92-SBE-018

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 89R-0111-SS
WEYERHAEUSER COMPANY	)	

For Appellant: Robert C. Fellmeth
Attorney at Law

For Respondent: A. Kent Summers
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 Weyerhaeuser Company for refund of franchise tax in the amount of $196,510 for the income year 1983.

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

The question presented in this appeal is whether appellant is entitled to a solar energy tax credit for windows, tile, and brick installed in tract homes built without consideration of solar energy planning.

Appellant planned, designed, developed, and constructed several housing tracts in southern California without consideration of solar design concepts or solar benefits. Approximately two years after the tracts were completed, pursuant to the advice of a consultant, appellant filed an amended franchise tax return for its 1983 income year and claimed solar energy tax credits for construction costs of individual houses with the requisite southern orientation. Dual pane windows had been installed as a standard feature in all window openings throughout the tract, and more than 33 percent of the windows were in the rear walls of the houses, regardless of the solar orientation of the house. Appellant contends that, because houses with the rear wall facing south had in excess of 33 percent of the solar glazing, those houses constituted "passive thermal systems" eligible for the credit. Appellant also claimed solar energy credits for "thermal mass storage" which it claimed to have installed with the so-called passive thermal systems. The thermal mass storage consisted of brick facing on the fireplaces and ceramic tile in the entryways and countertops, neither of which was installed within the direct path of the sun, especially in the solar-oriented units.

Inspired by the energy crisis of the 1970's, the California Legislature joined the effort to reduce the use of conventional energy sources by enacting the 1976 Solar Energy Tax Credit as an incentive for taxpayers to install "solar energy systems." (Rev. & Tax. Code, § 23601, subd. (a)(1) and (2).) Regulations implementing the statute were adopted by the California Energy Commission (CEC), setting forth further standards for qualification as an eligible "passive thermal system" (20 Cal. Code Regs., § 2604, subd. (b)). To qualify as a "passive thermal system," "solar glazing systems" must meet certain criteria, including proportional area and orientation to the sun, and must "utilize the structure of a building and its operable components (and the climate resources available at the site) to provide heating or cooling during the appropriate times of the year." (Emphasis added.)

Respondent denied appellant the credit on the ground that the dual pane windows, although qualifying as "energy conservation devices" under Revenue and Taxation Code section 23601.5, do not constitute a "passive solar energy system" as required by section 23601 because they were installed without consideration of solar energy planning. Respondent's determination was made on the recommendation of the Executive Director of the CEC, who characterized appellant's so-called "passive thermal system" as "standard structural building elements" and noted the random nature of the solar orientation in the project and the inadequacy and poor location of the thermal mass for storage of solar gain.

In a case with substantially similar facts, William Lyon Company v. Franchise Tax Board, 4 Cal.App.4th 267 [5 Cal.Rptr.2d 680] (1992), the court of appeal has upheld respondent's denial of solar energy tax credits. The court closely analyzed the language of the statute and the CEC regulations establishing guidelines and criteria for determining eligibility of systems and noted that statutory provisions for tax credits must be narrowly and strictly construed against the taxpayer. (Miller v. McColgan, 17 Cal.2d 432, 442 [110 P.2d 419] (1941).) The court concluded that, unless

the taxpayer claiming solar energy tax credits proved that "it installed devices that function together for the common purpose of providing heating during the winter season in order to maintain a comfortable temperature within the living space, it [would] not be entitled to tax credits under section 23601." (William Lyon Company v. Franchise Tax Board, supra, 4 Cal.App.4th at 276.) Expert testimony in Lyon established that the installation of excess solar glazing and thermal mass does not necessarily accomplish the end of energy conservation or "space conditioning," and, in the case of the Lyon tract homes, overheating and extra air conditioning costs were associated with the solar glazing. The trial court in Lyon had found that the taxpayer had presented insufficient evidence "to show the solar glazing system worked to collect, store or distribute solar energy for the purposes of heating the structure," and the court of appeal found substantial evidence to support the trial court's judgment. Without a finding of installation of passive thermal systems, there could, of course, be no finding of thermal mass installed "in conjunction with" passive systems. (William Lyon Company v. Franchise Tax Board, supra, 4 Cal.App.4th at 277.)

The Lyon court specifically declined to address the FTB's assertion, made also in the instant appeal, that section 23601 requires a "specific intent" either to install a solar energy tax system or to qualify for a tax credit under section 23601. (William Lyon Company v. Franchise Tax Board, supra, 4 Cal.App.4th at 277, n. 5.)

In the instant appeal, the taxpayer has relied solely on its claimed compliance with the technical and specific requirements set forth in the regulations as a basis for its claim to qualify as a passive solar power system. Appellant characterizes its houses as having "identically qualifying systems" as those in Lyon and has declined the opportunity to submit evidence at hearing that might cause us to resolve its appeal differently from that of Lyon. Accordingly, respondent's denial of appellant's refund claim will be sustained.

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 Weyerhaeuser Company for refund of franchise tax in the amount of $196,510 for the income year 1983 be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of July, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

Brad Sherman, Chairman

Ernest J. Dronenburg, Jr., Member

Windie Scott*, Member

_____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9

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