

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
RAY CAVAGNARO, INC.)

For Appellant: Leslie J. Jacob
Certified Public Accountant

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 claim of Ray Cavagnaro, Inc., for refund of franchise tax in the amount of **\$686.00** for the income year ended June 30, 1975.

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The issue presented is whether appellant may offset against **its** tax liability for later years an alleged tax overpayment, the refund of which is barred by the statute of limitations.

Appellant, a California corporation, reports its principal business activity as "**wholesale** trade" on its California franchise tax returns. It is an **accrual** basis taxpayer with a fiscal year ending on June 30. On its franchise tax return for the income year ended June 30, 1971, appellant initially reported tax due of \$3,406, which was paid in full. Thereafter, on October, 19, 1972, appellant filed an amended return for that income year, showing a net loss for that period and claiming a refund of \$3,306 (the amount of tax paid less the minimum tax then in effect).

The amended return constituted a claim for refund but, in respondent's view, did not specifically set forth the grounds upon which the claim was founded. On January 10, 1973, respondent **therefore** requested further information concerning the claim for refund. It also inquired whether a similar federal claim had been filed, and requested information as to the results of any federal audit. Appellant's representative replied on January 26, 1973, and advised respondent merely that a claim had been filed on a similar basis with the federal government but that no audit had as yet been initiated by the Internal Revenue Service.

On two subsequent occasions respondent requested more information from appellant's representative concerning the basis of appellant's claim for refund and the results of any federal action. Respondent maintains that these letters were not answered. On September 10, 1974, respondent issued its notice of action denying appellant's claim for refund on the grounds of failure to furnish information as requested. **Respondent's action** was not appealed.

On appellant's franchise tax return for the income year ended June 30, 1973, it reported a tax liability of \$2,084 but claimed that it **was** entitled to an offset against this amount and also to a cash refund because of the alleged overpayment of \$3,306. Respondent advised appellant that no such \$3,306 credit appeared in its account and, on June 28, 1974, demanded payment of the remaining liability for the income year ended June 30, 1973. Appellant immediately paid the amount demanded.

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On November 15, 1975, appellant filed its return for the income year ended June 30, 1975, reporting a tax liability of **\$5,573**. Appellant offset against that amount payments totalling \$6,259, including the alleged overpayment of **\$3,306**, and requested that the **\$686** difference be credited against the installment payments for the subsequent year. On February 11, 1976, respondent issued its notice of action, denying the attempted offset and the \$686 refund claimed, and demanding payment of the tax it consequently considered as due. Appellant timely appealed from respondent's action.

In this appeal, appellant's representative asserts that its corresponding refund claim filed with the Internal Revenue Service was routinely granted by the Service without an audit, and that a refund of \$13,850 was received from the federal government. He maintains that all necessary information pertaining to the state franchise tax refund claim for the year ended June 30, 1971, was furnished to respondent on several occasions, and that respondent was also notified of the action taken by the Internal Revenue Service. He contends, therefore, that the initial refund claim was improperly denied. Under the circumstances, he **urges** that it was entirely proper for appellant to offset the overpayment for the earlier year against the liability for subsequent periods.

Subdivision (a) of section **26075** of the Revenue and Taxation Code provides, in pertinent part:

If the Franchise Tax Board disallows any claim for refund, it shall notify the taxpayer accordingly. ... [a]t the expiration of 90 days from the mailing of the notice, the Franchise Tax Board's action upon the claim shall be final unless within the 90 days the taxpayer appeals in writing from the action of the Franchise Tax Board to the board.

Appellant did not appeal respondent's denial on September 10, 1974, of the initial refund claim for the income year ended June 30, 1971. Therefore, respondent's action upon the initial claim was final. On several occasions we have held that where respondent's action upon a claim is final, we do not have jurisdiction of the claim for refund, and, consequently, may not consider it. (See Appeal of Peter D. and Kathryn C. Tilton, Cal. St. Bd. of Equal., Nov. 12, 1974; Appeal of T. E. Mohler, Jr., Cal. St. Bd. of Equal., May 28, 1963; Appeal

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of Edward Matzger, Trustee, Cal. St. Bd. of Equal., May 2, 1961; Appeal of Herond N. and Marie Sheranian, Cal. St. Bd. of Equal., Jan. 7, 1964.)

The refund claim filed on *November 15, 1975*, was barred by the statute of limitations because **of the** statute disallowing a refund unless a claim is filed within four years from the last day prescribed for filing a return or within one year from the date of payment. (Rev. & Tax. Code, § 26073.) The final date for filing a timely claim for refund for the income year ended June 30, 1971, was September 15, 1975.

As already explained, appellant's representative nevertheless maintains that because **appellant's** initial refund claim was erroneously denied, it should be entitled to offset the final tax liability against amounts owed for subsequent periods.

There is no statutory basis for such an offset. Section 26073d of the Revenue and Taxation Code does provide for a seven-year statute of limitations for offsetting overpayments which result from a transfer of items of income or deductions to or from another year. However, it is readily apparent that there has been no such transfer of income or deductions in the matter before us.

In addition, since entirely different periods and entirely different funds or transactions are involved in the present case, the doctrine of equitable recoupment is clearly not applicable. (See Hall v. United States, 43 F. Supp. 130 (Ct. Cl. 1942), cert. den., 316 U.S. 664 [86 L. Ed. 17401 (1942); Appeal of James T. King, Cal. St. Bd. of Equal., Oct. 27, 1964.)

For the foregoing reasons, this board lacks jurisdiction to consider the initial refund claim for the earlier period, irrespective of its merits, and the right to offset against tax liability for later periods was properly denied by respondent.

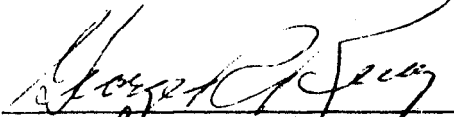
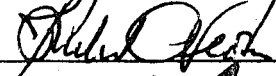

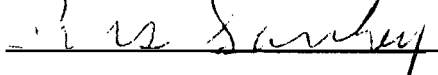
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O R D E R

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 Ray Cavagnaro, Inc., for refund of franchise tax in the amount of \$686.00 for the income year ended June 30, 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of July, 1978, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member

_____, Member
_____, Member