BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
RIETZ MANUFACTURING COMPANY)

Appearances:

For Appellant: David P. Brown
Stephen J. Martin
Attorneys at Law

For Respondent: Carl G. Knopke
Counsel

O P I N I O N

These appeals are made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Rietz Manufacturing Company against proposed assessments of additional franchise tax in the amounts of $3,071.79, $2,666.67, and $3,865.41, for the income years ended September 30, t967, 1968, and 1969, respectively, or in the amounts of $3,071.79, $2,666.67, and $6,607.00 for the income years ended September 30, 1967, 1968, and 1969, respectively.[1/]

1/ For reasons explained further in this appeal, respondent issued two Notices of Action dated August 30, 1979 and October 5, 1979, respectively. The amounts for the income years ended September 30, 1967 and 1968 were the same in both Notices. The amount for the income year ended September 30, 1969 was increased. Should respondent prevail in all respects, the amounts protested in the Notice of Action dated October 5, 1979, will be the amount of appellant's assessment of additional franchise tax.

There are two procedural questions presented by these appeals: (i) whether respondent had the authority to withdraw a Notice of Action (NOA) before it became final under Revenue and Taxation Code section 25666;[2/] and (ii) whether respondent was bound by NOAs which became final and could not, therefore, issue later Notices of Additional Tax Proposed to be Assessed (NPAs) and NOAs covering the same issues and years.

On July 7, 1971, respondent issued NPAs (first NPAs) to appellant for the income years ended September 30, 1967, 1968, and 1969. The amounts assessed in those NPAs were $48,141.09, $5,400.75, and $7,730.39, respectively. The NPAs were timely protested, and, after due consideration, respondent issued NOAs (first NOAs) on August 21, 1972, revising the first NPAs as follows: 1967 revised to $382.47; 1968 withdrawn; and 1969 withdrawn.

Before the first NOAs became final, respondent received information that an Internal Revenue Service (IRS) audit was underway and withdrew the first NOAs in a letter to appellant dated September 11, 1972. The thirty-day appeal period expired on September 20, 1972, without an appeal being filed by appellant.

Upon completion of the IRS audit, respondent issued new NOAs (second NOAs) on August 6, 1979, for the July 7, 1971, NPAs as follows: 1967 revised to $3,071.79; 1968 revised to $2,666.67; and 1969 revised to $3,865.41.

After appellant indicated its intention to appeal the above assessments, respondent asserted an alternative basis for assessing the deficiencies under appeal. This was done by issuing new NPAs on August 6, 1979, based on the federal income tax adjustments resulting in the following assessment: 1967--$3,071.79; 1968--$2,666.67; and 1969--$6,607.00. Appellant timely protested these NPAs, and respondent affirmed its

2/ All references to Revenue and Taxation Code section 25666 in this appeal are to former section 25666 in effect prior to the enactment of Assembly Bill 2656 (Stats. 1982, Ch. 700), operative January 1, 1983, which substantially revised this section.

assessments in NOAs (third NOAs) issued on October 5, 1979. Appellant has also timely appealed the third NOAs.3/

The same legal issues were involved in all of the NPAs and NOAs which are the subject of these consolidated appeals: principally, "Royalty Expense" for each year under review, "Legal Expense" for the income year ended September 30, 1967, and "Officers' Salaries" and "Pension Trusts" for the income year ended September 30, 1969. The merits of these adjustments are not in issue.

Pursuant to the provisions of regulation 5028 of the State Board of Equalization Hearing Procedures (Cal. Admin. Code, tit. 18, § 5028), appellant and respondent have stipulated to the above facts. The parties agree that in order for appellant to prevail, both issues must be resolved in its favor.

The first question to consider is whether respondent had the authority to withdraw the first set of NOAs before they became final.

Revenue and Taxation Code section 25666, provides, in pertinent part:

> After consideration of the protest and the evidence adduced in the event of such oral hearing, the Franchise Tax Board's action upon the protest is final upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer unless within the 30-day period the taxpayer appeals in writing from the action of the Franchise Tax Board to the board.

Appellant argues that the 30-day period provided for in section 25666 does not speak in terms of respondent's "action, unless modified or withdrawn" but only of its singular "action." It submits that once that action is taken, the only event prescribed by the statute which

3/ The difference in the second NOAs and the third NOAs for the income year ended September 30, 1969, results from an NPA issued June 15, 1977 covering areas not previously assessed in the first NPA for that year. Respondent withdrew the June 15, 1977, NPA by the second NOA and then included adjusted assessments of these areas in the August 6, 1979, NPA which was affirmed in the third NOA.

can prevent respondent's decision from becoming final is the filing of a written appeal by the taxpayer with this board. Appellant contends that if the Legislature had envisioned that respondent could revoke or amend its action, the statute would have provided that the taxpayer had thirty days from the last action of respondent within which to file an appeal. Appellant compares section 25667 of the Revenue and Taxation Code and notes that section 25666, unlike section 25667, is barren of any reference to authority on the part of respondent to reconsider its action once a determination has been made. As such, appellant concludes that the Legislature's specific grant of authority demonstrated in section 25667 and its failure to grant such authority to respondent in section 25666 evidences an irrefutable indication that the Legislature specifically did not intend to confer such authority on respondent in enacting section 25666. Finally, appellant submits that such authority cannot be implied because the authority of an administrative agency must be specifically delegated by the Legislature.

