STATE OF CALIFORNIA

465.0160

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Claim for for Refund Under the Sales and Use Tax Law of: U--- P--- R--- CO. Claimant	)))))))	DECISION AND RECOMMENDATION No. SR -- XX-XXXXXX-001

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel David H. Levine on April 13, 1993 in Sacramento, California.

Appearing for Claimant:

F. K--- K---
General Tax Counsel

J--- J. G---
Manager Prod. Tax/Reg. Analysis

J--- A. V---, Attorney
B---, L--- & M---

D--- W---
D---, M--- & A---., Inc.

Elaine Bialczak
D---, M--- & A---., Inc.

Appearing for the Sales
and Use Tax Department:

Jack E. Warner
District Principal Auditor

Joe Arjona
Petitions Unit (observer)

Subject of Claim

Claimant seeks a refund of tax for the period October 1, 1982 through December 31, 1986 as follows:

	Item	State, Local and County
1.	Sales tax paid on pollution control devices financed by C--- P--- C--- F--- A---	$ 939,788.52
2.	Sales and use taxes paid on warehouse purchases	1,213,979.67
3.	Sales tax paid with respect to platinum catalyst	301,618.18
4.	Miscellaneous overpayments and accruals	400,000.00
	Total	$2,855,386.37[1]

Claimant's Contentions

Claimant contends that it paid tax with respect to its purchases of chemicals which were incorporated into the finished product it resold. It contends that it paid tax whenever it withdrew property from its warehouse for use by joint ventures and that such withdrawals were not taxable. Claimant contends that tax was paid on pollution control devices which were financed by the C--- P--- C--- F--- A--- and that such transactions were not taxable. Claimant contends that tax is not applicable to platinum catalyst reconditioning as sales, but rather that the reconditioning should be regarded as repairs. Claimant contends that its claim is not barred by the statute of limitations.

Summary

Claimant is a petroleum company that was audited in 1988 for the period October 1, 1982 through December 31, 1986. A determination was issued to claimant, but it did not file a petition for redetermination. The determination became final, but within six months claimant filed this claim for refund, dated April 18, 1989. A reaudit was performed in March 1990 and a second reaudit was performed in November 1991.

This claim involves a procedural issue and substantive issues. The procedural issue is whether this claim, for the fourth quarter 1985 and previous periods, is barred by the statute of limitations established by Revenue and Taxation Code section 6902. That section states that no

[1]These figures are from claimant's claim for refund. During claimant's settlement negotiations with the Department, it indicated that the amount of its claim is $1,408,278.

refund shall be approved by the Board unless it is filed within three years from the due date of the return for the reporting period for which the asserted overpayment was made, or, with respect to determinations issued by the Department, the claim is filed within six months from the date the determination becomes final, or the claim is filed within six months from the date of the overpayment, whichever period expires the later.

Claimant contends that its claim was timely for all claim periods because those periods were covered by a determination issued by the Department and the claim was filed within six months from the date that determination became final. The Department contends that the claim for the fourth quarter 1985, and the periods before it, was barred by section 6902 because the claim was filed more than three years after January 31, 1986, the due date of claimant's return for the fourth quarter 1985. The Department asserts that the provision in section 6902 extending the limitations period six months beyond the finality of a determination pertains only to claims for amounts which were included in the determination.[2]

One of the substantive issues involves the use by claimant of tax-paid chemicals. The Department agrees that the chemicals which are the subject of the claim were incorporated into the finished product and could have been purchased by claimant for resale. Another issue is certain warehouse withdrawals. Claimant withdrew property from its warehouse for use on fields with various joint ventures. After that use, the property was returned to the warehouse for later withdrawal. Whenever the property was withdrawn, claimant reported tax. It is not clear whether tax was paid when claimant first obtained the property (that is, it is not clear whether this property was held as resale property or if instead it was tax-paid property).

The Department agreed with claimant's contentions with respect to the chemicals and the warehouse withdrawals. It therefore allowed as a credit (as a tax-paid purchases resold deduction for the chemicals) against the amount of its determination the portions of the claim which it regarded as timely (that is, for the periods after the fourth quarter 1985). It also allowed the portions of the claim it regarded as time barred as an offset against the amount of its determination. That amount offset the full amount of the determination and left a credit balance. (The credit was not refunded because the Department regarded a refund of that amount as barred by section 6902.)

The warehouse withdrawals were not part of the determination. During the conference, the question arose as to whether claimant purchased any of the chemicals at issue here ex-tax, with the Department picking up those purchases during the audit as purchases subject to use tax. In a letter dated May 4, 1993, claimant states that all its purchases from N--- C---Company were tax paid. Claimant also states that while the Department did not schedule any N--- invoices for chemicals in the audit, the Department did sample production purchases including account

[2]Section 6902 also provides that a claim is timely if it is filed before the expiration of any period for which the taxpayer gave the Board a waiver pursuant to section 6488. Claimant did give the Board such a waiver, but it expired on January 31, 1989, prior to the date this claim was filed.

number 405-45 and, based on that sample, projected an additional amount of tax to assess.

