

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19024279  
CORNERSTONE COMPOUNDING )  
PHARMACY, INC. )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellant: Gevorg Achabahian

For Respondent: Bradley Kragel, Tax Counsel IV

For Office of Tax Appeals: Oliver Pfof, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Cornerstone Compounding Pharmacy, Inc. (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$7,130, plus applicable interest, for the tax year ending June 30, 2015.

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant’s revival retroactively validated the filing of its claim for refund, which was made while appellant’s corporate status was suspended.<sup>1</sup>

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<sup>1</sup> FTB concedes that it would allow a refund if appellant’s claim for refund were valid. Therefore, if we determine that the claim for refund is valid, we will hold that appellant is entitled to a refund.

### FACTUAL FINDINGS

1. On August 1, 2017, FTB suspended appellant, a California corporation.<sup>2</sup>
2. On September 7, 2017, appellant filed a 2014 California tax return (Form 100) for the tax year ending June 30, 2015.<sup>3</sup>
3. On November 7, 2018, appellant filed a 2014 amended tax return (Form 100X), which claimed a refund of \$7,130.<sup>4</sup>
4. On December 6, 2018, appellant revived with the issuance by FTB of a Certificate of Revivor.
5. On December 19, 2018, FTB issued a Refund Claim Denial notice, which denied the claim for refund because appellant was suspended at the time the claim for refund was filed.
6. Appellant did not re-file its amended return after revival.
7. This timely appeal followed.
8. On appeal, FTB concedes that it would have allowed the claim for refund, if it was valid.

### DISCUSSION

If it is determined that there has been an overpayment of any liability imposed under the Personal Income Tax Law or the Corporation Tax Law, by a taxpayer for any year for any reason, the amount of the overpayment may be credited against any amount due from the taxpayer and the balance shall be refunded to the taxpayer. (R&TC, § 19301; *Appeal of Cornbleth*, 2019-OTA-408P.) The taxpayer has the burden of proof in showing that the claim is timely and that a refund should be granted. (*Appeal of Benemi Partners, L.P.*, 2020-OTA-144P.)

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<sup>2</sup> FTB stated appellant was suspended as a result its failure to file a tax return and pay the balance due for the tax year ending June 30, 2015.

<sup>3</sup> On September 7, 2017, appellant paid the reported balance due of \$46,616. On October 2, 2017, FTB issued a notice indicating an additional balance due of \$9,242.25 for the tax year ending June 30, 2015, which appellant paid on the same day.

<sup>4</sup> The amount of the refund was the result of applying a reported net operating loss carryback from a Form 100 for the tax year ending June 30, 2016, which appellant filed on September 7, 2017.

There is no dispute that appellant filed its amended return (i.e., claim for refund) before the statute of limitations expired.<sup>5</sup> However, FTB argues that the claim for refund filed while appellant was suspended is invalid, and it remains so even though appellant was revived before the statute of limitations expired.<sup>6</sup>

FTB relies on its Legal Ruling No. 184, 1957 WL 1220 (Ruling) in support of its position. The Ruling states, in part, the following:

The period within which a claim may be filed expired the day after the taxpayer's attempted filing and therefore a subsequent revivor will not validate the filing. The California courts have held that the filing of a complaint by a suspended corporation is not valid and does not toll the statute of limitations, and a subsequent revivor does not validate the action *unless* the statute of limitations is still open when the certificate of revivor is issued. (*Cleveland v. Gore Bros.* [(1936)] 14 Cal.App.2d 681 [*Cleveland*]; *Hall v. Citizens National Bank* [(1942)] 53 Cal.App.2d 625 [*Hall*].) By analogy, the same rule applies to the filing of a claim for refund.

(Emphasis added.)

FTB is authorized to suspend a domestic corporation for failure to pay any tax, penalty, or interest due, or for failure to file a tax return. (R&TC, §§ 23301, 23301.5.) While suspended, a corporation cannot exercise its corporate powers, rights, and privileges, with limited statutory exceptions.<sup>7</sup> (*Ibid.*) In other words, a suspended corporation is “shorn” of all rights except those reserved by statute, and cannot commence or defend an action, or appeal from an adverse decision. (*Appeal of Lomita Plaza, Inc.* (61-SBE-009) 1961 WL 1400.) However, upon the issuance of the certificate of revivor by FTB, the taxpayer shall become reinstated, but the reinstatement shall be without prejudice to any action, defense, or right which has accrued by

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<sup>5</sup> The four-year statute of limitations expired on September 15, 2019, which is four years from September 15, 2015, the 15th day of the third month following the close of appellant's taxable year on June 30, 2015. (R&TC, §§ 19306(a), 18601(a) [effective January 1, 2001, to December 31, 2016].) The four-year statute of limitations of September 15, 2019, is later than the expiration of the one-year statute of limitations in 2018 for payments made in 2017. (See R&TC, § 19306(a).) Therefore, appellant's claim for refund, filed on November 7, 2018, was filed before the statute of limitations expired on September 15, 2019.

<sup>6</sup> FTB asserts that because this claim for refund is not “valid” and appellant did not file a new claim for refund after it revived, OTA lacks jurisdiction to decide this appeal. However, OTA has jurisdiction under California Code of Regulations, title 18, section 30103(a)(3) because appellant timely appealed FTB's refund claim denial.

