BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
THE PULLMAN COMPANY)

For Appellant: Robert Edmondson
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

A. Ben Jacobson
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 protests of The Pullman Company against proposed assessments of additional franchise tax in the amounts of $2,273.32 $5,780.34, $3,053.86, $5,481.59, $5,592.92, $8,206.12 $655.89, $2,018.43, $113.37, $3,472.89, $5,019.53, $1,536.80, **$941.06**, **$968.96**, and $4,604.84 for the income years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1950, 1951, 1952, and 1953, respectively. Since the filing of the appeal, the parties entered into a series of stipulations and an agreement was reached with respect to all years except **1938** through 1943, inclusive.

The sole issue remaining is whether the proposed assessments for the years still unresolved were barred by the statute of limitations.

Appellant is an Illinois corporation created in **1867**. While its principal place of business is in Chicago, Illinois, it has been doing business in California for many years. In its business, appellant operates and provides services on railroad parlor and sleeping cars.

State franchise tax returns were duly filed for the years under consideration. Appellant and its parent filed consolidated federal income tax returns for the years 1938 through 1943. Federal waivers of the statute of limitations were obtained during the course of a prolonged federal audit. Prior to June 30, 1953, federal deficiencies were issued and an appeal was taken to the United States Tax Court. A stipulated agreement was entered into with the Commissioner of Internal Revenue after appeal to the Tax Court, and on October 5, 1954, a stipulated order was entered in the Tax Court establishing appellant's federal tax liability for the years 1938 through 1943. The Tax Court's determination became final on January 5, 1955. (Int. Rev. Code of 1939 §§ 1140 and 1142; Int. Rev. Code of 1954 §§ 7481 and 7483.) A deficiency could not be assessed until the decision of the Tax Court became final. (Int. Rev. Code of 1939, § 272; Int. Rev. Code of 1954, § 6213.) The running of the federal statute of limitations was suspended until sixty days after the final decision. (Int. Rev. Code of 1939, § 277; Int. Rev. Code of 1954; § 6503.)

Between August 11, 1949, and August 20, 1954, respondent sent appellant at least nine letters requesting the status of the federal audit with respect to the years 1938 through 1943. On August 20, 1954, respondent sent appellant a request for information, including advice on the current status of the federal examination for the years 1938 through 1946. On September 16, 1954, appellant replied that the federal audit was completed and that prior to June 30, 1953, the Bureau of Internal Revenue sent 90-day deficiency letters containing changes proposed for the years 1938 through 1947. Appellant also advised that petitions were filed in the Tax Court, that after numerous conferences tentative agreement was reached, and that settlement was in the process of completion. On December 8, 1954, respondent requested further information regarding the federal audit for 1944 through 1947. With respect to the tentative agreement for the years 1938 through 1947, respondent also stated:

> In your letter of September 16th you wrote that you had reached a tentative agreement with the Internal Revenue Service and that settlement was in the process of completion. If you have concluded the agreement, please submit copies of the adjustments to net income and explanations thereof.

On December 14 or 15, 1954, appellant returned state waivers for 1944 through 1947 but neglected to reply 'regarding the years.1938 through 1943, even though this was over two months after the Tax Court stipulation had been signed. Respondent also received communications from appellant dated December 28, 1954, and February 3, 1955, but neither made any mention of the years 1938 through 1943.

On June 14,1955, in response to an inquiry of respondent dated April 12, appellant furnished considerable information for 1946 through 1954. It was also stated:

> Our Federal Income Tax Returns for the years prior to 1953 have been finally audited, controverted and settled. For years prior to 1947, the final tax was determined by the United States Tax Court after long drawn out litigation.

On June 28, 1955, based upon U. S. Treasury Department figures of revised taxable income for the years 1946 through 1952, appellant enclosed state recomputations for those years. The letter also provided:

> There is also enclosed herewith photostatic copies of U. S. Revenue Agent's adjustments for the years 1948 to 1952 inclusive. Settlement of our Federal income taxes for the years 1938 to 1947 were subject to Court litigation and accordingly we do not have Revenue Agent's reports for these years to send you a copy of same. This situation was explained to you when we made settlement with your office of our Franchise tax for the years 1944 and 1945'.

