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STATE OF CALIFORNIA

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Executive Director

January 12, 1996

Re: Request for an Opinion - Claim for Refund of Overpayment of Property Taxes - Possessory Interest Account

Dear

This is in response to your letter of December 21, 1995 to Mr. E. L. Sorensen, Jr. in which you request our opinion whether your client, is entitled to a refund of overpaid taxes assessed for the 1991-1992 fiscal year under the facts described in your letter and materials enclosed therewith and set forth below.

FACTS

For the fiscal year 1991-1992, the Assessor (Assessor) assessed possessory interest at a taxable value of $347,986. This figure reflected a base year value established as a result of a change in ownership which the assessor believed had occurred in 1984 which was factored for inflation to the 1991-1992 lien date. On the basis of this assessment, property taxes were levied in the sum of $3,583.90 for the 1991-1992 fiscal year which taxes, according to your letter, were paid by your client, on August 28, 1991. Your client's claim for refund apparently was filed within four years of that date.

The Assessor made similar assessments of possessory interest and paid the property taxes levied on such assessments for fiscal years 1992-1993, 1993-1994, 1994-1995, and 1995-1996.

In July 1995, the Assessor determined that, in fact, no change in ownership of possessory interest had occurred in 1984. The Assessor then corrected the erroneous base year

value established in 1984 in accordance with the provisions of Revenue and Taxation Code[1] section 51.5, subdivision (a) by restoring the 1975 base year of $75,080. Your letter shows that this base year value factored to the 1991-1992 lien date results in a taxable value of $102,056 and that the difference in taxable value between what the possessory interest was assessed for ($347,986) and what it should have been assessed for ($102,056) is $245,930 for the 1991-1992 lien date.

Refunds have been granted to your client for property tax overpayments for fiscal years 1992-1993 through 1995-1996. The Assessor, however has recommended to the Board of Supervisors that your client's claim for refund for fiscal year 1991-1992 be denied. From the materials presented and from my discussions with personnel of the Assessor's office, it appears that the Assessor is relying on section 4831 which permits roll corrections for errors (excluding errors involving the exercise of value judgments) if such corrections are made within four years after the making of the assessment being corrected.

LAW AND ANALYSIS

Section 51.5 provides in pertinent part:

> "(a) Notwithstanding any other provision of the law, any error or omission in the determination of a base year value pursuant to paragraph (2) of subdivision (a) of Section 110.1, including the failure to establish that base year value, which does not involve the exercise of an assessor's judgment as to value, shall be corrected in any assessment year in which the error or omission is discovered.
>
> "(b) An error or an omission described in subdivision (a) which involves the exercise of an assessor's judgment as to value may be corrected only if it is placed on the current roll or roll being prepared, or is otherwise corrected, within four years after July 1 of the assessment year for which the base year value was first established.

[1] All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

"* * *

"(d) If a correction authorized by subdivision (a) or (b) reduces the base year value, appropriate cancellations or refunds of tax shall be granted in accordance with this division. If the correction increases the base year value, appropriate escape assessments shall be imposed in accordance with this division. (Emphasis added.)

"* * *"

Section 5096 provides, in pertinent part, that "[a]ny taxes paid before or after delinquency shall be refunded if they were:

"* * *

"(b) Erroneously or illegally collected.

"(c) Illegally assessed or levied.

"* * *"

Section 5097, subdivision (a) provides:

"(a) No order for a refund under this article shall be made, except on a claim:

(1) Verified by the person who paid the tax, his or her guardian, executor, or administrator.

(2) Filed within four years after making of the payment sought to be refunded or within one year after the mailing of notice as prescribed in Section 2635, or the period agreed to as provided in Section 532.1, whichever is later."

In this case, the Assessor properly corrected the incorrect base year value in 1991 pursuant to section 51.5, subdivision (a)

when he discovered that no change in ownership had occurred in 1984 as he had previously believed.

Pursuant to section 51.5, subdivision (d), "appropriate...refunds of tax" were then required to be granted" in accordance with this division". The phrase "this division" simply means that portion of the Revenue and Taxation Code which addresses property taxation, i.e., from section 50 through section 5911.

In our view, the phrase "appropriate...refunds of tax" means that under the terms of the applicable refund provisions, the facts of a given case are such that a refund is required to be paid.

In this case, taxes were assessed, levied and collected based on an assessed value that was excessive as a matter of law, i.e., based on a reappraised value resulting from a change in ownership which the assessor thought at the time had occurred but later discovered had not occurred. As a result, such taxes were "[e]rroneously or illegally collected..." and "[i]llegally assessed or levied" pursuant to section 5096, subdivisions (b) and (c). In either of such events, section 5096 requires that such taxes "shall be refunded" subject, of course to the procedural requirements of section 5097, subdivision (a)(1) and (2) set forth above.

