

Appeal of Eagle Banner Ranches

The issue presented is whether appellant's claim for refund is barred by the statute of limitations.

Appellant received an extension of time until June 15, 1977, for filing its return for **the** income year ended September 30, 1976. The **return** was filed on February 22, 1978. In January 1981, appellant was notified that respondent planned to audit its returns for the income years ending in 1976, 1977, 1978, and 1979. Because of appellant's failure to respond promptly to respondent's letters, the audit was not begun until May 1981 and was not completed until October 1981. The statute of limitations on deficiency assessments and claims for refund for the income year 1976 expired on June 15, 1981. A waiver of the statute of limitations was executed on October 31, 1981. Since the waiver was filed after the statute of limitations had run, the waiver did not extend the statute of limitations for income year 1976.

Upon completion of the audit, respondent's auditor informed appellant that she had discovered an error in the 1976 return which, if corrected, would result in a large refund. By letter dated October 28, 1981, she explained that extensive work would be required to determine the amount of the refund and that **respondent** was not able to perform this task **because** of manpower limitations. However, she stated that if appellant desired to pursue the possibility of a refund, it could file an amended return within three weeks. On **November** 18, 1981, appellant filed an amended return for 1976, claiming a refund of \$19,704. **Respondent** denied the claim, contending that it was filed more than four years from the extended due date of appellant's return and was therefore barred by section 26073 of the Revenue and Taxation Code.

Section 26073 of the Revenue and Taxation Code provides that claims for refund must be filed within four **years** from the last date prescribed for filing the return or within one year from the date of the overpayment. Appellant concedes that its claim was not filed within that time period and therefore was not timely under section 26073. However, it contends that the claim for refund was timely filed under section **25663(c)** of the Revenue and Taxation Code. That section provides that if the taxpayer improperly omits from gross income an amount in excess of 25 percent of the gross income stated on the return, additional tax may be assessed within six years after the return was filed. Appellant contends that

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section 25663(c) applies in this instance, resulting in respondent **having six** years to issue a deficiency assessment. It further contends that the period for filing claims for refund was also extended to six years.

We must reject this argument. Even if we concluded that section 25663(c) applies in this instance and that respondent has six years to issue a deficiency assessment, appellant would remain subject to the **four-** year statute of limitations found in section 26073. Section 25663(c) extends only the period during which additional tax may be assessed and does not mention the period during which claims for refund may be filed. Appellant reasons that the statute of limitations applicable to respondent and to the **taxpayer** is always the same. This position has no support in either the statute or in cases.- (See, e.g., Plunkett v. Commissioner, 465 **F.2d** 299 (7th Cir. 1972).) - -

Appellant complains of the unfairness it has suffered, since respondent's agent encouraged it to file the amended return. While we are sympathetic to appellant's situation, the language of section 26073 is mandatory, and we cannot waive the statute of limitations merely because one of respondent's auditors encouraged the untimely filing of the claim for refund.

Appellant's final argument is that, even if its claim was not timely filed, it is entitled to an offset against its tax liabilities for other years under section 26073d of the Revenue and Taxation Code. Section 26073d allows certain overpayments barred by the statute of limitations to be "allowed as an offset in computing any deficiency in tax" Appellant contends that the overpayment in question is the type covered by section 26073d and that, therefore, the overpayment should be allowed as a credit against future tax liabilities. Appellant's argument ignores the purpose and the language of section 26073d. The statutory purpose is to provide relief by means of an offset to a taxpayer who has items of income or deductions transferred between years, or between affiliated taxpayers, resulting in both a deficiency not barred and an overpayment barred by the normal statute of limitations. The section specifically states that the barred overpayment shall be allowed as a credit against a **deficiency of tax**. Appellant has no outstanding **deficiency of tax** and thus the sole remedy it seeks is a refund of the overpayment. Section 26073d does not allow a refund of the **barred overpayment** and, in fact, specifies that no refund of the overpayment can be

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allowed **absent** a timely claim. Since appellant has not **filed** a **timely** claim,, we cannot grant the refund it requests.

For the above reasons, respondent's action must be **sustained**.

