



12/8/58

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
RAYMOND H. OSBRINK, MARY E. OSBRINK,)
M. A. OSBRINK, TRUST, B. W. BEALS,)
TRUSTEE, R. H. OSBRINK, JR., TRUST,)
B. W. BEALS, TRUSTEE)

Appearances:

For Appellants: Mackay, McGregor, Reynolds &
Bennion and Adam Y. Bennion,
Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel;
Paul L. Ross, John S. Warren and
Crawford H. Thomas, Associate
Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the protests of Raymond H. Osbrink, Mary E. Osbrink, M. A. Osbrink, Trust, B. W. Beals, Trustee, and R. H. Osbrink, Jr., Trust, B. W. Beals, Trustee, to proposed assessments of additional personal income tax in the amounts of \$698.19, \$566.73 and \$69.15 against each of the Appellants for the years 1943, 1944 and 1945, respectively, and in the amounts of \$198.03 against each of the trusts for the year 1946.

Appellants were partners in the R. W. Osbrink Manufacturing Company during the years 1943 through 1946. Matters affecting their tax liability for these years were subjects of previous appeals to this Board, a controversy with the Bureau of Internal Revenue and suits for refund in a Federal District Court. The previous appeals to this Board were determined on July 22, 1952, the suits in the Federal District Court were decided on July 10, 1951, and on September 22, 1953, Appellants notified the Franchise Tax Board of a settlement on the controversy with the Bureau of Internal Revenue.

Pending the outcome of those matters the Franchise Tax Board, in February, 1949, requested waivers of the statute of limitations on assessments. The Appellants consented to waivers for the period up to April 15, 1950. In November,

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1949, the Franchise Tax Board requested and received waivers to April 15, 1951. On February 20, 1951, the Franchise Tax Board sent a letter to Appellants requesting waivers to April 15, 1952, and inquiring whether a settlement had been reached as to their Federal tax liability. Appellants do not recall **having** received this letter.

On April 9, 1951, having received **no** reply to its letter, the Franchise Tax Board issued the notices of proposed assessment here in question. The notices set forth estimated figures for additions to income and each contained the following statement:

"This notice of proposed additional assessment was issued because of impending expiration of the statute of limitations. If information is promptly submitted showing the proposed assessment should be reduced or the notice withdrawn, prompt consideration will be given to any adjustment that appears to be in **order**."

By letter of April 13, 1951, Appellants stated that their Federal liability had not been settled and requested the Franchise Tax Board to await such settlement. On May 4 they submitted additional waivers. On May 28, 1951, the Franchise Tax Board replied that these waivers were not effective since the statute of limitations had already expired and suggested that protests be filed to keep the matters open, The Appellants then filed such protests.

After the prior **appeals** to this Board, the Federal refund suits and the Federal administrative controversy were settled, the Franchise Tax Board issued notices of action reducing the estimated income figures in its original notices of assessment by considerable amounts to figures corresponding to the final adjustments in the Federal tax liability. The Appellants have appeal from that action.

The Appellants have produced no evidence or figures to indicate that the final notices of action are incorrect. Their position is that the original notices of proposed assessment were arbitrary and capricious and therefore null and void. Thus they argue that, in effect, no notices of assessment were issued prior to the running of the statute of limitations.

Appellants have cited several sections of the Revenue and Taxation Code dealing with the assessment of deficiencies, with waivers and with the investigative powers of the Franchise Tax Board. These sections are not materially different

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from those in the United States Internal Revenue Code of 1939. A determination of tax by the Commissioner of Internal Revenue is not void and a nullity even though it is arbitrary. (Marx v. Commissioner, 179 Fed. 2d 938, cert. den. 339 U.S. 964; Federal National Bank of Shawnee, 16 T.C. 54, app. dism. 191 Fed. 2d 402; R. J. Durkee, T.C. Memo. Dkt. No. 5892, entered August 15, 1949, affd. 181 Fed. 2d 189).

The notices here in question were arbitrary, because they were merely estimates, but they were not capricious. The facts surrounding their issuance indicate that the Franchise Tax Board acted reasonably. Copies of prior correspondence in the record show that Appellants were made aware of the reasons why notices had theretofore been deferred and of the problem raised by the statute of limitations. The notices themselves contained an explanation of their necessity. Appellants were thereafter given full opportunity to contest them and revisions were made. We conclude that the notices were effective to stop the running of the statute of limitations.

Appellants have not been deprived of their right to have their appeals heard on the merits. Since, however, they have not presented any issue on the merits, the action of the Franchise Tax Board must be upheld.

ORDER

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 18595 of the **Revenue** and Taxation Code that the action of the Franchise Tax Board in denying the protests of Raymond H. Osbrink, Mary E. Osbrink, M. A. Osbrink, Trust, B. W. Beals, Trustee, and R. H. Osbrink, Jr., Trust, B. W. Beals, Trustee, to proposed assessments of additional personal income tax in the amounts of \$698.19, \$566.73 and \$69.15 against each of the

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Appellants for the years 1943, 1944 and 1945, respectively, and in the amounts of \$198.03 against each of the trusts for the year 1946, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of November, 1958, by the State Board of Equalization.

Geo. R. Reilly, Chairman

J. H. Quinn, Member

Robert E. McDavid, Member

Robert C. Kirkwood, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary