

Annotate

(916) 445-5550

April 6, 1988

Mr. _____

Re: _____

Insurance Tax
Repeal to S.T.O.D

Dear Mr. _____:

This is in response to your letter _____ filed a petition for redetermination of insurance tax assessed for the period of 1980 through 1983. The hearing on petition is scheduled for _____. On December 18, 1987, an assessment identified as Billing No. _____ was issued to _____ for 1984 and 1985. In a letter dated _____, _____ asked that "this assessment ... be heard at the same time as the premium one and on the same grounds." In a letter dated _____, Senior Tax Auditor _____ notified _____ that his letter was not accepted as a petition for redetermination because it was not filed timely (the envelope in which it was enclosed was postmarked January 28, 1988, and it was received by the Board on February 1, 1988). You now ask us to reconsider this decision.

The statutory provision regarding finality of deficiency assessments is explicit:

"An insurer against whom a deficiency assessment is made under Section 12424 or 12425 may petition for redetermination of the deficiency assessment within 30 days after service upon the insurer of the notice thereof, by filing with the board a written petition setting forth the grounds of objection to the deficiency assessment and the correction sought. At the time the petition is filed with the board a copy of the petition shall be filed with the commissioner.

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"If a petition for redetermination is not filed within the period prescribed by this section, the deficiency assessment becomes final and due and payable at the expiration of that period." (Rev. & Tax. Code § 12428 (emphasis added).)

The notice of deficiency assessment, Billing No. _____ informed _____ that a penalty would be due if the assessment was not paid by _____, 30 days after service of the assessment on _____. (See Rev. & Tax. Code § 12632.) The notice further informed _____ that it would become final unless a petition for redetermination was filed prior to the date the penalty attaches (i.e., January 18, 1988). The law and the notice are clear on this issue. The amounts assessed, plus penalty and interest, are due and payable. There is no statutory authority for the Board to accept a petition for redetermination when it is not filed timely.

You argue that it was reasonable for _____ to conclude that all assessments would be incorporated into the original petition for redetermination. There is absolutely no statutory authority for this conclusion. Furthermore, the notice of deficiency assessment was explicit in this regard, and it would have been entirely unreasonable for _____ to have made the conclusion you assert to have been reasonable.

You cite Bendix Corp. v. City of Los Angeles (1984) 150 C.A.3d 921 in support of your argument. The court in Bendix allowed plaintiff to treat an amended complaint for refund of taxes as relating back to the date of the filing of its original complaint under the specific facts of that case. Those facts are not present here. Also, had the relation back doctrine not been applied in Bendix, the plaintiff would apparently have been unable to recover taxes paid which it was clearly entitled to receive under the specific facts involved. And, as you so aptly note, the court applied equitable principles. The branch of government having the power to grant such equitable relief is the judiciary. (See City of Long Beach v. Mansell (1970) 3 C. 3d 462, 496-97.) As an executive agency, the Board lacks this power. (Cal. Const. Art. III, § 3; Ferdig v. State Personnel Board (1969) 71 C. 2d 96, 103-104.)

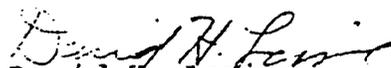
_____ is not even foreclosed from pursuing administrative relief, let alone judicial relief. At this time, _____ must pay the amount due under Billing No. 16117. It may then file a claim for refund. (Rev. & Tax. Code § 12977 et seq.) If that claim is denied, it may then seek judicial relief. (Rev. & Tax. Code § 13101 et seq.)

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If the Poal grants [redacted] petition for redetermination which is scheduled for hearing on [redacted] and if the facts involved in Billing No. [redacted] are identical, it is highly probable that Harbor's claim for refund on Billing No. [redacted] would be granted also (assuming, of course, that the tax is paid and claim properly filed). [redacted] would also recover interest on any amounts refunded, compounded daily from the due date of the tax for the year for which the overpayment would have been made. (Rev. & Tax. Code § 12983.)

As noted in the notice of deficiency assessment and in Mr. [redacted]'s letter, [redacted] incurred a penalty by virtue of its failure to pay the assessment when due. If [redacted] believes that its failure was due to reasonable cause and to circumstances beyond its control, and occurred despite the exercise of ordinary care and in the absence of willful neglect, [redacted] should follow the procedure set forth in Revenue and Taxation Code section 12636.

Sincerely,


David H. Levine
Tax Counsel

DHL:jb

cc: Mr.