

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
CUPPLES PAPER BAG COMPANY) No. 85R-145-CB
)
)

Appearances:

For Appellant: Paul Shimoff
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 claims of Cupples Paper Bag Company for refund of franchise tax in the amounts of \$19,207, \$23,740, and \$56,603 for the income years 1975, 1978, and 1979, respectively.

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

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The issue presented by this appeal is whether appellant agreed to pay certain deficiency assessments of an affiliated company, Cupples Company, which could not be assessed against that affiliate because of the statute of limitations.

Appellant, a California corporation, is a wholly owned subsidiary of Cupples Company, Manufacturers, which was an Ohio corporation during the appeal years. As its name suggests, appellant is engaged in the business of manufacturing paper bags from its plant in La Mirada, California.

For the income years 1974 through 1979, appellant reported its income on the basis of a combined report which included the incomes of the parent company as well as other subsidiaries, including Cupples Company, an Ohio corporation which was qualified to do business in California. On audit, respondent disallowed use of combined reporting procedures by the group and issued deficiency assessments to appellant and Cupples Company on the basis of the application of separate accounting methods.

During the course of subsequent protest proceedings, respondent determined that appellant and Cupples Company were the only two corporations engaged in a single unitary business and, therefore, entitled to file a combined report. Respondent then determined what the amount of income for these two corporations would be under formula apportionment procedures. However, the determination of income apportionment was agreed upon by the parties after the statute of limitations for issuing deficiency assessments had expired as to Cupples Company. Respondent calculated that the assessments **for** appellant would be reduced but that those for Cupples Company would be increased, resulting in the following adjusted deficiencies or overpayments for the appeal years:

<u>Income Year</u>	<u>Assessments</u>	
	<u>Appellant</u>	<u>Cupples Company</u>
1975	65,076	24,342
1978	[43,140] Overpayment	25,962
1979	[81,853] Overpayment	58,291

Although it was determined that Cupples Company owed more tax

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for 1975, 1978, and 1979, respondent was prohibited from assessing that company with additional tax due to the statute of limitations.

In order to resolve the protest and facilitate collection of the tax attributable to Cupples Company, respondent advised appellant that it was going to transfer substantial portions of the tax liabilities of Cupples Company for 1975, 1978, and 1979 to appellant's account. For 1975, respondent transferred \$19,207 of Cupples Company's tax liability to appellant, increasing appellant's assessment to \$84,283. For 1978 and 1979, respondent transferred \$23,740 and \$56,603, respectively, of Cupples Company's tax liability to appellant, reducing appellant's overpayments to \$19,400 for 1978 and \$25,250 for 1979. Appellant objected to respondent's action, arguing that there was no statutory authority for the transfer of tax liability from Cupples Company to appellant. Nevertheless, on December 21, 1984, respondent issued notices of action and consent to transfer forms which stated that, on receipt of appellant's signed consent, respondent would "credit the indicated overpayment(s) to the proposed deficiency and bill (appellant) for the net amount owing." In January of 1985, appellant signed the consent to transfer forms (form 5850) and paid the net tax due for the relevant income years as set forth in the notices of action and sent an accompanying letter asking that Cupples Company's net overpayment not be netted against appellant's overall deficiency because appellant's tax had already been paid. Shortly thereafter, appellant filed the claims for refund at issue. The claims were denied on the ground that appellant had agreed to the transfer of Cupples Company's additional liability.

Appellant contends that there was no agreement to transfer tax liability. A contract is an agreement containing necessary elements. (Civil Code, §§ 1549, 1550.) A contract may be contained in a number of writings. (Twining v. Thompson, 68 Cal.App.2d 104 (1945).) A review of the documents in this matter clearly demonstrates that there is a binding contract. Appellant formalized the agreement by signing the written consent forms which accompanied respondent's December 21, 1984 letter, which spelled out the transfers of tax liability. Specifically, appellant was asked to sign the enclosed consent to transfer forms if appellant were in agreement with respondent's adjustments, and to appeal to this board, if appellant were not in agreement with the adjustments. On January 4, 1985, appellant's assistant treasurer signed the necessary consent forms agreeing to respondent's adjustments and thereafter the two accounts were adjusted by respondent. In signing the consent forms, appellant knew that respondent had apportioned the tax liability between the two

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entities in the manner appellant now disputes. Appellant's January 5, 1985 letter, accompanying the signed consent forms, did not mention any dispute over the deficiency amounts appellant was being asked to pay on behalf of Cupples Company. Based on the aforementioned, appellant must be bound by the agreement.

Appellant asserts that the language of the consent to transfer form only permits respondent to "procedurally" apply a corporation's overpayment to other tax years and refund the difference. However, the form states, "Consent is given for immediate assessment of the proposed additional tax indicated on the accompanying notice(s)" There were accompanying notices which included the transfer of tax liability. Appellant agreed to the assessment of the tax liability, not just the mere procedure of the form.

Another contention by appellant is that the payment of tax was done to prevent the further accrual of interest. In spite of the contention, however, appellant is a sophisticated taxpayer which could easily have stopped the accrual of interest merely by paying, under protest, the amount it believed was its full liability and expressly stating its dispute with respondent's calculations. There was no need to sign the consent forms to stop the accrual of interest.

Appellant also asserts that the statute of limitations prevents the assessment of tax. However, the statute of limitations is not an absolute bar to assessment of the tax. A debtor may eliminate the restriction of the statute of limitations by making payment and acknowledging the existence of the debt in writing. (43 Cal.Jur.3d, Limitations of Actions, § 166.) Appellant was clearly aware of the significance of the statute of limitations, knew respondent's position, signed the consent forms, and paid the tax. Clearly, appellant acknowledged the existence of the debt and made payment. Thus, the statute of limitations is not a bar for the collection of tax in this matter and appellant is bound by its agreement. That agreement involved a benefit to the affiliated group in the form of a net refund to Cupples Company exceeding \$50,000, which was readily accepted, and the group must likewise accept the burden of the quid pro quo in the form of the deficiency assessments allocated to appellant.

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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 claims of Cupples Paper Bag Company for refund of franchise tax in the amounts of \$19,207, \$23,740, and \$56,603 for the income years **1975, 1978, and 1979, respectively,** be and the same is hereby sustained.

Done at Sacramento, California, this 23rd day of October, 1990, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Dronenburn, Mr. Bennett, and Mr. Davies present.

Conway H. Collis	Chairman
Ernest J. Dronenburg, Jr.	Member
William M. Bennett	Member
John Davies*	Member
	Member

*For Gray Davis, per Government Code section 7.9