

Memorandum**465.0050**

To: Mr. William Dunn
Assistant Principal Tax Auditor

Date: July 28, 1992

From: Gordon P. Adelman
Senior Tax Counsel

Subject: Offsets Against Non-final Liabilities

Mr. C--- N--- has questioned the Board's offset of a refund of a client against a non-final liability of that client.

Mr. N--- cites Revenue and Taxation Code Section 6561 which provides that if a petition for redetermination is not filed within the 30-day period, the determination becomes final (all references are to the Revenue and Taxation Code unless otherwise noted). He then cites Section 6564 which states that an order or decision of the Board upon a petition for redetermination becomes final 30 days after service upon the petitioner of notice of the decision. Finally, Section 6901 requires the Board to refund any amount not offset against taxes then due and payable.

Mr. N---'s client did file a petition within the 30-day period, required by Section 6561. There has not been a Board hearing, so Section 6564 is not relevant.

In response to Mr. N---, you cited Section 6452 which states that tax is due and payable quarterly on or before the last day of the month next succeeding each quarterly period. You also interpreted Section 6565 to pertain to determinations, and not to the taxes.

Mr. N--- then cited Section 6536 relating to jeopardy determinations and has questioned your interpretation in light of legislative enactment of Section 6536. Mr. N---'s primary issue is that non-final liabilities are not "due and payable" and therefore not subject to offset under Section 6901.

Mr. N---'s interpretation of the words "due and payable" while favorable to his position is not correct in law.

In People v. Buckles, 57 Cal.App.2d 75 (1943), the Court covers the definition of "due and payable" quite comprehensively.

If the taxpayer does not pay the tax, it is "due" and remains "unpaid" and due to the State until paid. The determination does not create a new obligation or liability, but is merely a determination by the Board of the amounts the taxpayer has failed to pay.

The court stated further that while the determination sections indicate when they become final, "this does not justify a holding that such taxes were 'not due and payable'...because as a matter of plain fact they were taxes which the vendor had heretofore failed to pay but which he became obligated to pay under the action when the taxable sales were made."

With the proper interpretation of the term "due and payable" in mind, Mr. N---'s remaining arguments are no longer relevant.

GPA:sr

cc: Mr. Gary J. Jugum