96-SBE-012

ADOPTED 5/15/96

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 94A-0982
Jack and Arla Meyer	)	
	)	

Representing the Parties:

For Appellants:	Richard H. Wagner, Attorney
For Respondent:	John W. Penfield, Senior Counsel
Counsel for Board of Equalization:	Craig R. Shaltes, Staff Counsel

O P I N I O N

This appeal is made pursuant to section 19045[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Jack and Arla Meyer against a proposed assessment of additional personal income tax in the amount of $28,279 for the year 1983,[2] and, pursuant to section 19324, from the action of the Franchise Tax Board in denying the claim of Jack and

[1] Unless otherwise specified, all section references in the body of this opinion are to sections of the Revenue and taxation Code as in effect for the years in issue.

[2] As pointed out by the respondent, the appellants have not truly disputed the merits of the 1983 assessment. Instead, the appellants have focused their appeal on the 1984 and 1989 refund claims. Therefore, the 1983 assessment will be affirmed, and in this opinion we will only address the issues surrounding appellants' 1984 refund claim. (See footnote 3 regarding appellants' 1989 refund claim.)

Arla Meyer for refunds of personal income tax in the amounts of $23,817 and $1.00 or more for the years 1984 and 1989,[3] respectively.

The general issue addressed in this opinion is whether the appellants timely filed their refund claim for 1984. The more specific issue is whether the statue of limitations for filing a 1984 refund claim remained open because of the signing of a federal Form 872-A waiver, after the appellants entered into a federal Form 906 closing agreement which resulted in the issuance by the Internal Revenue Service (IRS) of an overassessment for 1984.

On their 1983 federal and California tax returns, the appellants reported losses from an investment in Baker Oil Partners, Ltd. (Partnership).[4] In their 1984 return, the appellants reported a gain of $262,445 from the sale of their Partnership interest, which resulted in the payment of California income taxes in the amount of $23,817. At some point, the IRS apparently began an investigation of the Partnership. On or about February 11, 1988, the IRS and the appellants agreed to an open extension of the federal assessment period for 1984 by signing an IRS Form 872-A, which form was limited to items involving the Partnership items and "Bear, Stearns" transaction items (which transactions were unrelated to the Partnership).

In paragraph "(1)," the Form 872-A stated that the open extension would end after either party signed and sent to the other a Form 872-T, or the IRS mailed a notice of deficiency. In paragraph "(2)," It stated:

> This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax or the overassessment date of a decrease in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment or overassessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments

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[3] Initially, this board did not recognize that the 1989 refund claim was properly before it. However, at the hearing of this appeal on October 13, 1995, the respondent conceded that the 1989 refund claim was not only properly before this board, but that it was timely. However, respondent has pointed out that, although the appellants were entitled to their 1989 refund claim, they were not entitled to an actual refund "because the additional deduction of $41,375 is insufficient to offset appellants' negative taxable income for the 1989 taxable year," and because the appellants paid no California personal income tax for 1989. The appellants were given an opportunity to further address or settle this issue, but failed to do so. Therefore, we will presume that the respondent's analyses and conclusion are correct, and will not specifically address the appellants' 1989 refund claim in this opinion.

[4] The appellants have stated that they subsequently learned that the Partnership was a "sham," resulting in the loss of their investment.

> do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration date determined in (1) above. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

On June 28, 1990, the appellants and the IRS settled the federal tax matters with respect to the Partnership items by signing a "Closing Agreement on Final Determination Covering Specific Matters" (Form 906). In that closing agreement, the appellants were denied some of their claimed 1983 Partnership deductions, the Partnership-related income stated in 1984 was not recognized, and a portion of an ordinary Partnership-related deduction was allowed for 1989. The June 28, 1990, Form 906 did not address any of the "Bear, Stearns" items allegedly at issue with the IRS.[5] Apparently, on or about December 17, 1990, the IRS entered an overassessment by crediting and/or refunding an overpayment to the appellants' federal account for 1984, pursuant to the Form 906 agreement. The appellants did not report the IRS changes to the respondent.

