BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
FIRESTONE TIRE AND)
RUBBER COMPANY)

Appearances:

Por Appellant: Dennis A. Page
Attorney at Law

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a),[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Firestone Tire and Rubber Company for refund of franchise tax in the amount of $301,800[2] for the income year ended October 31, 1978.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in-issue.

2/ The parties now agree that the actual amount in controversy is $293,400.

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The sole issue in this appeal is whether respondent can apply appellant's 1978 income year overpayment of tax against alleged unpaid interest on "preliminary assessments" for prior years.

Appellant is an Ohio corporation qualified to do business in California. It reports its tax and files returns on an October 31 fiscal year basis. This appeal arises as the result of a protracted controversy regarding appellant's tax liability during the 1960's and 1970"s. In order to halt the accumulation of interest on possible deficiencies for the years 1964-76, which years had not been audited, respondent, as part of a 1978 stipulation, issued "preliminary assessments" for those years totaling $6 million. According to respondent, at the time the notices were issued, interest in excess of $2.7 million dollars had accrued on the $6 million "preliminary assessments." The "preliminary assessments" were not intended to be determinative of appellant's ultimate tax liability for 1964-76 which could result in a lower or a higher final assessment; their sole purpose was to stop the running of interest by setting out an amount which would be paid by appellant.

On April 24, 1978, appellant remitted the sum of $6 million in partial payment of these amounts. As agreed between the parties, this payment was credited in its entirety against principal, reducing the outstanding principal amount to zero. The $2,776,666.11 accrued interest, which respondent contends was due as of the date of the principal payment, remained unpaid in its entirety.

On July 15, 1979, appellant filed its 1978 income year tax return declaring a tax liability for that year in the amount of $6,200 and reflecting a now agreed overpayment of estimated tax for this year amounting to $301,800. The amount in controversy, $293,400, was applied by respondent in partial satisfaction of the $2.7 million in interest which respondent contends was due. Pursuant to appellant's request, the remaining amount of $8,400 was credited to its 1979 tax year.

Appellant argues that there was no interest due at the time of the offset since the so-called assessments were preliminary only and not final. According to appellant, there can be no interest due until an actual tax liability, as opposed to a speculative tax liability, exists. Respondent contends that, pursuant to the stipulation between the parties, "an actual liability or one

reasonably assumed to be imposed by law" (§ 26080.2) existed. Therefore, the amount of interest in controversy was due, owing, and unpaid at the time appellant's overpayment was offset.

The basic provisions for the so-called "preliminary assessments" appear at section 7 of a stipulation entered into between the parties and filed in Los Angeles Superior Court as part of litigation concerning previous tax years. (Firestone Tire & Rubber Company v. Franchise Tax Board, Super.Ct. L.A.Co., No. C31243.)[3] The stipulation provided, in pertinent part, that:

> 7. . . . Upon issuance of preliminary NPA's Firestone may pay deficiencies in tax shown thereon to be due and thereupon no further interest will accrue on the amounts paid from and after the date of payment. Any payment made by Firestone will be credited in full against the deficiencies in tax only and shall not be applied against interest which may have accrued with respect to said deficiencies.
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> 8. . . . The preliminary NPA's and payment herein referred to shall be without prejudice to any claim or defense of Firestone or Board regarding the correctness of the amounts or substantive propriety of the "estimated" assessments shown in said preliminary NPA's in any claim for refund, litigation or any other action which may result therefrom.

(App. Br., Ex. A.)

The parties agreed that the assessments were not intended to be determinative of appellant's ultimate tax liabilities for the assessment years, a process that was to continue, but were issued solely to stop the running of interest. Any portion of any payments appellant remitted which ultimately proved to be overpayments would

3/ The litigation has now been completed, (See Firestone Tire & Rubber Co. v. Franchise Tax Board, 2 Civ. 62918 (Feb. 9, 1984) [unpub. opn.], app. dism., -- U.S. -- [83 L.Ed.2d 9] (Oct. 1, 1984).) However, we do not believe that the outcome of the case should have any bearing on the actions of the parties herein at the time the actions were taken.

accumulate interest. It was also agreed that section 26080.2, which provides that any "payment not made incident to a bona fide and orderly discharge of an actual liability or one reasonably assumed to be imposed by law, is not an overpayment ... and interest is not payable thereon" would not apply to the payments.

Respondent advances two arguments in support of its position. First, that payment of interest is required under sections 26071 and 25901. It notes that under section 26071 if there has been an overpayment of any liability by a taxpayer for any year for any reason, the amount of the overpayment shall be credited against any amount then due from the taxpayer and the balance refunded to the taxpayer. Respondent seeks support for this argument from Revenue Procedure 64-13, 1964-1 Cumulative Bulletin 674 (Part I), which provides that an advance payment of federal tax following issuance of a statutory deficiency notice will usually prompt an immediate assessment following which interest will also be immediately due and payable. Additionally, respondent submits that in California, generally there is a present obligation to pay all tax liabilities, including interest, which dates from the time a return for the period is originally due. (See §§ 25551, and 25901.)

Respondent's second argument is advanced on public policy grounds. In essence, it claims that to allow appellant a refund under these circumstances results in an "interest-free loan" and that a decision by this board that interest is not due until there has been a final determination will only serve to further delay the resolution of matters between the parties as appellant would then have the opportunity to utilize the money for profit without cost until final resolution, with the profits growing larger as, time passes.

For the reasons expressed below, we disagree with both arguments respondent has advanced.

First, we consider the argument that the provisions of sections 26071 and 25901 control this situation and require the payment of interest, While we agree with respondent that under certain circumstances those sections would control and require the payment of interest, the circumstances are not present in the instant case. At the time appellant filed its bank and corporation franchise tax return on July 15, 1979, section 26071 provided, in pertinent part, that, "(I)f ... there has been an overpayment of tax, penalty or interest by a

taxpayer for any year for any reason, the amount of the overpayment shall be credited against any taxes then due from the taxpayer. ..." Effective July 24, 1979, as a result of the passage of Senate Bill 237 (Stats. 1979, ch. 292, §36, p. 1089), the reference to "tax, penalty, or interest" in section 26071 was changed to "any liability imposed by this part," and the reference to "taxes" was changed to "amount." Respondent calls the 1979 amendment a technical correction, or one intended merely to clarify the statute, and therefore not significant. We disagree. As a matter of statutory construction it is well settled that a material change in the language of a legislative enactment is usually viewed as indicative of an intent to change its meaning and that the courts will not infer that the Legislature intended only to clarify the law unless the nature of the amendment clearly demonstrates that this is the case or the Legislature itself states' in a particular amendment that its intent was to be declaratory of existing law, (Verreos v. City and County of San Francisco, 63 Cal.App.3d 86, 99 [133 Cal.Rptr. 649] (1976).) Neither is the case here. Furthermore it seems clear that the 1979 amendments were clearly substantive in nature in that they enlarged the scope of section 26071 from "taxes" then due to "any amount" then due. Amendatory acts, no less than original enactments, will be denied retrospective operation on substantive rights, in the absence of a declared intention to make them retrospective. (Hibernia S. and L. Soc. v. Rayes, 56 Cal. 297 (1880); Booker v. Castillo, 154 Cal. 672 [98 P. 1067] (1908).) It is a well-recognized general rule of construction that unless the intention to make a statute retrospective clearly appears from the act itself, a statute will not be construed to have that effect. (Estate of Frees, 187 Cal. 150 [201 P. 112] (1921).) There was no provision in Senate Bill 237 for a retroactive application of the amendments to section 26071. The same legislation amended other provisions of the Revenue and Taxation Code and provided for retroactive application of certain of the provisions. (See Stats. 1979, ch. 292, § 41, p. 1091.) As such, we must conclude that at the time the overpayment was made by appellant, the provisions of former section 26071 applied and respondent could only credit an overpayment against any taxes then due, as opposed to any interest then due.

Because of our conclusion that former section 26071 controls in this situation, we find it unnecessary to address the issue raised by respondent that for policy reasons appellant should not be allowed an "interest-free loan." Suffice it to say, however, that respondent freely

entered into the stipulation with appellant which allowed for postponement of the interest payment and a halt to running of the interest. While the agreement was no doubt necessary because of the exigencies of the protracted litigation referred to in respondent's brief, it did operate to confer certain benefits to appellant. We see no reason why respondent should be allowed to undermine the agreement through the actions it attempted in the instant case.

In conclusion, respondent was not entitled to apply appellant's 1978 income year overpayment of tax against alleged unpaid interest on "preliminary assessments" for prior years. As such, appellant's claim for refund was improperly denied and respondent's action must be reversed.

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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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Firestone Tire and Rubber Company for refund of franchise tax in the amount of $301,800 for the income year ended October 31, 1978, be and the same is hereby reversed.

Done at Sacramento, California, this 8th day of May, 1985, by the State Board of Equalization, with Board Members, Mr. Dronenburg, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9