The refund claim filed here appears to have been filed on August 24, 1995 and states, under penalty of perjury, that the taxes for the 1991-1992 fiscal year were paid by claimant, on August 28, 1991. Thus, subdivision (a)(2) of section 5097, appears to be satisfied. Subdivision (a)(1) of section 5097, however, does not. Subdivision (a)(1) requires the claim to be verified by the person who paid the tax, his or her guardian, executor, or administrator. In this case, the "person" who paid the tax was the claimant (See Rev. & Tax. Code §19 which includes "corporation" within the meaning of the word "person".) The refund claim was not verified by claimant, however, but instead by you as agent for claimant. Thus, the refund claim in this matter was not verified by the person who paid the tax or his or her guardian, executor, or administrator and accordingly, does not comply with the requirements of section 5097, subdivision (a)(1). While a different result could occur under section 5097, subdivision (b), that provision is not applicable because it involves an application for reduction of assessment and no such application was filed in this case.

Although you are aware, from our recent telephone conversation, that it is our opinion that the refund claim does not comply with section 5097, subdivision (a)(1), you have nevertheless requested our opinion with respect to the merits of your claim, assuming for the purpose of such opinion, that the refund claim had been verified by and thus complied with section 5097, subdivision (a)(1).

Based on that assumption and the foregoing discussion as well as the reasons discussed below, we believe that the refund of the overpaid taxes for the 1991-1992 fiscal year would be "appropriate" for purposes of section 51.5 and that section 4831 does not prohibit such refund.

Neither section 51.5, 5096 nor 5097 expressly or by implication require a roll correction as a condition to obtaining a refund nor is section 4831 even mentioned. Moreover, section 4831 itself does not make any reference to refunds or a refund procedure let alone provide that roll correction is required for a refund.

Section 4831, subdivision (a) provides in pertinent part:

> "Any error resulting in incorrect entries on the roll <u>may</u> be corrected under this article. The correction <u>may</u> be made at any time after the roll is delivered to the auditor but shall be made within four years after making of the assessment which is being corrected. (Emphasis added.) This section shall not apply to the following:
>
> (1) Errors involving the exercise of value judgment.
>
> (2) ...."

Under section 16, the word "shall" is mandatory and the word "may" is permissive. Thus, section 4831, in saying that an error "...may be corrected..." or that a "...correction may be made..." does not <u>require</u> the assessor to make roll corrections. It only requires that if a correction is made it "...shall be made within four years after the making of the assessment which is being corrected."

As indicated above, section 51.5, subdivision (d) states that "...appropriate...refunds of tax shall be granted...." If property taxes were erroneously or illegally collected or illegally assessed or levied, section 5096 provides that such "...taxes...shall be refunded...." Both provisions are mandatory because of the use of the word "shall."

Therefore, if it were necessary that a roll correction be made under section 4831 in order to make a refund, not only should sections 51.5 and 5096 make reference to section 4831 and the necessity of a roll correction thereunder, but 4831 would have to be mandatory on the assessor rather than permissive. Otherwise, the assessor could prevent refunds from occurring simply by choosing not to make roll corrections thus nullifying the provisions of section 51.5 and 5096 relating to refunds. Moreover, section 51.5, subdivision (b) permits correction of a base year value in cases involving the "...exercise of an assessor's judgment as to value..." and subdivision (d) of section 51.5 provides for "...appropriate...refunds..." in such a case. However, if roll correction under section 4831 is required before a refund can be granted in such a case, such a refund (as contemplated in sections (b) and (d) of section 51.5) could not legally be made because, by its terms, section 4831 does not permit roll correction of "[e]rrors involving the exercise of value judgments." (§4831, subd. (a)(1).) Such a result could not have been intended by the Legislature in enacting sections 51.5 and 5096.

For the foregoing reasons and assuming compliance with section 5097, subdivision (a)(1), we must conclude that the refund sought is required under sections 51.5 and 5096 and that the absence of a roll correction for the 1991-1992 assessment does not prohibit the refund sought in this case.

In summary, our conclusions in this matter are:

1. That the refund claim in this matter does not comply with the requirements of section 5097, subdivision (a)(1) because it was not verified by the person who paid the tax.

2. That if the refund claim had been verified by the person paying the tax in this matter, the claimant would be entitled to the refund sought.

Our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor or board of supervisors of any county.

Very truly yours,

Eric F. Eisenlauer
Senior Tax Counsel

EFE:ba
cc:

Mr. James Speed - MIC:63
Mr. Dick Johnson - MIC:64
Ms. Jennifer Willis - MIC:70

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