



BEFORE **THE** STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
HOLGATE ENTERPRISES, INC. }

For Appellant: Donna M. Garafalo

For Respondent: Terry Collins
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Holgate Enterprises, Inc., for refund of franchise tax in the amount of **\$7,235** for the income year ended November 30, 1980.

Appeal of Holgate Enterprises, Inc.

Appellant is a California corporation principally engaged in real estate sales.' All of its shares are owned by **Stephen** Holgate, its president. On February **15**, 1980, appellant executed a request for a **six-month** extension for filing its franchise tax return for its income. **year** ended November **30, 1979**. The extension was granted, **and** so the time for filing that return was extended until August **15**, 1980. However, appellant filed its franchise tax return for that income year on April 12, 1980, approximately four months before the extended permissible filing due date. The return information was based upon the **accrual** method of **accounting** and reflected **a** net loss for the year of \$134,796. The return claimed a deduction of \$48,484 for a contribution to a retirement plan.

The minutes **of the** regular meeting of appellant's board of directors for October 31, 1979, noted that the corporation had been operating at a net loss for that fiscal year, that no dividends or bonuses could be paid for the fiscal **year**, and that full compensation to which the president was entitled in that fiscal year had not been paid but might possibly be paid from operations in the next fiscal year. The minutes contained the following entry regarding the pension contribution:

The **Chairman** noted that the contribution to the corporate **retirement** plan will be due two and one-half (2 **1/2**) months after the end of this fiscal year. He further stated that determination of the amount of **such** contribution would be made at a later date by the plan administrator, **ROBERT PIGOTT**, of the **Hartman** Group. After discussion and upon motion duly made, seconded and unanimously carried; it was

RESOLVED that upon determination of the amount of the annual contribution to the corporate retirement plan, said contribution shall be made within two-and one-half (2 **1/2**) months after the end of this fiscal year.

(Resp. Br., Ex. E at 4.)

On August **15**, 1980, appellant made a \$48,484 contribution to the pension plan.

The minutes of the regular meeting of appellant's board of directors **for October** 29, 1980, noted that a net profit of \$20,000 was expected for **that** fiscal

Appeal of Holgate Enterprises, Inc.

year, that the cash flow problems required that no dividends or bonuses could be paid, and that the full compensation to which the president was entitled had not been paid to him in that fiscal year and that compensation **would** be paid to him either as a corporate promissory note **or** as a cash payment. The minutes also contained the following entry regarding the pension contribution:

Discussion ensued concerning the amount to be contributed to the corporate retirement plan. It was estimated from the foregoing financial report and discussion of officers compensation, that approximately Fifty Thousand Dollars **(\$50,000.00)** will be available for such contribution with the exact amount to be determined by pension actuary ROBERT **PIGOTT**. After discussion and upon motion duly made, seconded and unanimously carried; it was

RESOLVED, that the contribution to the aforementioned retirement plan of this corporation shall be made within the time required by law in the amount of approximately Fifty Thousand Dollars **(\$50,000.00)** with the exact amount to be determined at a later date by pension actuary ROBERT **PIGOTT**.

(Resp. Br., Ex. J? at 3-4.)

On August 9, 1982, appellant filed a claim for refund for its income year ended November 30, 1980, on the basis that the \$48,484 contribution was properly deductible in that *year* and would partially offset the taxable income of \$130,888, which the appellant had actually realized in that income year. Respondent contends that the contribution **was** properly deducted on appellant's return for its income year ended November 30, 1979, and denied appellant's claim for its income year ended November 30, 1980. This appeal followed.

In general, a corporation's contributions to a pension trust are properly deductible in the year in which the contributions are paid. (Rev. 6 Tax. Code, **§ 24601**.) **But section 24607** of the Revenue and Taxation Code sets forth an exception to that general rule which states:

For purposes of Sections 24601, 24602, and 24603, a taxpayer shall be deemed to have made a payment on the last day of the **preceeding**

Appeal of Holgate Enterprises, Inc.

income year if the payment is on account of such income year and is made not later than the time **prescribed by** law for filing the return for such income year (including extensions thereof).

Part of the regulations then applicable explained:

Deductions under Sections 24601 to 24608, inclusive, are generally allowable only for the **year** in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make its returns on the accrual method of accounting. Exceptions are made in the case of overpayments as provided in Sections 24601, **24603, 24608**, and, as provided by Section 24607, in the case of payments made by **a taxpayer on the accrual** method of accounting not later than the time prescribed by law for filing the return for the income year of accrual (including extensions thereof). This latter provision is intended to permit a **taxpayer** on the accrual method to deduct such accrued contribution or compensation in the year of accrual, provided payment is actually made not later than the **time** prescribed by law for filing the return for the income year of accrual (including extensions thereof), but this provision is not applicable unless, during the income year on account of which the contribution is made, the taxpayer incurs a liability to make the contribution, the amount of which is accruable under Sections 24681 to 24684, inclusive, for such income year. See Sections 24681 to 24684, inclusive, and the regulations thereunder.

(Former Cal. Admin. Code, tit. **18, reg. 24601-24611(a)(3)**, repealed filed November 30, 1982 (Register 82, No. 49); cf. Treas. Reg. 1.404(a)-1(c), T.D. 6203, 1956-2 Cum. Bull. 219; amended, T.D. 6676, **1963-2** Cum. Bull. 41.)

Thus, while under the general rule of section **24601**, appellant's contribution paid on August 15, 1980, would have been deductible in appellant's income year ended November 30, 1980, the conditions set forth in **section** 24607 are met, so the appellant's contribution payment of August 15, 1980, is properly deductible only in appellant's income year ended November 30, 1979. In

Appeal of Holgate Enterprises, Inc.

this case we do have a taxpayer on the accrual method of accounting, and a payment made on August 15, 1980, by that taxpayer, which was not later than the time prescribed by law for filing the return for the income year of accrual (including extensions thereof). Neither party directly addresses the requirement of former regulation 24601-24611(a)(3) to the effect that section 24607 does not apply unless the taxpayer had incurred a liability to make the contribution in question. However, we do know that the **appellant's** board of directors discussed and voted the pension trust payment months before the actual payment, so in the lack of any contravailing evidence, we conclude that the payment made into the pension trust was a corporate duty and not a corporate whim.

Further indications that the pension plan payment of August 15, 1980, was for the income year ended November 30, 1979, are that the actuary treated it as such on the report of employee benefit plan, and that the appellant deducted the payment on its return for that income year.

Appellant argues that the payment could not be deducted against income for the income year ended November 30, 1979, because the payment was made on August 15, 1980, which was **after the** time its return for that year was filed on April 12, 1980. Appellant argues also that the payment on August 15, 1980, was made for the income year ended November 30, 1980, as contemplated by the appellant's board of directors.

But section 24607 requires only that the date of payment be made on or before the date the return for the preceding year was due. That section does not require that the payment be made both on or before the date the *return* for the preceding year was due and also on or before the date the return **for** that year was actually filed.

Since appellant's board of directors' meetings near the end of both its income years of 1979 and 1980 authorized pension payments of about \$50,000, the exact amounts to be determined by the actuary, we are not persuaded that the payment made on August 15, 1980, was the payment for income year 1980 and authorized by the board of directors on October 29, 1980. Rather, it appears to us that the payment of August 15, 1980, was the payment for income year 1979, which was authorized by the board of directors on October 31, 1979.

Appeal of Holgate Enterprises, Inc.

Accordingly, we must sustain **respondent's**
action in this matter.

