

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
Michael and Zorine V. Lewis)) No. 94R-0225
)
)

Representing the Parties:

For Appellants: Patrick E. McGinnis,
Attorney at Law

For Respondent: John W. Penfield,
Counsel

Counsel for Board of Equalization: Philip Dougherty,
Tax Counsel

OPINION

This appeal is made pursuant to section 19324, subdivision (a),^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Michael and Zorine V. Lewis for refund of personal income tax in the amount of \$11,999.79 for the year 1979.

^{1/} Unless otherwise specified, all section references in the body of this opinion are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The issue presented in this appeal is whether respondent's notice of proposed assessment was barred by the applicable statute of limitation.

The Internal Revenue Service (IRS) audited appellants' 1979, 1980, and 1981 federal income tax returns. On March 14, 1984, the IRS issued a statutory notice of deficiency that reflected its adjustments for those years. Appellants petitioned the United States Tax Court, challenging the IRS adjustments. Later, the appellants and the IRS settled the matter by agreeing to file a stipulated tax court decision stating that appellants had certain deficiencies for 1979 and 1981. The appellants signed the stipulation on July 23, 1987. The IRS signed the stipulation on July 30, 1987. The tax court signed the stipulated decision and entered it on August 24, 1987. Appellants failed to notify respondent of that decision, although the adjustments, as applied to their California returns, had the effect of increasing appellants' California tax liabilities for 1979 and 1981.

On November 1, 1991, respondent issued its notices of proposed assessment (NPA) for 1979 and 1981 based on information about the federal adjustments that respondent had received from the IRS. Appellants did not file a timely protest of the NPA. On June 23, 1992, respondent affirmed its proposed assessment. Appellants paid the deficiency and filed a timely claim for refund, alleging that the NPA was not timely. On October 26, 1993, respondent denied the claim. This appeal followed.

Appellants' position is that respondent's notice of proposed assessment was barred by the applicable statute of limitation (Rev. & Tax. Code, § 18586.2, since amended and renumbered § 19060, operative Jan. 1, 1994). Appellants argue that the applicable section starts the limitation period running when the federal change or correction is reported to or filed with the federal government, which in this case was the entry of the tax court's decision on August 24, 1987.

Respondent's position, set forth in its brief filed June 23, 1994, is that its notice was not barred by the statute of limitation, but that even if its notice had been barred, the appellants did not contest the NPA but paid it and filed a claim for claim for refund, and therefore to prevail here in their appeal of respondent's denial, appellants must demonstrate that their tax was overpaid. Respondent argues that appellants have offered no argument or proof that they have overpaid their California tax for the year at issue.

This board's opinion in the Appeal of Clifford L. and Linda Schaffer (94-SBE-013), decided December 14, 1994, held that the statute of limitation period under section 18586.2 started to run when the stipulated tax court decision was entered by that court. Under that rule, respondent's notice of proposed assessment in this case was issued after the period permitted by the applicable statute of limitation. Clearly, a protest of the proposed assessment of appellants, followed by a timely appeal of that proposed assessment to this board, would require us now to follow Schaffer and reverse respondent's affirmation of such a proposed assessment. But appellants did not timely protest that notice by respondent but paid the proposed assessment and are here on a claim for refund of tax, which they have not argued was not due.

Thus, the question presented is whether we can reverse respondent's denial of appellants' claim for refund simply upon proof that respondent's notice of proposed assessment, which preceded appellants' payment of the amount now claimed, was barred by the statute of limitation and

without further proof that the amount paid and then claimed as a refund also represented an overpayment of the tax due for the year at issue.

In approaching this issue, we note that the federal income tax law defines an overpayment to include that part of the amount of the payment of any internal revenue tax that is assessed or collected after the expiration of the applicable periods of limitation. (Cf. IRC § 6401(a); Rev. Rul. 74-580, 1974 C.B. 400) The California Sales and Use Tax Law likewise contemplates the refund of amounts erroneously or illegally determined or collected. (Cf. Rev. & Tax. Code, §§ 6932-6937; Marchica v. State Board of Equalization (1951) 107 Cal.App.2d 501 [237 P.2d 725].)

The administrative provisions (Rev. & Tax. Code, Div. 2, Part 10.2) of the California Personal Income Tax Law and the Bank and Corporation Tax Law presently authorize certain suits for refund after payment of the tax on the grounds that the tax computed and assessed is void in whole or in part. (Rev. & Tax. Code, §§ 19382, 19385, formerly §§ 19082, 19085.) The use of the term “void,” rather than overpaid, is an appropriate description of taxes assessed and paid as a consequence of a notice of proposed assessment of taxes otherwise due but which notice was issued after the period permitted by the applicable statutes of limitation. Thus, we construe that section as authorizing the refund of tax collected as a consequence of a barred assessment. Since appeal to this Board is intended to provide taxpayers with an interim, inexpensive, and procedurally simpler remedy than the pursuit of a direct action against the respondent in the Superior Court, this Board’s duty is to provide the relief otherwise afforded by judicial remedies. Thus, we find that respondent erred in denying appellants’ claim for refund.

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 action of the Franchise Tax Board in denying the claim of Michael and Zorine V. Lewis for refund of personal income tax in the amount of \$ 11,999.79 for the year 1979 be and the same is hereby reversed.

Done at Sacramento, California, this 10th day of October, 1996, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Dronenburg, Mr. Sherman and Mr. Halverson present.

Johan Klehs _____, Chairman

Dean F. Andal _____, Member

Ernest J. Dronenburg, Jr. _____, Member

Brad Sherman _____, Member

Rex Halverson* _____, Member

*For Kathleen Connell, per Government Code section 7.9.