The next issue pertains to certain pollution control equipment that the C--- P--- C--- A--- financed for claimant. Claimant states that the law requires the A--- to own such property and provides an exemption from sales tax.[3] During the conference, I requested that claimant provide me additional information on this subject, including citations to relevant statutory authority, but it has now indicated that it has no additional information to provide on the subject. A review of the file indicates that the tax in question is in connection with one or more construction contracts during 1983, 1984, and 1985. The contractor (and subcontractors) apparently paid sales tax reimbursement or use tax with respect to purchases of materials, and passed that cost on to the contractor's customer. With respect to the contractor's sales of fixtures and equipment, the contractor collected sales tax reimbursement from its customer. It is not clear whether the customer was claimant (who would have apparently then resold the project to the A---) or the A---.

The final issue relates to platinum catalysts which claimant used in its refining business. The catalysts become contaminated in one and one-half to three years, depending on use. Since the refinery had to be shut down when the catalyst was replaced, claimant would arrange to have a reconditioned catalyst available at the time of replacement in order to minimize down time. Claimant was required to transfer the contaminated catalyst to the reconditioner within 35 days. The reconditioner charged a reconditioning fee as well as a rental fee, which was for claimant's use of the reconditioned catalyst during the period prior to the transfer of the contaminated catalyst to the reconditioner. The reclaimed platinum was weighed. This weight was applied as a credit against claimant's debit for the platinum sent to it in the form of the reconditioned catalyst. The reconditioner would then bill claimant for the net difference in weight at the then current market value of platinum. If claimant did not return any contaminated platinum within 35 days, the "net difference" would be the total amount of platinum it had received. Claimant agrees that after the 35 days, it owned the reconditioned catalyst, and it also agrees that the reconditioned catalyst did not include any part of the contaminated platinum claimant transferred to the reconditioner.

Claimant states that it was taxed by the reconditioner on the reconditioning fee, on the rental fee, and on the fee for the platinum weight differential, and it does not dispute the tax on these charges. However, it states that it was also taxed on the amount of the credit received for the weight of contaminated platinum transferred by claimant to the reconditioner and it is this portion of the tax that claimant disputes.

All of the taxes at issue were paid to the reconditioner, and none were part of the assessments for which the determination was issued. The amounts which are the subject of the

[3]It appears that the applicable Revenue and Taxation Code provision is section 6010.10 which excludes from the definition of "sale" and "purchase" any transfer of tangible personal property constituting any project or pollution control facility under certain conditions.

claim for refund were paid during the fourth quarter 1985 as well as for periods before and after that period. The Department believes that the claim for the fourth quarter 1985 and prior periods is barred by section 6902. The Department agrees that the remainder of the claim on this issue is timely, but contends that it should be denied on the merits in accordance with previous Board actions and a recent, unpublished decision in the case of E. M. Sector Holdings, Inc. v. State Board of Equalization (No. A054062, Court of Appeal, First Appellate District (5/29/92).) Claimant contends that it is being treated differently than larger refiners who can afford to leave a credit balance of platinum with the reconditioner and who are thus treated as owning the reconditioned catalyst they receive. Claimant contends that its purchases come squarely within subdivision (b)(4) of Regulation 1546. Claimant asserts that the Court of Appeal decision is wrong and does not have precedential effect since it is unpublished, nor can it be relied on by a court or a party in any other action against claimant since the decision is not res judicata or collateral estoppel as to claimant.

Analysis and Conclusions

A claim for refund is timely if it is filed within any of the three periods set forth in subdivision (a) of Revenue and Taxation Code section 6902. One of these periods is three years from the due date of the tax, and claimant must concede that its claim was not within this period with respect to the fourth quarter 1985 and earlier.

Another of the periods is six months from the date that the tax is actually paid. There has been some confusion as to whether this period relates only to claims filed with respect to taxes that were paid pursuant to determinations issued by the Department or instead relates also to claims filed for asserted overpayment of self-assessed tax. The wording of section 6902 is certainly amenable to the former interpretation. However, we have concluded that the language of the statute should not be interpreted so narrowly. Rather, in accordance with the decision in Holland Furnace Co. v. State Board of Equalization (1960) 177 Cal.App.2d 672, 675-76, we conclude that a claim is timely if filed within six months of the payment of the tax which is the subject of the claim, without regard to whether the tax was paid pursuant to a determination or was self-assessed. Thus, if any of the taxes which are the subject of this claim had been paid within six months of its filing, I would conclude that the claim was timely with respect to such taxes. However, claimant has made no showing that such is the case.

