*77-SBE-008*

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )
)
CHROMALLOY AMERICAN CORPORATION )

For Appellant: Richard A. Paysor
Assistant Treasurer

For Respondent: Bruce W. Walker
Chief Counsel

Paul J. Petrozzi
Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Chromalloy American Corporation for refund of franchise tax in the amounts of $30,628 and $93,227 for the income year 1965.

Appeal of Chromalloy American Corporation

During 1965, the California operations involved in this appeal were conducted by Chromizing Corporation (Chromizing), a wholly owned subsidiary of the appellant, Chromalloy American Corporation. Prior to and during 1965, Chromalloy American did no business in California. However, on December 31, 1965, Chromizing was liquidated into Chromalloy American and became the Chromizing Division of Chromalloy American Corporation. Appellant, as transferee, filed Chromizing's return for the 1965 income year on June 13, 1966, after receiving an extension of time until June 15, 1966. All of Chromizing's income was reported as California source income. Sometime after 1965, a federal audit of both Chromizing and appellant was conducted, resulting in the assessment of a deficiency for 1965. Final federal action was taken on November 13, 1968. The particular federal adjustments are not relevant here.

Subsequently, on May 27, 1970, shortly before the four-year statute of limitations ran, appellant filed a claim for refund for $30,628 in the form of an amended return for income year 1965. The claim incorporated the federal adjustments and also asserted that certain sales made by Chromizing in 1965 should have been attributed to sources outside of California thereby reducing the amount of income subject to taxation. by Californid.

Thereafter, respondent did not investigate appellant's claim for approximately two years. During the course of its audit, respondent determined that appellant, including Chromizing in 1965 and the Chromizing Division thereafter, was a unitary business. As a result of this determination, respondent concluded that appellant should have filed a combined report including its California operations as a part of its unitary business operations throughout the United States. The years audited were income years 1965, 1966, 1967, and 1968, While the audit was in progress, appellant filed waivers extending the statute of limitations for 1966 and 1967. On December 12, 1973, appellant filed timely claims for refund for income years 1966 and 1967 based on respondent's determination that appellant was engaged in a unitary business. These refunds were granted by respondent's Notice of Action dated February 5, 1974.

However, on December 26, 1973, respondent denied appellant's claim for income year 1965. The basis for denial was respondent's determination that

the alleged sales were for services, coupled with its long-established practice of assigning proceeds from services to the situs where the services were rendered, which in this case was California. Appellant appealed the denial of its claim for refund on January 28, 1974.

Subsequently, on May 21, 1974, appellant filed a second claim for refund for the income year 1965 in the amount of $93,227. Appellant's basis for the second refund claim was that its California operation was part of its unitary business in 1965 as well as in later years. Respondent denied this claim as being untimely and barred by the statute of limitations.

This appeal presents two issues for determination. First, was appellant's second claim for refund for income year 1965 barred by the statute of limitations? Second, was appellant's first claim for refund for income year 3.965 properly denied on the basis that certain sales were properly attributable to a California source rather than an out-of- state source?

Initially, we will consider whether appellant's second claim for refund was timely, either as a separate claim or as a supplement or an amendment to the first claim. At the outset we note that respondent does not challenge the merits of the claim; it concedes that appellant's operations, including Chromizing, were unitary in 1965. However, respondent maintains that the claim was not timely since it was not filed until May 21, 1974, almost four years after the last date allowed for filing a claim for 1965. (Rev. & Tax. Code, § 26073.)

Section 26073 of the Revenue and Taxation Code requires that claims for refund be made within four years of the last date for filing a return, or within one year of the date of overpayment, whichever expires the later. In this matter, appellant received an extension of time in which to file its 1965 return until June 15, 1966. Apparently, the last payment with respect to the year in issue was made March 15, 1966. According to section 26037, the last date upon which a claim for refund could be filed for income year 1965 was June 15, 1970. Thus, in the absence of some compelling reason, we must conclude that appellant's second refund claim, which was not filed until May 21, 1974, is barred by the statute of limitations.

The sole argument raised by appellant to counter the effect of the statute of limitations relies on sections 25432 and 25673 of the Revenue and Taxation Code. Appellant argues that its failure to report the federal adjustments to its 1965 return within 90 days extended the statute of limitations for filing a claim for refund four more years, until May 26, 1974. Therefore, appellant concludes that its second claim for refund, filed May 21, 1974, was timely. This argument is without merit. We have previously held that these sections only concern deficiency assessments by respondent and do not apply to refund claims. (Appeal of Daniel Gallagher Teaming, Mercantile and Realty Co., Cal. St. Bd. of Equal., June 18 1963.) The Appeal of The Pullman Company, decided by this board on March 28, 1972, relied on by appellant is inappos-ite. That case merely held that the failure to comply with these and similar sections, allowed respondent to assess deficiencies within four years Of the final federal action.

