BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
BANK OF AMERICA NATIONAL TRUST)
AND SAVINGS ASSOCIATION AS)
TRUSTEE UNDER ITS TRUST BI-35)

Appearances:

For Appellant: George G. Witter, its Attorney.

For Respondent: James J. Arditto, Franchise Tax Counsel.

O P I N I O N

These appeals are made under Section 27 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) and Section 20 of the Corporation Income Tax Act (Chapter 765, Statutes of 1937, as amended) from the action of the Franchise Tax Commissioner in disallowing the claims of Bank of America National Trust and Savings Association as Trustee under its Trust BI-35 for refund of taxes paid under the Massachusetts or Business Trust Tax Act (Chapter 211, Statutes of 1933) in the amounts of $264.45 for the taxable year ended December 31, 1934, and paid under the Corporation Income Tax Act in the amount of $827.07 for the taxable year ended December 31, 1939.

With respect to the claim of $264.45 paid under the Massachusetts or Business Trust Tax Act for the taxable year ended December 31, 1934, Respondent concedes that the question is solely one of procedure. Payment was made on March 5, 1934, and a claim for refund filed on December 17 1936. Section 27 of the Bank and Corporation Franchise Tax Act [made applicable to Massachusetts or Business Trusts by Section 2 of the Massachusetts or Business Trusts Tax Act) then provided in part as follows:

> "If the commissioner disallows any claim for refund he shall notify the taxpayer accordingly. Within thirty days after the mailing of such notice, or if the commissioner does not act upon any claim for a refund within six months from the time the claim was filed, then within thirty days after the expiration of said six months, the commissioner's action upon the claim shall be final, unless within such thirty-day period the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization."

As the Commissioner did not allow or disallow the claim, he contends that the period within which an appeal might have been taken expired on July 17, 1937, which is thirty days after the six months period from the time the claim was filed. The appeal was not filed until July 3, 1941. Appellant, however, takes the position that by failing to allow or disallow the claim, the Commissioner took no "action" upon the claim, that there was, therefore, no "action" which, under Section 27, became final upon July 17, 1937, and that, accordingly, the taking of the appeal on July 3, 1941, was not barred.

We cannot agree with Appellant that the failure of the commissioner to allow or disallow the refund claim did not constitute "action" by the Commissioner within the meaning of Section 27. It will be noted that the section provides that "if the commissioner does not act upon any claim for a refund within six months from the time the claim was 'filed. then within thirty days after the expiration of said six months the commissioner's action. upon the claim shall be final." (Emphasis added.) If "action" does not include the failure to allow or disallow the claim, the limitation period in case the Commissioner does not "act" upon the claim (i.e., allow or disallow the claim), would be meaningless, for the situation to which it would be applicable could never arise. The only limitation period for taking an appeal would be thirty days after the mailing of notice of disallowance of the claim. If the claim was neither disallowed nor allowed, there would be no limitation period. We cannot adopt this interpretation, particularly in view of the principle of statutory construction that whenever possible all the words of a statute are to be given some effect.

Appellant maintains, however, that there is at least an ambiguity in the statute which should be construed in favor of the taxpayer, and points to the 1937 amendment to Section 27, effective August 27, 1937, eliminating the provision regarding the failure of the Commissioner to act within six months, thereby permitting an appeal in all cases within thirty days after the mailing of the notice of disallowance. We are not impressed with Appellant's argument that we should look to this amendment to find the true meaning of the statute prior to the amendment, but we deem it appropriate to give consideration to whether or not it may be given a retoractive effect in the sense that the right to take an appeal, which was barred on July 17, 1937, under Section 27, was revived by an amendment to that section, effective August 27, 1937, eliminating the provision of the former law constituting the bar to the taking of the appeal.

It is unquestionably the general rule that statutes of limitation are presumed to be prospective and not retroactive in their operation, at least in the absence of express legislative intent to the contrary (16 California Jurisprudence 407); and it seems clear that once a limitation period has fully run, the bar of the statute is not lifted, or the cause of action revived, by subsequent legislation lengthening or dispensing with the limitation period. 67 A.L.R. 297.

Appeal of Bank of America National Trust and Savings Association as Trustee Under its Trust BI-35

In Opinion NS 1998a, January 10, 1940, the California Attorney General held that the 1939 amendment to Section 27 of the Bank and Corporation Franchise Tax Act, extending the limitation period for filing refund claims from three to four years, does not have a retroactive effect; with the result that a claim barred on March 15, 1939, was not revived by the amendment, effective July 25, 1939. This Board, however, in Appeal of Phyllis Marshall, decided December 15, 1941, held that the 1939 amendment to Section 20 of the Personal Income Tax (Chapter 915, Statutes of 1939), effective July 25, 1939, extending the time for filing a claim for refund from three to four years, permitted the Commissioner to allow a claim filed on May 12, 1939, although the three-year period prescribed by the statute prior to the amendment expired on March 12, 1939. In that opinion we pointed out that there is no constitutional objection to the application of the four-year limitation period to claims barred prior to the effective date of the amdnement, and concluded that the phrase "for any year" used therein constitutes an expression of legislative intent that from and after the effective date of Chapter 915 a refund may be allowed if a claim therefore is filed within the four-year period provided therein. The section, as amended, provided in part as follows:

> "If, in the opinion of the commissioner, or the State Board, as the case may be, there has been an overpayment of tax, penalty or interest by a taxpayer for any year for any reason, the amount of such overpayment shall be credited against any taxes then due from the taxpayer under this act, and the balance refunded to the taxpayer. No such credit or refund shall be allowed or made until approved by the State Board of Control. No such credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of such period a claim therefor is filed by the taxpayer..." (Emphasis added)

The statute with which we are concerned in this appeal (Section 27 of the Bank and Corporation Franchise Tax Act) provided prior to the 1937 amendment, in part as follows:

> "If the commissioner disallows any claim for refund he shall notify the taxpayer accordingly. Within thirty days after the mailing of such notice, or if the commissioner does not act upon any claim for a refund within six months from the time the claim was filed, then within thirty days after the expiration of said six months, the commissioner's action upon the claim shall be final, unless within such thirty-day period the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization." (Emphasis added)

The 1937 amendment (Chapter 836, Statutes of 1937), effective August 27, 1937, simply deleted the underscored portion. We do not, therefore, in this appeal, have the addition, by the amendatory act,

or particular words constituting an expression of legislative intent that any appeal taken within thirty days after the mailing of notice of disallowance of a claim for refund, is timely. We do have, however, in Section 27 in its amended form, the statement:

> "If the commissioner disallows any claim for refund he shall notify the taxpayer accordingly. Wit in thirty days after the mailing of such notice, the commissioner's action on-the claim shall be final, unless within such thirty-day period the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization." (Emphasis added)

It seems to us a reasonable construction that the Legislature intended the limitation period set forth therein to apply to an appeal from the disallowance of "any" claim, regardless of when filed, and that an appeal could properly be taken from the disallowance of any claim, provided only that it be taken within thirty days after the mailing of notice of disallowance. As a matter of fact, the claim and a so-called "supplemental claim" filed on March 21, 1941 (over 3 years too late to constitute a timely claim), were denied on April 4, 1941.

But we believe that' there are additional matters which may well be considered in determining the proper construction of the statute. It is not questioned, even by Respondent, that Appellant's claim is just and equitable, and involves a moral obligation. bioreover, the claim is asserted against the State, rather than against a private individual. It is pointed out in 67 A.L.R. 306 that in case of claims against municipal corporations, no majority rule can be laid down, the authorities being divided, but that some of them hold that a statute of limitation will be given a retrospective application and thereby revive a cause of action already barred. Such a case is Jackson Hill Coal and Coke Company v. Sullivan County. 184 Ind. 335. The opinion in this case points out that the United States Supreme Court in Campbell v. Holt, 115 U.S. 620, "held that the repeal of the statute of limitation restored the remedy, even though the claim was barred under a law previously in force. That case makes a distinction as to actions on contracts for the recovery of a money judgment and actions for the recovery of specific property, both real and personal; holding in the former case that the repeal of the statute revives the action, while in the latter case it does not because of vested interest in the property by reason of the lapse of time." Referring to the fact that the case being considered by the court presented an additional question to those decided in the Campbell case, the Court states: "Here we have the case of a County, which is the creature of the law, and constituting a part of the State government, and directly under the control of the legislature, with only such powers as that body may delegate to it, and with such liabilities as it may impose. Then referring to the moral obligation of the municipal or public corporation, the opinion quotes from Dillon's Municipal Corporations 4th ed. sec. 75, as follows:

> "The fact that a claim against a municipal or public

> corporation is not such an one as the law recognizes as of legal obligation has often been decided, by the courts of the highest respectability and learning, to form no constitutional objection to the validity of a law imposing a tax and directly its payment; ... The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, moral obligation. To this extent, and with this limitation, the doctrine is unobjectionable in principle, and must be regarded as settled, although it asserts a measure of control over municipalities, in respect of their duties and liabilities, which probably does not exist as to private corporations and individuals."

Another such case is People v. Board of Education, 110 N.Y.S. 769 (affirmed without opinion in 193 N.Y. 601, 86 N.E. 1130). Referring to the moral obligation to refund an excessive tax, the Court says:

> "The moral obligation to refund an excessive tax is just as strong whether it was paid voluntarily or by duress, for the ground thereof is a payment beyond that which should in justice have been charged...the Legislature has deemed that a moral obligation exists and has given its legal effect by a retroactive statute. The principle that such a statute is within the legislative power is well settled."

As against the contention that the effect of such application of the statute is in effect to give an interest-paying investment to the claimant, the Court said!

> "But that fact affords no justification for nullification or judicial legislation. Such criticism is not against the policy of refund of an excess, but against that express provision of the statute which affords interest."

And the following language is interesting in relation to the California constitutional provision prohibiting the gift of public money (Art. IV, sec. 31).

> "This statute but provides for an abatement, not for a donation or gift."

The opinion then quotes from Campbell v. Holt, supra, as follows:

> "We can see no right which the promisor has in the law which permits him to plead lapse of time instead of

payment, which shall prevent the Legislature from repealing the law, because its effect is to make him fulfill his honest obligations."

It seems to us, therefore, that as the present appeal involves a conceded overpayment of tax, the claim for its refund being just and equitable, and not involving any possible infringement of property rights of private parties that may have become "vested" or even any rights of individuals based on contract, we should not depart from our position taken in the Phyllis Marshall appeal, even if the legislative intent in the present case is less clearly shown by the language of the amended statute than was the case upon that appeal.

It being our view, therefore, that the appeal was not barred, and may, therefore, be considered by us, and Respondent having conceded that whether the claim should be allowed turns upon the question of the Board's jurisdiction to consider the appeal, we conclude that the Commissioner's action in disallowing the claim should be reversed.

With respect to the claim of $827.07 paid under the Corporation Income Tax Act for the taxable year ended December 31, 1939, Appellant at the hearing conceded that the action of the Commissioner in disallowing the claim was correct. This question, therefore, is no longer in dispute, and we conclude that the Commissioner's action should be sustained.

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 that the action of Honorable Charles J. McColgan, Franchise Tax Commissioner, in disallowing the claim for refund of Bank of America National Trust and Savings Association as Trustee under its Trust BI-35 of tax paid under the Massachusetts or Business Trust Tax Act in the amount of $264.45 for the taxable year ended December 31, 1934, be and the same is hereby reversed; and that the action of Honorable Charles J. McColgan, Franchise Tax Commissioner, in disallowing the claim for refund of Bank of America National Trust and Savings Association as Trustee under its Trust BI-35 of tax paid under the Corporation Income Tax Act in the amount of $827.07 for the taxable year ended December 31, 1939, be and the same is hereby affirmed.

Done at Sacramento, California, this 23rd day of September, 1943, by the State Board of Equalization.

R. E. Collins, Chairman
Geo. R. Reilly, Member
J. H. Quinn, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Pierce, Secretary