Respondent argues that under appellant's interpretation of section 25666, the 30-day appeal period is superfluous, meaningless and unnecessary. Respondent points out, however, that the Legislature is presumed to intend that each phrase it enacts has an effect, rather than being redundant and meaningless. As such, it submits that the only meaningful effect that this phrase can have is to allow respondent to act on its own order before it becomes final.

It has generally been recognized that if the jurisdiction of an administrative board is purely statutory, it must look to its statute to ascertain whether its determinations may be reopened. (Olive Proration Etc. Corn. v. Agri. Etc. Corn., 17 Cal.2d 204 (1941); 16 Ops.Cal.Atty.Gen. 214, 215; 25 Ops.Cal.Atty.Gen. 179.)

In 25 Ops.Cal.Atty.Gen. 119, a 90-day period found in former section 19057 of the Revenue and Taxation Code was examined by the Attorney General to determine whether the Franchise Tax Board had the authority to *reverse* its action within the 90-day period. The Attorney General concluded that the Legislature, by making the action of the board on the claim final only upon the expiration of the 90 days after mailing of the notice of such action, must have intended that the action of the board was subject to modification. (25 Ops.Cal.Atty.Gen., supra, at p. 121.)

We can find no justification for interpreting the 30-day period found in section 25666 in a different manner than the interpretation made by the Attorney General in his discussion of former section 19057. Unless the language of a statute permits no alternative, a literal construction which results in absurd consequences should not be chosen. (58 Cal.Jur.3d, Statutes, § 104, p. 476; Jersey Maid Milk-Products Co. v. Brock, 13 Cal.2d 620, [91 P.2d 577] (1939).) Where the language is susceptible of two constructions, one of which will render it reasonable, fair, and harmonious with its purpose, and the other of which will produce absurd consequences, the first should be adopted. (58 Cal.Jur.3d, Statutes, § 104, supra.) When the meaning of a statute is not clear on its face, a construction which results in inconvenience and impracticality is to be avoided. (Napa v. Easterby, 76 Cal. 222, [18 P. 253] (1888).) Appellant's construction of section 25666 leads to such an inconvenient and impracticable result in that if it is accepted, respondent is powerless to act in any situation, even one that works to a taxpayer's advantage and would allow a taxpayer to avoid unnecessary further action and expense. As such, we conclude that respondent was properly permitted to withdraw the first set of NOAs within the 30-day period.

Appellant's reliance on a comparison between section 25667 and 25666 as indicative of the Legislature's intent on this subject is misplaced. In section 25667 both the Franchise Tax Board and the taxpayers are specifically named because the statute is addressing what action these parties must take before a third party, this board. Both section 25666 and section 19057 deal solely with respondent's actions.

The second issue to be resolved is whether respondent was bound by the principle of res judicata with respect to the same issue for the same income years when the first set of NOAs became final, thus rendering the third set of NOAs and the second set of NPAs upon which they were based a nullity.

Appellant submits that the only reasonable interpretation of sections 25666 and 26424, taken together, is that when the first set of NOAs became final, they were res judicata with respect to the issues dealt with in the first set of NPAs, the protest filed thereto, and the first set of NOAs issued by respondent upon due consideration of the protest. Appellant argues that the Legislature did not intend to grant respondent the power to override its own prior actions and that once the action of an administrative

agency becomes final, that agency loses jurisdiction over the matter.

Respondent submits that section 26424 does not apply in situations where, as here, there h-as been no final determination (i.e., there having been no action taken prior to the end of the 30-day period); therefore, the doctrine of res judicata is inapplicable in the instant case.

Due to the fact we have concluded that respondent acted properly in withdrawing the previously issued **NPAs** and **NOAs** and issuing new **NPAs** and **NOAs,** we find it unnecessary to delve deeply into the question of whether the first set of **NOAs** were res judicata with respect to the issues dealt with in the first set of **NPAs.** Suffice it to say that our understanding of the doctrine of res judicata as one which operates only upon the parties and prevents them, on account of a prior determination, from litigating a controversy or issue which, except for the prior determination, could have been litigated in the subsequent proceeding, would render its operation ineffective in the instant case. In this case, the statutory basis for the application of the doctrine is section 26424, which also couches its application in terms of a final determination. Accordingly, we must conclude that there has been no "prior determination" until the end of the 30-day period. As such, there is no administrative decision which is final and enforceable and the doctrine does not apply. (Gage v. Gunther, 136 Cal. 338 **[68** P. **710] (1902).)**

For the reasons stated above, respondent's action in this matter will be sustained.

Appeals of Rietz Manufacturing Company

O R D E R

Pursuant to the views expressed in the opinion of the board on file in these proceedings, and good cause appearing therefor,

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 Rietz Manufacturing Company against proposed assessments of additional franchise tax in the amounts of $3,071.79, $2,666.67, and $6,607.00, for the income years ended September 30, 1967, 1968, and 1969, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of February, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9