BEFORE -THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ANDRESON COMPANY)

Appearances:

For Appellant: Geo. W. Rellyer, Attorney at Law

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner: Milton A. Huot, Assistant Tax Counsel.

O P I N I O N

This appeal is made pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner on the protest of the Andreson Company to a proposed assessment of additional tax in the amount of $538.99 for the taxable year ended December 31, 1939.

Appellant's franchise tax return for the year in question was filed on or before March 15, 1939. In January, 1942, Appellant executed an agreement with the United States Bureau of Internal Revenue extending until June 30, 1943, the time within which additional deficiencies in Federal income tax for the year 1938, the income year here involved, might be assessed. Section 25 of the Bank and Corporation Franchise Tax Act was amended by Chapter 37, Statutes of 1943, effective February 10, 1943, by the addition of the following proviso to the four year limitation period for the mailing of notices of additional tax proposed to be assessed:

> ". . . . provided, that in the case of any taxpayer which shall agree with the United . . States Commissioner of Interna?. Revenue for an extension (or renewals t-hereof) of the period for proposing and assessing deficiencies in Federal income tax for any year, the period for mailing notices of proposed deficiency tax pursuant to this section shall (unless otherwise agreed between the commissioner and the taxpayer) be four years after the return was filed or six months after . . the date of the expiration of the agreed period for assessing deficiencies in Federal income tax, whichever period expires the later."

On June 10, 1943, twenty days prior to the expiration of Appellant's agreement with the Comissioner of Internal Revenue,

but more than four years after its return was filed, the Franchise Tax Commissioner issued his notice of the proposed assessment here in question. Appellant relies on the bar of the statute, asserting that the amendment quoted above by its terms operates to extend the statute of limitations only in those cases in which the taxpayer's agreement with the Commissioner of Internal Revenue extending the time for proposing and assessing deficiencies in Federal income tax was entered into after the effective date of the amendment. The Commissioner rests his case on the general principle that an act of the legislature extending the statute of limitations applies to all pending matters which were not barred by the statute at the time of its amendment.

An amendment which extends a period of limitation unquestionably applies to pending matters which are not barred at the time the amendment becomes effective unless such matters are expressly excepted. Such an amendment changes only the remedy and is prospective rather than retrospective in its effect. Mudd v. McColgan, 30 Cal. 2d 463. The amendment with which we are concerned, however, is expressly made applicable only in the case of "...any taxpayer which shall agree with the United States Commissioner of Internal Revenue..." (Underscoring added) The word "shall" has two well understood meanings. It may imply either futurity or a command. Obviously, the command connotation is not present here. There is nothing in the amendstory act and the Commissioner has not referred us to any legislative history or other aids to construction tending to show that the term was not meant to indicate futurity, which is its usual connotation. See People v. Allied Architects Association of Los Angeles, 201 Cal. 428, 437. This meaning is probably entirely consistent with the intent of the Legislature, for it is reasonable to believe that it intended to put taxpayers on notice that in the future agreements with the Commissioner of Internal Revenue might effect an extension of the limitation period in Section 25, but that it did not intend to assign new consequences to a past act of a taxpayer.

Furthermore, it is to be observed that the Legislature expressly provided in Section 23 of the 1943 amendatory act that certain of its provisions should have a retroactive effect. If it so desired as respects the amendment to Section 25 here in question, it could easily have so stated. It appears, therefore, that in accordance with the most basic of all rules of statutory construction the terms "shall agree" should be given their ordinary and usual meaning, that of connoting future agreements.

It follows, then, that the proviso added to Section 25 of the Act by Chapter 37, Statutes of 1943, does not apply as respects an agreement entered into prior to February 10, 1943, between the taxpayer and the United States Commissioner of Internal Revenue extending the period within which Federal income tax deficiencies might be assessed and that the proposed assessment here in question was not levied within the time provided by that Section,,

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, pursuant to Section 25 of the Bank and Corporation Franchise Tax Act, that the action of Chas. J. McColgan, Franchise Tax Commissioner, on the protest of Andreson Company to a proposed assessment of additional tax in the amount of $538.99 for the taxable year ended December 31, 1939, he and the same is hereby reversed.

Done at Sacramento, California, this 5th day of January, 1949, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J. H. Quinn, Member
J. L. Seawell, Member
Geo. R. Reilly, Member

ATTEST: Dixwell L. Pierce, Secretary