Sometime thereafter, the IRS informed the respondent about the increased assessment for appellants' 1983 tax year. On October 11, 1991, the respondent issued a Notice of Proposed Assessment (NPA) to the appellants for 1983, based upon the federal adjustments. On October 30, 1991, the appellants protested the NPA issued for 1983, and requested refunds for both 1984 and 1989, which refunds were also based upon the federal adjustments. The respondent denied the protest and the refund claim for 1984 and ignored the refund claim for 1989. (See footnote 3.)

Respondent contends that the 1984 refund claim was untimely, because it was filed over six months after the expiration of the federal waiver (Form 872-A). This contention is based upon

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[5] At the hearing of this matter on October 13, 1995, appellants' counsel admitted that the IRS was not actively pursuing the "Bear, Stearns" items, and that there was no formal IRS activity on such items. It appeared that, as a practical matter, any issues which the IRS may have had regarding appellants' "Bear, Stearns" investments were never pursued or resolved, and may never be formally or officially resolved.

respondent's argument that, when the IRS entered the "overassessment" amount on December 17, 1990, the Form 872-A extension was terminated pursuant to paragraph 2 of that agreement.

The appellants contend that the Form 872-A extension agreement is still (as of October 13, 1995) open, and therefore their 1984 refund claim was timely when filed on October 30, 1991. Appellants argue that none of the termination events listed on Form 872-A have occurred, and that the "overassessment" entered by the IRS on December 17, 1990, was not a "final determination of tax" for 1984. This is because the Form 906 settlement agreement only dealt with the Partnership items in dispute, but the "Bear, Stearns" items still remain unresolved. Appellants further point out that multiple Form 906 settlement agreements may be entered for the same year (Rev. Proc. 68-16, 1968-1 C.B. 770), and that Form 906 closing agreements affect only the specific matters therein agreed to. (Zaentz v. Commissioner, 90 T.C. 753 (1988).)

The normal statute of limitations for filing a refund claim is four years from the last date prescribed for filing the return, or one year from the date of overpayment, whatever period expires later. (Former Rev. & Tax. Code, § 19053, renumbered as § 19306, operative Jan. 1, 1994.) However, under former section 19053.3, subdivision (b) (renumbered as section 19308, subdivision (b), operative January 1, 1994), the period in which a refund claim may be filed is the same as the period in which the respondent may make an assessment if:

> The taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension (or renewals thereof) of the period for proposing and assessing deficiencies in federal income tax for any year.

Therefore, in the present case, the period in which the appellants had to file their 1984 refund claim was equal to the period the respondent had to issue a deficiency assessment. Pursuant to former Section 18587 (renumbered as section 19065, operative January 1, 1994) that period was four years after the 1984 return was filed, or six months after the expiration of any agreed-upon federal waiver, whatever period expired later.

In the present case, the appellants entered into a federal waiver (Form 872-A). However, the Form 872-A waiver signed by the appellants was a "restrictive waiver," which was specifically limited in application to the two separate issues stated therein. Form 872-A federal waivers only terminate in the manners provided for on the form itself. For example, it has been held that 872-A waivers will not terminate under the following conditions: 1)even if either party issues a termination letter (see Aronson v. Commissioner, ¶ 91.539 T.C. Memo (P-H)(1991); 2) a "reasonable" time limit has elapsed following the signing of the Form 872-A (see Mecom v. Commissioner, 101 T.C. 374 (1993);

or 3) a Form 906 closing agreement for the same year is entered (see DeSanctis v United States, 783 F. Supp.165 (S.D.N.Y. 1992); Silverman v., Commissioner, 105 T.C. 157 (1995)). The only ways a Form 872-A waiver can be terminated are, as stated previously, the issuance by either party of a Form 872-T, the issuance of a deficiency by the IRS, or the issuance of an assessment or overassessment "that reflects the final determination of tax and the final administrative appeals considerations." (See Rev. Proc. 79-22, 1979-1 C.B. 563.)

