



## OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
 )  
 EDISON CALIFORNIA STORES, INC. )

## Appearances:

For Appellant: Loewenthal & Elias, Attorneys at Law  
 For Respondent: Burl D. Lack, Chief Counsel; Mark  
 Scholtz, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 27 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claim of Edison California Stores, Inc., for a refund of tax in the amount of \$9,034.22, plus interest, for the income year 1941.

Appellant filed a franchise tax return for that year on or before March 15, 1942, paying a tax therewith in the amount of \$12,596.47. On March 15, 1946, the Franchise Tax Commissioner, pursuant to Section 25(a) of the Bank and Corporation Franchise Tax Act, issued a notice of proposed additional tax for the income year 1941 in the amount of \$18,258.35, the details of which were as follows:

"Estimated income	\$771,370.50
4%	30,854.82
Previously assessed	12,596.47
Additional tax	18,258.35"

The assessment was not protested within the 60-day period allowed for that purpose by Section 25(b) and on June 7, 1946, the Commissioner sent Appellant a final notice of additional tax and a demand for payment in accordance with Section 25(2). On August 12, 1946, Appellant paid the amount of \$23,096.81 to the Commissioner, that figure including the \$18,258.35 assessed plus \$4,838.46 as interest up to August 15, 1946. In making the payment Appellant stated in a letter of transmittal that it was doing so involuntarily. It also stated in that communication that an additional tax of only \$6,927.29 was due from it under the Commissioner's allocation formula, but that it did not acquiesce in the application of that formula and did not waive any right it might have to assert a refund claim as to all or any portion of the amount paid. On September 3, 1946, the Commissioner notified Appellant of additional penalties and interest in the sum of \$47.79, this amount being paid on September 10, 1946. On

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November 29, 1946, Appellant mailed to the Commissioner its claim for refund of the entire additional tax, interest and penalties paid in the amount of \$23,144.60. Thereafter, on June 15, 1948, after several conferences on the subject between the parties, Appellant was granted a credit in the amount of \$14,110.38, leaving the balance of \$9,034.22 here in question.

Appellant does not now contend that it was not originally liable for a tax in the amount finally determined to be due. According to the undisputed statement of the Franchise Tax Board, Appellant agrees that it was, its liability in this regard apparently having been settled by Edison California Stores, Inc. v. McColegan, 30 Cal. 2d 472. It does maintain, however, that the additional tax was invalidated because of the Commissioner's failure to set forth the details of the proposed assessment in his notice of March 15, 1946, pursuant to Section 25(a) of the Sank and Corporation Franchise Tax Act which then read as follows:

"Sec. 25. (a) As soon as practicable after the return is filed, the commissioner shall examine it and shall determine the correct amount of tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice or notices to the taxpayer at its post-office address (which must appear on its return) of the additional tax proposed to be assessed against it. Such notice shall set forth the details of the proposed additional assessment and of collecting said tax." (Underlined added.)  
SEARS, L. 1945, Chap. 946, 5p. 1824,

Even though we assume that the notice given did not comply with Section 25(a) in the respect mentioned, it is our opinion that under the circumstances we would not be justified in upholding the Appellant's position. A complete answer to that position, so far as the present proceeding is concerned, is to be found in the principle enunciated in Pacific Fruit Express v. McColegan, 67 Cal. App. 2d 93, at 96, in the following language:

"Furthermore, since a suit to refund taxes is in the nature of an action in assumpsit, the taxpayer may recover only if it be shown that more taxes have been exacted than in equity and good conscience should have been paid."

Appellant seeks to avoid the effect of this authority by contending that the Court was there "dealing with and talking about the fair amount of taxes which should have been paid on the basis of the principle of consolidation and allocation" (Appellant's Additional Memorandum, page 2) and that its language was intended to be applicable only to that question. In support of this view it refers to the Court's subsequent comments at page 104 of follows:

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". . . However, it does not follow that plaintiff is entitled to a refund of any taxes, for as heretofore pointed out, a taxpayer may recover a refund only if it be shown that he has paid more taxes than in equity and good conscience he should have been required to pay; and in the present case plaintiff has failed to show that the formula applied resulted in the payment of more taxes than in equity and good conscience it should have paid, or that under the formula applied it had paid a tax measured by more than the amount of net income reasonably and fairly attributable to the business done in this state. (emphasis added)

". . . It would seem, therefore, that the formula used by the Commissioner was much more favorable to plaintiff than the situation warranted, and that even though allowances should have been made for out-of-state labor performed under contract, the amount of taxes called for by the commissioner's formula was not more than plaintiff in equity and good conscience should have been required to pay."

That the Court did not intend the principle to possess such a limited sphere of operation is clearly demonstrated, however, by the decisions cited as authority for it. Those decisions (Stone v. White, 301 U.S. 532; and Lewis v. Reynolds, 284 U.S. 281) did not involve any such question as consolidation and allocation of income and disclose no intent to restrict the principle to any particular question or questions. The comment at page 104 of the Pacific Fruit Express opinion is nothing more than a reiteration of the principle and its application to the specific situation there at hand.

The Pacific Fruit Express, Stone and Lewis cases are considered in Northrop Aircraft, Inc., v. California Employment Stabilization Commission, 32 Cal. 2d 872. Although it was there held that the broad statement first above quoted of the Pacific Fruit Express case did not justify the denial of a recovery of the amount of assessment made after the statute of limitations had barred it, the reasoning of that case does not, in our opinion, compel a similar result as respects an assessment levied within the prescribed statutory period but defective in a certain technical respect, in the absence, at least, of a showing that the taxpayer was misled by the defect. See also, in this connection, Steele v. San Luis Obispo County, 152 Cal. 785, also cited in the Northrop case.

It may not be amiss to point out at this time that the strong support given to the doctrine of exhaustion of administrative remedies by the recent decisions of the California Supreme Court in People v. West Publishing Co., 35 A.C. 101; Simms v. County of Los Angeles, \_\_\_ A.C. \_\_\_; Security-First National Bank v. County of Los Angeles, \_\_\_ A.C. \_\_\_, may well preclude the questioning of an assessment on procedural or technical, as distinguished from substantive, grounds for the first time in a

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refund proceeding. It may well be concluded under these and similar authorities that such an attack should first be made directly upon the assessment through a protest against it in order that the tax agency may have an opportunity to correct the technical defect, if any, by reassessing the tax. To be sure, if such an attack were successful in the present case, the Commissioner would be precluded from levying a second assessment inasmuch as the defective one was levied on the last day of the statutory period. This result follows, however, merely from the fact that he had delayed his original assessment until the last possible moment. The principle of law requiring that such defects be pointed out by protest would be generally applicable and would extend to the more usual situation in which a second assessment could be asserted after the taxpayer had called attention to the defect in the first one. In this way the rights of the taxpayer would be safeguarded as respects technically defective assessments, while at the same time the equitable principle set forth in the Pacific Fruit Express case would operate to deny the allowance of a refund in the absence of an actual overpayment.

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 27 of the Bank and Corporation Franchise Tax Act, that the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claim of Edison California Stores, Inc., for a refund of tax in the amount of \$9,034.22, plus interest, for the income year 1941 be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of May, 1950,  
by the State Board of Equalization.

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

ATTEST: Dixwell L. Pierce, Secretary