law. Thus, the deduction
21 claimed on the 3Q09 return cannot be considered a timely claim for refund, and the claim for refund
22 petitioner did file (on May 9, 2014, with its petition for redetermination) was filed long after the
23 expiration of the statute of limitations. Further, petitioner’s failure to file a timely claim for refund
24 constitutes a waiver of petitioner’s demand against the State on account of the overpayment. (Rev. &
25 Tax. Code, § 6905.) Simply stated, there is no statute permitting petitioner to grant itself a refund, as
26 petitioner attempted to do by taking the “self-help” deduction. (See *Philips and Ober Electric Co. v.*
27 *State Board of Equalization* (1991) 231 Cal.App.3d 723.)

1 With respect to petitioner's assertion that section 6483 allows the Board, in making a
2 determination, to offset overpayments for a period or periods against underpayments for another period
3 or periods, section 6483 is subject to the limitations set forth in section 6901, et. seq. (*Independent*
4 *Iron Works, supra*, 167 Cal.App.2d at 324.) Accordingly, such offset is not available because
5 petitioner did not file a timely claim for refund for the overpayments.

6 We also note that the Board allows time-barred claims for refund to be offset against timely
7 deficiency determinations, and it allows time-barred deficiency determinations to be offset against
8 timely claims for refund, under the authority of Revenue and Taxation Code section 7081 (providing in
9 relevant part that the purpose of any tax proceeding between the Board and a taxpayer is the
10 determination of the taxpayer's correct amount of tax liability) and *Sprint Communications Company v.*
11 *State Board of Equalization* (1995) 40 Cal.App.4th 1254 (*Sprint*). In *Sprint*, a taxpayer filed a timely
12 claim for refund, and the court allowed the Board to offset an otherwise time-barred deficiency *arising*
13 *from the same period* that was the subject of the claim. (*Sprint*, 40 Cal.App.4th at 1260.) The court
14 reasoned that "[A] refund case throws open the taxpayer's entire tax liability for the period in question
15 [citation], and the Board may raise issues unrelated to the basis or theory on which the taxpayer is
16 seeking a refund in order to defeat the claim." (*Id.*) The Board has long applied these principles
17 equally in favor of taxpayers, by allowing time-barred claims for refund to be offset against timely
18 deficiency determinations for the same period, using *Sprint* as indirect authority.

19 In our Supplemental D&R, we noted the relevance of *Sprint* in that claimant's time-barred self-
20 help deductions could be offset against a timely deficiency determination for the same period;
21 however, claimant's time-barred self-help deductions arise from a period *prior* to the timely deficiency
22 determination. Therefore, *Sprint* is inapplicable and claimant's time-barred self-help deductions
23 cannot be offset against the deficiency determination.

24 As for petitioner's arguments regarding equitable recoupment, there appears to be no dispute
25 that the first two requirements identified by petitioner have been met, that (1) recovery of the tax for
26 which recoupment is being sought is otherwise barred by an expired statute of limitations; and (2) the
27 time-barred overpayment arose out of the same transaction, item, or taxable event as the deficiency.
28 However, the doctrine of equitable recoupment also requires that the erroneously paid taxes for which

1 recoupment is sought arise from a single transaction that has been subjected to two taxes on
2 inconsistent legal theories. (*Independent Iron Works, supra*, 167 Cal.App.2d at 325.) Here, petitioner
3 has been subjected to the tax only once since the Department’s disallowance in the audit of \$3,922,441
4 of the claimed 3Q09 deduction only seeks to right petitioner’s improper taking of the “self-help”
5 deduction for the 1Q09 and 2Q09 overpayments on its 3Q09 return, effectively staying petitioner’s
6 payment of tax with its 1Q09 and 2Q09 returns. Since petitioner was not subject to taxation twice on a
7 single transaction, the doctrine of equitable recoupment is inapplicable here.

8 **OTHER MATTERS**

9 None.

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11 Summary prepared by Lisa Burke, Business Taxes Specialist III
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