BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
FAMILIAN CORPORATION)

Appearances:

For Appellant: Richard J. Kaplan
Attorney at Law

For Respondent: Noel J. Robinson
Counsel

O P I N I O N

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Familian Corporation against a proposed assessment of penalty in the amount of $24,624.87 for the income year ended June 30, 1978.

The question presented is whether appellant has shown that respondent's assessment of a penalty for underpayment of estimated taxes is in error.

Appellant, a Delaware corporation, commenced doing business in this state in 1970. It uses the accrual method of accounting and files California franchise tax returns on the basis of a fiscal year ending June 30. On September 14, 1978, appellant submitted a request for extension of time to file its corporate franchise tax return for the income year ended June 30, 1978, which was accompanied by a payment of $400,000, representing appellant's expected liability for that income year. The request indicated that no payments of estimated tax had been made for that period. On March 12, 1979, appellant filed its corporate franchise tax return for the income year ended June 30, 1978, showing a self-assessed tax liability of $423,168. A payment of $23,168, the difference between the self-assessed tax liability and the $400,000 payment noted above, accompanied the return.

Based on these facts, respondent concluded that appellant had failed to pay any estimated tax for the income year ended June 30, 1978, and, accordingly, assessed a penalty for the underpayment of estimated tax pursuant to Revenue and Taxation Code section 25951 of $24,624.87 on April 24, 1979. In order to enable appellant to submit a timely protest, the penalty was subsequently canceled and reassessed pursuant to a Notice of Additional Tax Proposed to be Assessed on September 21, 1979. Respondent's denial of that protest led to this appeal.

In the event of an underpayment of estimated tax, a penalty is imposed pursuant to section 25951. An underpayment of estimated tax is defined as the excess of the amount that would be required to be paid on each installment of estimated tax if the estimated tax were equal to eighty percent of the amount of the tax shown as due on the final return, over the amount actually paid on or before the due date of each installment. (Rev. & Tax. Code, § 25952.) Since, based on the facts related above, eighty percent of the tax shown as due on the final return was not paid, an underpayment of estimated tax existed, and a penalty was properly assessed unless appellant can establish that it came within an exception.

Since appellant generated losses in the preceding year, under the relief provisions of section 25954 of the Revenue and Taxation Code, as in effect during the year at issue, appellant could have avoided the subject

penalty by filing a timely declaration of estimated tax and paying the minimum tax. In order to have availed itself of this provision, though, the minimum tax of $200 must have been paid on or before the date it became due, October 15, 1977. (Appeal of Uniroyal, Inc., Cal. St. Bd. of Equal., Jan. 7, 1975.)

Appellant argues that it made such a timely payment of estimated tax. The record indicates that on September 15, 1977, appellant filed an application for an extension to file its franchise tax return for the income year ended June 30, 1977, the income year preceding the year at issue. The request was accompanied by a $2,600 payment to be applied for that year (i.e., income year ended June 30, 1977). On March 13, 1978, appellant filed its franchise tax return for the income year ended June 30, 1977. Appellant did not claim credit for the above noted $2,600 payment on this return. Instead, pursuant to a letter dated March 27, 1978, appellant requested the return of that $2,600, indicating that the payment had been made to cover the estimated minimum tax liability for the income year ended June 30, 1977. Complying with that request, respondent refunded the $2,600 to appellant on May 15, 1978.

Appellant now claims that it had intended the $2,600 to be a payment of estimated tax for the income year ended June 30, 1978, rather than a payment of estimated tax for the income year ended June 30, 1977. Appellant buttresses its claim by noting that (1) the amount paid, $2,600, mirrored the minimum tax due for thirteen affiliated corporations that were in existence during the income year at issue; (2) no claim for refund of the $2,600 was made on the 1977 return: and (3) the provisions of Revenue and Taxation Code section 25444 allow it to treat the $2,600 as a payment of estimated tax for the year at issue. Respondent, on the other hand, contends that the documentation surrounding appellant's actions 1/ indicates that appellant intended the subject payment be applied to the prior year and not the year at issue.

1/ As indicated above, those circumstances are: (a) the $2,600 payment accompanied a request for extension for the prior year: (b) refund of that payment was requested and made; (c) the letter requesting that refund referred to the payment as being made as an estimate for the year prior to the one on appeal; and (d) the payment was not claimed as an estimated payment on the return filed for the year at issue.

Accordingly, resolution of this matter initially focuses on the factual determination of appellant's intent. In the Appeal of Jhirmack Enterprises, Inc., decided by this board on December 11, 1979, the taxpayer argued that it had intended that a prior period's overpayment be credited for the period at issue, but the computer service had erroneously checked the wrong instruction box, and that sum had been refunded. In sustaining the Franchise Tax Board, we held that the application of a tax payment is to be made in accordance with the instructions of the taxpayer. In Jhirmack, those instructions were established by the forms the taxpayer submitted. Moreover, we noted that once a taxpayer has given a direction as to the application of a payment, it may not change the direction of the application of that payment. In the instant case, appellant's instructions with respect to the application of the $2,600 are well documented. (See footnote one.) Moreover, respondent followed appellant's direction and refunded the payment to it. Under the Jhirmack rule, appellant simply has no right to direct a different application of the same funds at this time. Moreover, appellant's reliance upon section 25444 is misplaced. While that section has terminated some of the formalities surrounding declarations of estimated tax payments for years beginning after December 31, 1971, it does not permit taxpayers to change instructions clearly manifested as in the instant case. To do so, in the absence of any statutory authority therefor, would create chaos in the administration of tax laws. (See Starr v. Commissioner, 267 F.2d 148 (7th Cir. 1959).)

Accordingly, respondent's assessment of the subject penalty must be sustained.

Appeal of Familian Corporation

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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Familian Corporation against a proposed assessment of penalty in the amount of $24,624.87 for the income year ended June 30, 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 27th day of June, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis and Mr. Bennett present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

_____, Member