State of California **Board of Equalization**
Legal Division

M e m o r a n d u m

465.0056

To : Mr. William D. Dunn
Assistant Principal Tax Auditor - MIC:49

Date: August 25, 1994

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Subject: **Offsets**

This is in response to your memorandum dated April 8, 1994 regarding offset of refunds due to a taxpayer against that taxpayer's tax liabilities that have not yet become final.

You attached to your memorandum a letter and a memorandum from this office. The memorandum, from Thomas Cooke dated December 2, 1993, discussed circumstances when such offsets were not permissible. The letter, from Elizabeth Abreu dated December 3, 1993, discussed circumstances when such offsets were permissible. You ask whether there is a conflict between these opinions. We met to discuss this matter on July 21, 1994, and at that time you provided copies of relevant pages from a Decision and Recommendation issued by James Mahler on April 20, 1993 which was in substantial agreement with Ms. Abreu's opinion.

We agree with the conclusions in all three of the opinions referred to above. Mr. Cooke's opinion related to the offset of an overpayment of Environmental Fees against a non-final liability of sales and use taxes. Mr. Cooke advised that such an offset was not allowed under the applicable laws. We agree. However, the question to Mr. Cooke was whether a refund granted under one law can be applied to a non-final liability arising under another law. He relied on Revenue and Taxation Code section 6757 which provides that there is a perfected and enforceable state tax lien at the time that any amount under the Sales and Use Tax Law becomes due and payable.

Mr. Cooke relied on section 6757 because it creates a perfected state tax lien, which gives the state the right to apply funds of the taxpayer against the amount secured by the lien. Those funds of the taxpayer include amounts that the state owes to the taxpayer that are unrelated to the tax liability secured by the lien, such as a refund of taxes or fees due to the taxpayer under a completely different tax law.

Mr. Cooke's analysis does not apply to the application of an overpayment of tax under one law against the non-final liability of the taxpayer for taxes due under that same tax law. This is the scenario considered by Mr. Mahler and Ms. Abreu. Rather, Mr. Cooke's opinion was based on the necessity of the existence of a state tax lien, as discussed above.

Your present question relates to the application of an overpayment under the Sales and Use Tax Law to a non-final liability under that same law. We must look to its provisions, both individually and as a unified Sales and Use Tax Law, to ascertain whether we are authorized, or required, to apply overpayments to non-final liabilities. The remainder of this opinion relates solely to the application of an overpayment of sales or use tax to the non-final liability for sales or use tax.

Taxpayers who oppose the application of their overpayments to their non-final liabilities commonly cite Revenue and Taxation Code section 6901 and argue that since their liability is not yet "due and payable," as they understand the meaning of that phrase as it is used in section 6901, the Board is not authorized to apply the overpayment to that non-final liability. In Mr. Mahler's and Ms. Abreu's analyses on this question, they pointed out that this argument has no merit since the first paragraph of section 6901, which contains the due and payable language, applies only when the Board of Control approves the claimed refund. We agree with this analysis.

Further, the tax law must be looked at in its entirety. While persons who argue against application of an overpayment to non-final liabilities usually rely on the fact that determinations are "due and payable" when final, Revenue and Taxation Code section 6451 states the basic meaning of "due and payable" for purposes of the Sales and Use Tax Law: "The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period." (Accord Rev. & Tax. Code §§ 6055, 6203.5 (bad debt deductions against taxes becoming due and payable after a specified date), 6291 (due and payable date of taxes on use of vehicles, vessels, and aircraft), 6473, 6480.1 et seq. (prepayment provisions).) It is this definition of "due and payable" that is relevant to the present question.

Sales and use taxes are regarded as due and payable when they are required to be reported. If the Board, upon audit, concludes that the taxpayer underreported its tax and therefore makes an assessment, the amount of the assessment was due and payable on the due date of the return on which the taxes should have been reported. That is the very reason that such date is the date on which interest begins to accrue. (Rev. & Tax. Code § 6591.) Even when there is a petition for redetermination, when the determination does become final and thus due and payable under section 6565, the interest is nevertheless calculated from the date that the tax was due and payable under section 6451, that is, the last day of the month following the reporting period in which the tax was incurred. In other words, the use of the term "due and payable" in the context of a determination means that until it is final, collection efforts against funds in taxpayer's hands, or in the hands of a third party on behalf of the taxpayer, are stayed (these are the circumstances in which a lien would be relevant). However, the use of that term in section 6565 does not relate to the Board's calculation of the amount of overpayment actually due to the taxpayer.

Once the Board has issued a Notice of Determination, it reflects the Board's position that tax was, and is currently, due and payable. Unless and until that assessment is resolved partly or fully in favor of the taxpayer upon administrative appeal, the Board must regard the amounts as due and payable, even if collection efforts against funds in taxpayer's hands, or in the hands of a third party on behalf of the taxpayer, are stayed. Thus, it is our opinion that the term "due and payable" as used in section 6901 means those taxes which the Board has determined were underpaid, and with respect to which there has no administrative decision overturning that determination. That is, reviewing the entire Sales and Use Tax Law as a whole, it is clear that the statute does not contemplate that the Board refund amounts which the Board has concluded were overpaid when at the same time the Board has concluded other amounts were underpaid. Rather, the statute contemplates that refunds actually issued to taxpayers will be the net amount of overpayments made by the taxpayer. This is the reason for Revenue and Taxation Code section 6483, which provides:

> "In making a determination the board may offset overpayments for a period or periods, together with interest on the overpayments, against underpayments for another period or periods, against penalties, and against the interest on the underpayments. The interest on underpayment and overpayments shall be computed in the manner set forth in Sections 6591 and 6907."

In summary, we conclude that the Board may, and is required to, offset amounts of overpayments, including amounts with respect to which the Board has granted a claim for refund, against underpayments, which includes all amounts due and payable within the meaning of section 6451. Those amounts due and payable against which the Board offsets an amount with respect to which a claim for refund was granted would include amounts as to which Notice of Determination has been issued as well as amounts self-assessed but unpaid.

GJJ:DHL:plh

cc: Mr. Robert Buntjer - MIC:39
Mr. Steve Adams - MIC:38
Mr. Gordon P. Adelman - MIC:82
Mr. David H. Levine - MIC:82
Mr. Thomas Cooke - MIC:82