

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals. **of**

The Florsheim Shoe Store Company of
Hollywood, California
The Florsheim Shoe Store Company of
Long Beach, California
The Florsheim Shoe Store Company
(Los Angeles, California)
The Florsheim Shoe Store Company of
Oakland, California, Ltd.
The Florsheim Shoe Store Company of
Sacramento, California, Ltd.
The Florsheim Shoe Store Company of
San Bernardino, California, Ltd.
The Florsheim Shoe Store Company of
San Francisco, California, Ltd.

Appearances:

For Appellants: Chickering & Gregory, Attorneys
at Law

For Respondent: Burl D. Läck, Chief Counsel,;
Hebard P. Smith, Associate Tax
Counsel

O P I N I O N

These appeals are made pursuant to Section 26080.1 of the Revenue and Taxation Code from the action of the Franchise Tax Board in disallowing interest on overpayments of franchise tax made by the Appellants for each of the income years 1943 to 1947, inclusive.

Each of the Appellants is a California subsidiary of the Florsheim Shoe Company, an Illinois corporation. Each is engaged in the sale at retail in this State of shoes manufactured by the parent corporation, the latter not being engaged in business here. For the years 1937 to 1947, inclusive,

each Appellant filed returns and computed its tax as a separate corporation. The Franchise Tax Commissioner determined in 1948, however, that Appellants, their parent and other subsidiaries were carrying on a unitary business and that the tax of each Appellant should be computed on the basis of the combined income of the group. This resulted in the assertion of deficiencies for the years 1937 to 1941, inclusive, and a finding that overpayments were made for the years 1943 to 1947, inclusive. Interest was added to the deficiencies from the date the tax for each year was due to January 24, 1950, the date the deficiencies were extinguished by a transfer of the credit arising from the overpayments, but was disallowed on the overpayments. The Respondent has since conceded, however, that interest is allowable on the overpayments from and after October 1, 1949.

Section 27(c) of the Bank and Corporation Franchise Tax Act, as amended in 1933, allowed interest on an overpayment of tax at the rate of six per cent per annum "if the overpayment was not made because of an error or mistake on the part of the taxpayer." In 1947 that Section was amended to allow such interest "if the overpayment was made because of an error or mistake on the part of the Commissioner." It was again amended in 1949 so as to allow interest on "any overpayment in respect of any tax" with limitations not material here.

We are entirely in accord with the views expressed by the Attorney General as respects the scope of the 1947 and 1949 amendments. In his Opinion No. 50-45 of March 23, 1950 (15 Ops. Cal. Atty. Gen. 144), it was held that the 1947 amendment governed the payment of interest subsequent to its effective date, July 10, 1947, even though the overpayments of taxes were made at a prior time. Similarly, in Opinion No. 51-42 of April 5, 1951 (17 Ops. Cal. Atty. Gen. 138), it was concluded that the 1949 amendment controlled the payment of interest subsequent to its effective date, October 1, 1949, as respects overpayments made prior thereto. By way of summary, the Attorney General stated in this Opinion as follows:

"The application of the various amendments to section 27(c) may be illustrated. It is assumed that a taxpayer overpays its tax on January 1, 1946, but does not receive a refund of the overpayment until

"June 1, 1950. It is also assumed that the overpayment is not the result of an error or mistake on the part of the taxpayer or the taxing agency. The overpayment will bear interest from the date it was made, January 1, 1946, to and including July 9, 1947, the day prior to the effective date of the 1947 amendment. No interest will be payable for the period from July 10, 1947, to and including September 30, 1949, the day prior to the effective date of the 1949 amendment. Interest again will be payable on the overpayment subsequent to October 1, 1949, to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Franchise Tax Board."

It is to be observed that the Attorney General recognized that an overpayment might not be the result of an error or mistake on the part of either the taxpayer or the taxing agency. Obviously the Legislature proceeded upon that theory for it furnishes the only possible basis for the 1947 amendment.

The overpayments in question were the result of the redetermination by the Franchise Tax Commissioner in 1948 of the income of Appellants for the years 1937 to 1947, inclusive, in accordance with the principles upheld by the California Supreme Court in its decision of July 15, 1947, in Edison California Stores, Inc. v. McColgan, 30 Cal, 2d 472. For each of the years prior to that decision each Appellant had filed a return disclosing its own operations. It was only after his success in the Edison California Stores case that the Commissioner requested the filing by Appellants of a combined report and it was on the basis of that report that the deficiencies and overpayments were determined. In the light of these facts and the nature of the controversy settled in that case, it must be concluded, in our opinion, that the overpayments of Appellants for the years 1943 to 1947, inclusive, were not due to an error or mistake on their part.

On the other hand, we see no basis for concluding that those overpayments were made because of an error or mistake on the part of the Commissioner. The payments were voluntarily made by the Appellants on the basis of their own construction of the law and without ^{any} specific demand by the Commissioner or pursuant to any regulation or requirement prescribed

by him. The mere acceptance by him of the returns and payments of the Appellants under these circumstances can hardly be characterized as an error or mistake on his part.

It is further argued by the Appellants What, in fairness and in reason, no interest should accrue or be assessed against the taxpayer or any deficiency where, and to the extent that, an overpayment has been made by the taxpayer and is held by Respondent." It might well be a sufficient answer to this contention to say that it relates to the amount of interest to be charged to Appellants with respect to their underpayments rather than to the amount of interest to be allowed to them on their overpayments it being only the ~~latter~~ which is the subject of this appeal. It does no harm to point out, however, that the taxing act sets forth specifically the manner in which interest is to be charged or allowed and the interest computations must be made strictly in accordance with its provisions. That the act did not embody the general policy advanced by the Appellants is evidenced by former Section 24(d)(1) which made special provision for a particular situation, viz., where "the correction of an erroneous inclusion or deduction of an item in the computation of income of any year results in an overpayment for one year and a deficiency for another year..." The redetermination of Appellant's income on the broad basis of the Edison California Stores decision is obviously something more than the correction of an erroneous inclusion or deduction of an item in the computation of income and, accordingly, this Section is of no avail to Appellants.

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 26080.1 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in disallowing interest on ~~overpayments~~ of franchise tax made by The Florsheim Shoe Store Company of Hollywood; California; ~~The~~ Florsheim Shoe Store Company of Long Beach, California; The Florsheim Shoe Store Company (Los Angeles, California); The Florsheim Shoe Store Company of