<sup>7</sup> A suspended corporation may file an application for exempt status or amend its articles of incorporation as necessary either to perfect its application for exempt status or to rename itself. (R&TC, §§ 23301, 23301.5.)

reason of the original suspension or forfeiture.<sup>8</sup> (R&TC, § 23305a.) “The legal rights of a suspended corporation are then revived, as an unconscious person is revived by artificial respiration.” (*Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1490 (*Benton*).

Here, the question arises of whether the filing of the refund claim by appellant during the period of suspension may be retroactively validated upon revivor where that revivor occurs prior to the expiration of the statute of limitations for the filing of a refund claim. In examining whether the actions of a suspended corporation may be retroactively validated, courts have “created a distinction between procedural and substantive acts.”<sup>9</sup> (*Benton, supra*, 226 Cal.App.3d at p. 1490.)

“The revival of corporate powers validates any procedural step taken on behalf of the corporation while it was under suspension.” (*Benton, supra*, 226 Cal.App.3d at p. 1490.) “Most litigation activity has been characterized as procedural for purposes of corporate revival.” (*Ibid.*) For instance, it has been noted that, “[i]f revival of corporate powers occurs while a valid appeal can still be taken, ... the revival would validate a prior notice of appeal and permit the appeal to proceed. The appeal would be timely ....” (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 324 (*Bourhis*).

In *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371, the court stated: “In a number of situations the revival of corporate powers by the payment of delinquent taxes has been held to validate otherwise invalid prior action [citations] ... [T]he purpose of section 23301 of the Revenue and Taxation Code is to put pressure on the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation’s tax delinquencies, after correction, as mere irregularities ... There is little purpose in imposing additional penalties after the taxes have been paid.”

In contrast, “the statute of limitations is regarded as a substantive defense, not a procedural right.” (*Benton, supra*, at p. 1491.) As a result, the running of the statute of limitations “may not be prejudiced by later revival of corporate powers.” (*Bourhis, supra*, 56 Cal.4th at p. 328; see also *Welco Construction, Inc. v. Modolux, Inc.* (1975) 47 Cal.App.3d 69, 74 (*Welco*)). In other words, a revivor after the statute of limitations has run will not save the

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<sup>8</sup> R&TC section 23305a provides an exception not relevant here, for contracts that were voidable as a result of the corporation’s suspension, but which have not been rescinded.

<sup>9</sup> FTB argues that the filing of a claim for refund is a substantive act that cannot be retroactively validated by revival of the corporation.

barred action, even if the action would otherwise have been timely. (*Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849, 863.) In *Cleveland, supra*, 14 Cal.App.2d at pp. 682-683, which is cited by the Ruling, the action was commenced during suspension and thereafter, the statute of limitations expired prior to the corporate revival. The court held that the revival could not be given a retroactive effect to permit the filing of the action at a time of incapacity to toll the running of the statute of limitations. (*Ibid.*) As stated in *Hall*, also cited by the Ruling, in describing *Cleveland*, “it was the intervening fact of the expiration of the statute of limitations that controlled the decision.” (*Hall, supra*, 53 Cal.App.2d 625, 630-631.)

The above cases demonstrate the tension between the rule articulated where a procedural act is retroactively revived (see, e.g., *Bourhis, supra*, 56 Cal.4th at p. 329) and where the running of the statute of limitation results in a substantive defense that may not be prejudiced by later revival of corporate powers. (See, e.g., *Welco, supra*, 47 Cal.App.3d at p. 74.) However, these cases are easily reconcilable when applied to the facts of this appeal. Because the corporate revival occurred prior to the expiration of the statute of limitations, allowing retroactive validation of the claim for refund would not result in a running of the statute of limitations that is prejudiced by later revival. (See *Bouris*, at p. 328.)

As asserted in the Ruling, when the “period within which a claim may be filed expired ... a subsequent revivor will not validate the filing.” Specifically, it is stated in the Ruling that “a subsequent revivor does not validate the action *unless* the statute of limitations is still open when the certificate of revivor is issued,” and that this “rule applies to the filing of a claim for refund.”<sup>10</sup> (Emphasis added.) Thus, the Ruling suggests that a subsequent revivor validates a claim for refund if the statute of limitations is still open when the corporation is revived. In the instant case, appellant revived prior to the expiration of the statute of limitations. Accordingly, we find appellant’s claim for refund is retroactively validated. FTB concedes that it would have allowed the refund if the claim was valid. Therefore, we determine that appellant is entitled to a refund of \$7,130.

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<sup>10</sup> We note that, in applying California law where a suspended corporation files a petition for redetermination of deficiencies, the U.S. Tax Court reached the same conclusion: “The fact that petitioner’s corporate status was not reinstated during that 90-day period [to file a petition] is fatal to petitioner in that California law does not operate to toll a filing period from running during a period of suspension.” (*Le v. Commissioner* (2000) 114 T.C. 268, 274-275; see also *Matthews v. Commissioner*, T.C. Memo. 2015-78.)

HOLDING

Appellant is entitled to a refund of \$7,130.

DISPOSITION

FTB’s action denying appellant’s claim for refund is reversed.

DocuSigned by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

We concur:

DocuSigned by:  
*Nguyen Dang*  
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Nguyen Dang  
Administrative Law Judge

DocuSigned by:  
*Tommy Leung*  
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Tommy Leung  
Administrative Law Judge

Date Issued: 4/7/2021