It is noted, however, that appellant submitted with its letter dated December 28, 1954, detailed computations showing revised California income upon the basis of such stipulations for the years 1944 and 1945.

Respondent issued notices proposing to assess additional tax for the-years 1938 through 1943 on May 27, 1957. These notices only reflected the additional net allocable income to this state resulting from the federal adjustments.

In 1957 section 25432 of the Revenue and Taxation Code provided in pertinent part:

> If the amount of net income for any year of any taxpayer as returned by the United States Treasury Department is changed or corrected by the Commissioner of Internal Revenue or other office of the United States or other competent authority,... such taxpayer shall report such change or corrected net income,...within 90 days after the final determination of such change or correction... or as required by the Franchise Tax Board, and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended return with such department shall also file within 90 days thereafter an amended return with the Franchise Tax Board which shall contain such information as it shall require.

Section 25673 provided:

> If a taxpayer shall fail to report a change or correction by the Commissioner of Internal Revenue or other officer of the United States or other competent authority or shall fail to file an amended return as required by Section 25432, any deficiency resulting from such adjustments may be assessed and collected within four years after said change, correction or amended return is reported to or filed with the Federal Government.

Section 25674 provided:

> If a taxpayer is required to report a change or correction by the Commissioner of Internal Revenue or other officer of. the United States or other competent authority or to file an amended return as required by Section 25432 and does report such change or files such return, any deficiency res-ulting from such adjustments may be assessed within six months from the date such notice or amended return is filed with the Franchise Tax Board by the taxpayer, or within the period provided in Sections 25663 and 25663c, whichever period expires the later.

Section 25663a provided:

> If any taxpayer agrees with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period for mailing notices of proposed deficiency tax for such year shall 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.

Appellant maintains that the final waiver extension executed with the federal government expired June 30, 1953, and therefore section 25663a constituted a statutory bar. It further maintains that even if a federal waiver existed for a period beyond that date, there is still no evidence that it was signed by the Commissioner of Internal Revenue which it contends was necessary in order to establish the actual agreement required by section 25663a. Respondent disputes the fact that the waiver expired June 30, 1953, claiming the waiver by its terms extended the time beyond June 30, 1953, if a federal deficiency was duly issued, by the number of days during which the Commissioner was prohibited from making an assessment and for 60 days. thereafter. While not admitting its absence, respondent also claims that the Commissioner's signature was not necessary to make the waiver valid .

Appellant additionally asserts that the proposed assessments were barred by section 25674 because the federal agreement was reported to the state i.n the two June 1955 letters. It maintains that if a taxpayer is late in reporting, the state still has protection for six months after the report, and that section 25673 gives the state four years from the date of the change to give notice where there is no report at all, Appellant also contends that respondent's actions were such as to constitute grounds for estopping its imposition of the tax and interest.

We conclude that section 25674 did not operate as a statutory bar. In the Appeal of Philip Yordan, et al., decided by this board on November 7, 1958, the taxpayers sent to respondent computations of their California income tax based on stipulations filed with the federal Tax Court.

This information was provided after the 90-day period set forth in the comparable section of the Personal Income Tax Law. to section 25432 providing for corrections to be reported within 90 days (Rev. & Tax. Code, §18451). It was concluded that the provision which parallels section 25674 (Rev. & Tax. Code, §18586.3) was not applicable. It was then concluded that respondent was allowed four years after the change to issue its proposed assessment pursuant to the provision comparable to section 25673 (Rev. & Tax. Code, $18586.2). It was stated that any other interpretation would make meaningless the requirement of section 18451 that a report of a federal change be filed within 90 days. (See also the Appeal of Mary R. Encell, Cal St Bd . Equal., April 21, 1959; and Montgomery Ward & Co. v. Franchise Tax Board, 6 Cal. App. 3d 149, at 163 [85 Cal. Rptr. 890], appeal dismissed, 400 U.S. 913 [27 L.-Ed. 2d 152].)