The third period in which a claim is timely is within six months of the date that a determination becomes final. As relates to this case, the specific language of section 6902 is that a claim shall not be approved by the Board, "with respect to determinations made under Article 2 (commencing with Section 6481) ..., after six months from the date the determinations become final ...." Since a determination is not due and payable until it becomes final, and since a claim is timely if filed within six months of payment, it might seem at first blush that this provision is essentially superfluous. It is not, however, since it is not unusual for a taxpayer who has filed a petition for redetermination to pay the amount of the determination (in order to stop interest from running) while pursuing the petition. If that petition is granted, then of course the payment is

returned. However, if the petition is denied more than three years after the due date of the tax, and if the amount of the determination had been paid more than six months before the redetermination becomes final, then the taxpayer would be barred from filing a claim for refund but for the portion of section 6902 I consider now.

This is the reason that the provision was adopted: to avoid the unjust result that a taxpayer with a pending determination, and petition for redetermination thereof, who makes a payment of the determination before it becomes final, could be barred from filing a claim for refund of the very amounts that the taxpayer paid (and hence barred from recourse in court) even though the claim is filed immediately after the determination becomes final. That is, the provision was adopted for the specific purpose of extending the limitations period for matters and amounts that are subject to further administrative proceedings before becoming final, but which, because of the administrative proceedings, become final after the other applicable limitations periods.

This provision was not adopted to extend the limitations period for amounts not subject to a determination. This is made particularly clear by subdivision (b) of section 6902, which extends the limitations period to "any period for which a waiver is given under Section 6488 if a claim therefor is filed with the board before the expiration of the period agreed upon." This provision clearly extends the limitations period to the end of the waiver period, without regard to whether the subject of the claim was, or becomes, the subject of a determination. Thus, the Legislature knew how to extend the limitations period for all possible claims (to "any period"). Had the Legislature intended the interpretation proposed by claimant, it would have stated that the limitations period was extended "to any period with respect to which a determination becomes final ...." It did not. I conclude that claimant's claim for the fourth quarter 1985, and previous quarters, is barred by section 6902.

Claimant asserts that it overpaid taxes with respect to tax paid chemicals it resold and warehouse withdrawals, and the Department agrees.[4] The Department already granted a refund with respect to those periods for which the claim was timely, and gave an offset for the remainder to the full extent of the determination issued to claimant. I conclude that the claim for the remainder, which relates to the fourth quarter 1985 and before, is barred by section 6902. As indicated above, claimant also asserts that the Department sampled production purchases and projected that sample to ascertain the measure of tax assessed. This statement does not indicate that the Department assessed tax on the purchase of any of the chemicals that claimant could have purchased ex-tax for resale. Furthermore, since the full amount of the assessment was offset, there remains no part of it to be refunded.

---

[4]I note that I do not have sufficient facts at this time to also agree with respect to the warehouse withdrawals. The theory that the withdrawals were not subject to tax is that, with respect to a certain percentage of the ownership interests in those withdrawals, there was no change of ownership and thus no sale. However, the withdrawals with respect to this portion of the ownership interests would be subject to use tax on the owner's use of that property unless the property was tax-paid.

Claimant has provided no details with respect to its claim for taxes paid in connection with the pollution control equipment. It appears that the claim relates to sales tax reimbursement or use tax paid by construction contractors for materials and sales tax they paid with respect to their sales of fixtures. Claimant would not have standing to file a claim for such amounts. Nevertheless, claimant has not provided sufficient information for me to address the merits of this issue and, more importantly, the claim is barred by section 6902.

In accordance with the analysis above, I conclude that the claim for taxes paid with respect to platinum catalyst is barred for the fourth quarter 1985 and before. However, a portion of the claim is for the first quarter 1986 and after, and that portion of the claim is timely. Claimant contends that the Court of Appeal decision contrary to its position is unpublished and therefore cannot be cited as precedential authority in court. I essentially agree with this contention, but that does not mean that the court decision is irrelevant. Rather, that court decision affirmed a decision made by the Board. That is, the Board has previously taken a specific position on this issue. That position has not been overturned by the courts, but instead has been affirmed.

I have reviewed the court's decision, and I agree with its analysis. Claimant's contention that some taxpayers are treated differently than others does not disclose a defect in the administration of the tax but rather discloses the practical realities of the business world. There are benefits and burdens to all decisions. Larger entities have certain economies of scale. In this case, the larger companies may have sufficient funds to purchase extra platinum to keep in their accounts. Depending on the circumstances, the reconditioning transactions may be structured so that no sale occurs and thus no tax applies. This is clearly a benefit to such a company. However, the extra platinum ties up a sizable sum of funds which cannot be invested in some other manner. A different investment might yield a far greater return than the taxes saved in the reconditioning process, and this decreased investment flexibility is one of the burdens of such a decision.

I conclude that the Department's position on this issue does not improperly distinguish between large companies and small companies. The Department's position has been upheld by the Board, and by the Court of Appeal. I too conclude that it is correct.

Recommendation

Deny the claim.

July 29, 1993

David H. Levine
Senior Staff Counsel

Date