

For Appellant: Adrienne Jeffrey
Attorney at Law

For Respondent: John A. Stillwell
Counsel

Upon consideration of the petition filed March 19, 1992, by appellants for rehearing of their appeal from the action of the Franchise Tax Board, we are of the opinion that none of the grounds set forth in the petition constitute cause for the granting thereof and, accordingly, it is hereby ordered that the petition be and the same is hereby denied. It is also hereby ordered that the original opinion and order in this appeal, dated February 20, 1992, be withdrawn from publication in their entirety and the following opinion and order be substituted therefor.

OPINION

This appeal is made pursuant to section 19057, subdivision (a),^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Bernard and Dorris Lipinsky for refund of personal income tax in the amounts of \$17,057 and \$5,945 for the years 1977 and 1978, respectively.

The issue presented by this appeal is whether appellants can be relieved of the effect of the statute of limitations by application of the doctrine of equitable recoupment.

In 1976, appellants, through various partnerships, invested in cattle-raising operations in Australia. Funds advanced and deducted as losses in 1976 were refunded in 1977 and reported as income on a tax benefit theory. On audit, the Internal Revenue Service (IRS) denied the deductions for 1976 and agreed to reduce income for 1977 in the same amount. During 1977, appellants, through the same partnerships, invested in Treasury Bill "straddles," computing their 1977 losses as ordinary losses and their 1978 gains as capital gains. On audit, the IRS denied the ordinary loss claimed in 1977, but allowed appellants to claim a capital loss in the same amount. The adjustment resulted in an increase in 1977 income by the amount of \$141,550 and a reduction in income for 1978 as a result of the provision in federal law allowing the carry-forward of capital losses to the next year.

After audit of appellant's federal personal income tax returns for 1976, 1977, and 1978 and a Notice of Deficiency dated April 10, 1981, a Tax Court decision signed by appellants' representative agreeing to a deficiency adjustment for 1976 was filed on February 6, 1985. Based on this settlement, the IRS credited part of the overpayments for 1977 and 1978 against the 1976 deficiency and refunded the balance by check dated May 10, 1985, pursuant to the mitigation provisions of the Internal Revenue Code, sections 1311 to 1314.

On August 1, 1985, appellants' representatives sent a letter to the Franchise Tax Board (FTB) stating that appellants were "under audit" by the IRS and had entered into a "tentative settlement with respect to calendar years 1977 and 1978" which "would result in [federal] refunds to the taxpayers for both years." They proposed to submit amended state returns for the two years as soon as the federal audit was complete. On June 13, 1986, appellants filed amended state returns for 1977 and 1978, reporting overpayments and interest totaling \$42,763 and \$13,806, respectively. On December 30, 1986, appellants filed an amended return for 1976, reporting a deficiency and interest totaling \$86,186. With the amended return for 1976, appellants submitted a check for \$29,617, explaining that they had offset the 1977 and 1978 overpayments against the 1976 liability. The FTB accepted appellants' 1976 return as filed, and assessed the tax due as reported, but denied appellants' claims for refund on the grounds that they were barred by the statute of limitations.

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

Appellants concede now that their claims for refund were not timely filed. (Tr. at 3.) Instead, they argue that the statute of limitations should be disregarded pursuant to the doctrine of "equitable recoupment," citing this board's opinion in the Appeals of Wilfred and Gertrude Winkench, et al., decided on December 16, 1975. As explained in Winkench, equitable recoupment is a judicially created form of equitable relief developed by the federal courts by which, despite expiration of the statute of limitations on claims for refund, taxes erroneously paid may be recouped against a properly asserted deficiency when a single transaction has been taxed twice pursuant to inconsistent legal theories. (Bull v. U.S., 295 U.S. 247 [79 L.Ed. 1421] (1935); Stone v. White, 301 U.S. 532 [81 L.Ed. 1265] (1937); Rothensies v. Electric Storage Battery Co., 329 U.S. 296 [91 L.Ed. 296] (1946).) This board decided in Winkench that it not only had jurisdiction to apply judicial doctrines of equitable relief, but that it was bound to apply them in order to assure a prompt resolution of the competing claims of the parties without requiring unnecessary litigation and expense.

The doctrine of equitable recoupment is only applicable where "a single transaction constitute[s] the taxable event claimed upon and the one considered in recoupment." (Rothensies v. Electric Storage Battery Co., supra, 329 U.S. at 299; see also O'Brien v. United States, 766 F.2d 1038 (7th Cir. 1985).) A threshold requirement of the doctrine is that it may not be used "to revive an untimely affirmative refund claim, as opposed to offset[ing] a timely government claim of deficiency with a barred claim of the taxpayer." (O'Brien v. United States, supra, 766 F.2d at 1049.)

"[T]o permit an independent action for recoupment because there is but one transaction is to mistake the threshold requirement for its rationale. It is true that our precedents allowing recoupment pertain to cases where a single transaction is subjected to inconsistent taxation, but the reason the statute of limitations is not a bar in those cases is that the court has uncontested jurisdiction to adjudicate one of the taxes in question."

(United States v. Dalm, 494 U.S. 596, 611 [108 L.Ed 2d 548] (1990).)

Regardless of whether the requirements of a single transaction and inconsistent double taxation may be met here, the doctrine is not available to appellants here because there is no outstanding deficiency or refund claim still open against which any overpayment from 1977 or 1978 could be recouped. Appellants have apparently paid the 1976 deficiency and the year has become final without any claim for refund or appeal to this board filed for that year. As in Dalm and O'Brien, supra, appellants are trying to use "recoupment affirmatively to recover an erroneously paid tax and [do] not seek to offset the amount of a properly asserted and timely deficiency." (O'Brien v. United States, supra.) Equitable recoupment does not entitle a taxpayer to a refund that is otherwise barred, but only to an offset against what is otherwise owed.^{2/}

^{2/} Any refund that may be obtained in a recoupment claim would arise only because the deficiency year was kept

ORDER

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Bernard and Dorris Lipinsky for refund of personal income tax of \$17,057 and \$5,945 for the years 1977 and 1978, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of December, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, Mr. Fong, and Ms. Scott present.

Brad Sherman, Chairman

Ernest J. Dronenburg, Jr., Member

Matthew K. Fong, Member

Windie Scott*, Member

_____, Member

*For Gray Davis, per Government Code section 7.9
lipinsky.mw

(..continued)
open through the payment of the deficiency and the subsequent claim for refund of the amount paid. (O'Brien v. United States, supra, 766 F.2d at 1049, fn. 13.)