



BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
AMERICAN SMELTING-AND REFINING COMPANY )

For Appellant: Valentine Brookes,  
Paul E. Anderson, and  
Charles S. Franklin  
Attorneys at Law

For Respondent: Crawford H. Thomas  
Chief Counsel

Gary Paul Kane  
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of American Smelting and Refining Company against a proposed assessment of additional franchise tax in the amount of \$4,607.25 for the income year 1959.

The appeal was filed on July 6, 1967, together with-companion appeals for the income years 1958 and 1960. Prior to that date appellant had filed a suit for refund in the Superior Court of the State of California for the County of Sacramento with respect to a portion of the tax paid for the income year 1959..

The Franchise Tax Board has filed a motion to dismiss the appeal with respect to income year 1959 on the ground that by filing the suit for refund appellant has elected to have the superior court determine its entire tax liability for that year, 'In support of its position, the Franchise Tax Board cites Pope Estate Co. v. Johnson, 43 Cal, App. 2d 170 (110 P.2d 481), wherein the court said:

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When the taxpayer, the respondent, brought the action in the superior court for a refund of a portion of its 1933 tax, it put into issue the question as to whether a refund for the year 1933 was due to it. This placed in issue the question as to the total amount due from the taxpayer for the year 1933. ... Therefore, when the court adjudicated that the taxpayer had overpaid its 1933 tax in an amount in excess of \$3,000, it was in effect adjudicating that no other sum was due from the taxpayer.

Similarly, there is pending before the Superior Court an action involving appellant's tax liability for the income year 1959. The judgment in that action will be res judicata as to all matters relating to appellant's tax liability for that year. As a consequence a determination on the merits by this board would have no effect.

In opposition to the motion to dismiss appellant urges that jurisdiction has vested with this board and we are obligated to hear and determine the matter. We cannot agree.

Upon final action by the Franchise Tax Board on the refund claim appellant had a choice under the Bank and Corporation Tax Law whereby it could either appeal to this board or bring a suit for -refund in the superior court. By choosing to file a court action appellant has precluded this board from making an effectual determination of appellant's tax liability for the year in question, Under such circumstances appellate bodies will not proceed to a formal decision on the merits but instead will dismiss the appeal.' (Consolidated Vultee Aircraft Corp. v. United Aircraft & Agricultural Implement Workers of America-Local[167 P.2d 725]2d 859

Accordingly, we shall grant the motion to dismiss the present appeal with respect to the income year 1959 and thereby give full deference to the superior court's consideration of appellant's tax liability for that year,

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,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of American Smelting and Refining Company against a proposed assessment of additional franchise tax in the amount of \$4,607.25 for the income year 1953, be and the same is hereby dismissed.

Done at Sacramento, California, this 3rd day of October, 1967, by the State Board of Equalization,

Paul R. Leake, Chairman

John W. Lynch, Member

J. Paul G. ..., Member

..., Member

..., Member

ATTEST: ..., Secretary

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
AMERICAN SMELTING AND REFINING COMPANY )

ORDER CORRECTING CLERICAL ERROR

It is hereby ordered that the first paragraph on the last page of the opinion and order issued by this board on October 3, 1967, be corrected to read:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the appeal of American Smelting and Refining Company from the action of the Franchise Tax Board on its protest against a proposed assessment of additional franchise tax in the amount of \$4,607.25 for the income year 1959, be and the same is hereby dismissed."

Done at Pasadena, California, this 16th day of October, 1967, by the State Board of Equalization.

Paul R. Leake, Chairman  
Robert H. Hesse, Member  
John W. Lunnell, Member  
Richard H. Hesse, Member  
\_\_\_\_\_, Member

ATTEST: R. Hamilton, Acting Secretary