Although not expressly raised by appellant, we next consider the issue of whether a second refund claim filed after the limitation period has expired can be considered timely because a prior timely claim has been.filed. We have not previously considered this issue: however, the question has been treated on the federal level in similar settings. (See, e.g., United States v. Andrews, 302 U.S. 517 [82 L. Ed. 398] (1938); Commercial Solvents Corp. v. United States, 427 F.2d 749 (Ct. Cl.)', cert. denied, 400 U.S. 943 [27 L. Ed. 2d 247] (1970); Consolidated Coppermines Corp. v. United States, 296 F.2d 743 (Ct. Cl. 1961); Scovill Manufacturing Co. v. Fitzpatrick, 215 F.2d 567 (2d Cir. 1954): Scharpf v. United States, 157 F. Supp. 435 (D.C. Ore. 1956), aff'd per curiam, 250 F.2d 744 (9th Cir. 1957).)

In United States v. Andrews, supra, 302 U.S. at 524, the United States Supreme Court set out the following test:

> Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matter already within his knowledge, or which,' in

> the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

In other words, in order to be allowed, the second claim must not be premised upon a different theory than that urged in the original claim: the claimant may not raise a new factual basis or advance a new legal theory for his claim after the statute of limitations has run.

'Thus, the inquiry is whether this is a situation where a timely informal or general claim was later amended or followed by a specific claim; or whether, after the statute of limitations had run, an attempt was made to file a new claim'under the guise of an amendment or supplement to a prior timely claim. (See Scharpf v. United States, supra.) Appellant's original timely claim sought relief on the basis that the source of certain 1965 sales of Chromizing were outside the state and that the corporation's income taxable by California should be modified accordingly. The theory of the second claim, filed after the statute of limitations had run, was that the entire business of appellant, including Chromizing, was unitary. In effect, appellant has advanced both a new factual basis and a different legal theory in filing its second claim for refund. We believe that this is a case where an attempt was made to file a new claim under the guise of an amendment or supplement to a prior timely claim after the statute of limitations had run and is, therefore, barred as untimely.

Next, we turn to the question whether appellant's original claim for refund was properly denied. The basis for the first claim was that since certain sales to the federal government occurred outside California, income taxable by California should be modified accordingly.

During 1965, Chromizing was engaged in servicing and repairing military aircraft for the federal government. Appellant maintained a small office staffed by three to five employees near a Texas military base. These employees performed most of the negotiations and other

activities involved in obtaining contracts from the United States government. These contracts involved rework and repair of jet engines. When a contract was awarded, the damaged, worn, or off-specification parts were shipped to appellant's California facility. The parts were refurbished and returned to the air base in Texas for reinstallation. On occasion, a part would be so badly worn or damaged that appellant's chrome processing would not restore it to operational specification. In that case, appellant would replace the part from a pooled parts inventory. Appellant did not manufacture the new part, but purchased and stocked new parts against, the eventuality that they would be needed.

The precise issue in controversy was resolved adversely to the taxpayer by this board in Appeal of Aircraft Engineering & Maintenance Co., decided October 5, 1965. In Appeal of Aircraft Engineering, the taxpayer was also engaged in aircraft service and repair activities with its facilities located in Oakland. The taxpayer submitted bids on military aircraft refit and repair contracts. All contract negotiations were handled by the taxpayer's office staff located in Ohio, although the actual services were performed in California. After initially acknowledging the general rule that sales are attributable to the place where solicitation activities occurred, we approved respondent's established practice of apportioning receipts from services according to the situs of the services, noting that such practice was the simplest and most accurate means of giving recognition in the sales factor to income-producing activities of a service nature.

In support of its position, appellant relies on Appeal of Overseas Central Enterprise, Inc., decided by this board on February 18, 1964. However, since that appeal concerned the sale of tangible property, it is inapposite.

Based on the authority of Appeal of Aircraft Engineering & Maintenance Co., supra, we conclude that respondent's action in denying appellant's first claim for refund was proper and must be sustained.

Appeal of **Chromalloy** American 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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Chromalloy American Corporation for refund of franchise tax in the amounts of $30,628 and $93,227 for the income year 1965 be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of February, 1977, by the State Board of Equalization.

, Chairman

, Member

, Member

, Member

, Member

ATTEST: , Executive Secretary