In the present appeal the Tax Court's decision became final on January 5, 1955. We are not certain of the date of the actual federal assessment but in view of the federal statutory provisions, 60 days thereafter would have been the latest date for an assessment. Whether we consider the date the Tax Court's decision became final or the date of the actual federal assessment as the starting date for the 90-day period provided for in section 25432, it is clear that the 90-day period had expired prior to June 14, 1955. Furthermore, the June 14 and June 28, 1955, responses did not constitute actual reporting of a change or correction. As stated in the Appeal of Market Lessors, Inc., decided by this board on September 12, 1968, "The plain meaning of this language is that a taxpayer must report the substance of the change, correction or re-negotiation, not merely the fact that a change was made." Appellant maintains that the judgment of the Tax Court sets forth no corrected income or changes in net income, but simply a figure of additional tax. It is noted, however, that detailed computations were submitted showing California income upon the basis of such stipulations for the years 1944 and 1945.

Inasmuch as appellant did not comply with the reporting requirements of section 25432, respondent was entitled to take its action within the period prescribed in section 25673, and the proposed assessments were made well within this period. We do not deem it essential that the proposed assessments must also be issued within the period defined in section 25663a. In the Appeal of The Hermoyne, Inc., decided by this board on February 17, 1959, the taxpayer agreed with the Commissioner of Internal Revenue to extend to June 30, 1953, the time for assessing

federal tax deficiencies. The proposed assessments were issued subsequent to December 31, 1953, but within the period prescribed in section 25674. It was held that respondent was not barred from its action. We conclude that the same reasoning should apply where section 25673, rather than section 25674, provides the applicable limitation period. (See also Mudd v. McColgan, **30** Cal. 2d **463** [183 P.2d 10].) We believe the important point is that, as indicated in The Hermoyne, Inc., appeal, there are statute of limitation code provisions which provide for alternatives and that one of the statutory periods was open when respondent issued its notices of proposed assessments. (See the dictum in Montgomery Ward & Co. v. Franchise Tax Board, supra, **6** Cal. App. 3d 149, at 169 [85 Cal. Rptr. 890], appeal dismissed, **400** U.S. **913** [27 L. Ed 2d 152].) Nor is it essential that the statute of limitations be open under section 25663a at the time the federal determination becomes final or at the time when the federal assessment is made. Sections 25432, 25673, and 25674 come into consideration where there is a federal change or correction. Their purpose would be frustrated if through inadvertence or lack of necessity federal extensions were not agreed upon between the federal government and the taxpayer.

We also conclude that there is no basis for asserting estoppel against respondent with respect to the imposition of assessments for either principal or interest. Appellant's failure to perform timely and properly its duty of reporting resulted in the timely issuance of the notices of proposed assessments. It was not an act of respondent which left the statute open. (Cf. Market Street Railway Co. v. State Board of Equalization, **137** Cal. App. 2d **87** [290 P.2d 20].)

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,

Appeal of The Pullman Company

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 protests of The Pullman Company against proposed assessments of additional franchise tax in the amounts of $2,273.32, $5,780.34 $3,053.86 $5,481.59, $5,592.92, $8,726.13 $655.89 $2 018.43, $113.37, $3,472.89, $5,019.52, $1,536.80, $941.06, $968.96, and $4,604.84 for the income years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1950, 1951, 1952, and 1953, respectively, be modified in accordance with the agreement of the parties for the years 1944 through 1953, but in all other aspects the action be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of March, 1972, by the State Board of Equalization.

John W. Lynch, Chairman

William M. Bonelli, Member

George R. Reilly, Member

Richard Nevins, Member

_____, Member

ATTEST: W. W. Sumida, Secretary