Here, the IRS issued an "overassessment" for 1984 based upon the Form 906 closing agreement. However, we do not believe that, just because the overassessment was issued, the Form 872-A waiver was terminated as to both of the issues included in the waiver, as argued by the respondent. This is because the overassessment only pertained to the settlement of the Partnership tax issues, and therefore the overassessment could not be considered a "final determination of tax" for the "Bear, Stearns" issues.

However, the Form 906 closing agreement was a final determination for any matter included therein, i.e., the Partnership tax matters, pursuant to Internal Revenue Code (IRC) section 7121. In fact, the respondent's regulations specifically identify federal closing agreements, entered into under IRC section 7121, as final determinations which are irrevocable determinations or adjustments of a taxpayer's federal tax liability "from which there exists no further right of appeal either administrative or judicial." (Cal. Code Regs., tit. 18, § 18586.3, subd. (e)(1).) Therefore, following the signing of the Form 906 closing agreement, and absent any fraud, neither the appellants nor the IRS could change the appellants' tax liability relating to the Partnership tax matters. Those Partnership tax matters were closed and final.

Further, the appellants argue that the issues contained in the Form 872-A waiver were separate and distinct and the resolution of one of those issues did not resolve the other issue. We agree.

However, just as the IRS can enter more than one Form 906 closing agreements for the same year (albeit on different matters), so too can the respondent issue two separate assessments, on two separate issues, for the same year. (See Appeal of Robert F. and Clara B. Pyle, Cal. St. Bd. of Equal., Sept. 25, 1979; Appeal of James T. and Janice Sennett, Cal. St. Bd. of Equal., Sept. 28, 1977.) Therefore, with the Form 872-A waiver still in place, the respondent could issue assessments pertaining to either the Partnership matter or the "Bear, Stearns" matter. (Former Rev. & Tax Code, § 18587.) Once the Form 906 closing agreement was signed, making the resolution of the Partnership matters final, and the overassessment was issued based upon that resolution, the Form 872-A waiver with respect the Partnership issues was terminated. Pursuant to the Form 872-A terms, and former Revenue and Taxation Code sections 18587 and 19053.3, the appellants then had 60 days plus 6

months in which to file their 1984 refund claim based upon the adjustments made to their Partnership items. At the same time, the Form 872-A waiver, relating to the "Bear, Stearns" items, still remained open.[6]

The appellants' 1984 refund claim, which was based upon the IRS adjustments to the Partnership matters, was filed on October 30, 1991. The statute of limitations for refund claims based upon the adjustments to the Partnership items ended on or about August 17, 1991. (This date is reached by counting 6 months, plus 60 days, from December 17, 1990, the date the overassessment was issued.) Statute of limitations sections are strictly construed, and a taxpayer's failure, for any reason, to file a claim for refund within the statutory period bars the taxpayer from doing so at a later date. (Appeal of Sharon G. Yaskulski, Cal. St. Bd. of Equal., Sept. 10, 1985.) Therefore, the respondent's denial of appellants' refund claim for 1984 must be sustained.

[6] We make no determination in this opinion about how or when the Form 872-A waiver relating to the "Bear, Stearns" matters may close. However, it seems likely that, at some point the equitable doctrine of laches would operate to cut off the rights of both parties to act pursuant to the waiver.

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 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of James and Arla Meyer against a proposed assessment of additional personal income tax in the amount of $28,279 for the year 1983 be and the same is hereby sustained and pursuant to section 19333 of the Revenue and Taxation Code, that 1) the action of the Franchise Tax Board in denying the claim of Jack and Arla Meyer for refund of personal income tax in the amount of $23,817 for the year 1984 be and the same is hereby sustained, and 2) the action of the Franchise Tax Board in denying the claim of Jack and Arla Meyer for refund of personal income tax in the amount of $1.00 or more for the year 1989 be and the same is hereby reversed.

Done at Sacramento, California, this 15th day of May, 1996, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Dronenburg, Mr. Andal, Mr. Sherman and Mr. Halverson present.

Johan Klehs , Chairman

Ernest J. Dronenburg, Jr. , Member

Dean F. Andal , Member

Brad J. Sherman , Member

Rex Halverson* , Member

*For Kathleen Connell, per Government Code section 7.9.