Memorandum

To: Mr. Robert Nunes Date: April 1, 1980

From: Donald J. Hennessy

Subject: REDACTED TEXT

This is in reply to your memorandum of January 23, 1980. You inquire whether the administrative actions itemized below would be legally permissible to obtain (or retain) payment in this case of a liability as to which statutory collection procedures are barred by the statute of limitations.

It is longstanding Board policy not to obtain payment by such methods, according to Collections and Refunds personnel, apparently on the basis that the statutory methods are exclusive.

In this case a timely determination was issued for periods prior to 1968. The matter was petitioned and a redetermination was issued in 1971. The tax was paid, but not the interest. The Board did not file a lien pursuant to Section 6757 nor employ any collection method within three years of the finality date. The liability was deemed to be unrecoverable in 1974. The taxpayer filed a refund suit in 1976 for periods dating back to 1961. The case is at the appellate stage. The taxpayer refuses to pay the interest and asserts the Board's failure to file a lien as a complete bar to recovery.

This tax liability is still "due" despite the bar of the statute of limitations as to the collection methods specified in Sections 6701, 6702, 6711, 6757, and 6796. Any administrative methods not prohibited by statute should be available to recover it.

The Attorney General has held that a tax barred from collection by the statute of limitations is nevertheless a tax "due" under Section 30 of the Bank and Corporation Franchise Tax Act (No. INS 2068 dated 10/16/39).

The California Court of Appeal (Owens-Corning Fiberglas Corp. v. State Board of Equalization 39 CA3d 532, 536), has recognized that a tax debt may be due despite the bar of the statute on collection.

The United States Supreme Court has recognized that tax debts may be due despite the bar of the statute on collection (Lewis v. Reynolds [1932], 284 U.S. 281, 283; Stone v. White U.S. 532).

The California Constitution (Article XIII, Section 30) provides that the lien of a tax may survive for 30 years.

The Government Code (Section 12419.4) provides that "The State has a lien for any taxes due the State from any person or entity, upon any and all personal property belonging to such person or entity and held by the State or amount owed to such person or entity by the State … this lien shall apply … while such person or entity owes any taxes to that agency or another agency of the State." (Underlining added.) The lien may be enforced by offset by the Controller (Government Code Section 12419.5), by written demand by the creditor state agency on the debtor state agency, or by applying the amount owed by the state agency to the taxes owed to such agency.

Your first specific question is: Assuming an unidentified payment is received from REDACTED TEXT may we apply such payment to this debt? The answer is yes, provided the following two conditions are satisfied.

1) A separate identified payment unaccompanied by, but in the same amount as, a return or demand, should be accepted as the payment of that return or demand. The identical amount manifests an intention that the payment be so applied (Civil Code Section 1479).

2) Payment, if not directed by the taxpayer or the district, is to be applied first to tax not yet delinquent, then to determinations not yet final, and then to tax, to interest, and to penalty (CPPM 799.030). This is a longstanding Board policy aimed at preventing penalties and minimizing interest. As such, it applies to all taxpayers, including REDACTED TEXT.

Assuming we so apply an unidentified payment, the taxpayer cannot require us to reallocate the payment to some other debt (White v. Costigan, 133 C 564; Orlopp v. Willardson Co., 232 CA2d 750, 753).

Your second question: Since the State is one entity, would we have the right of offset to any debt owing REDACTED TEXT by some other agency? (For example by a bank and corporations tax refund owing to REDACTED TEXT or monies owed REDACTED TEXT by General Services

The answer is yes. Section 12419.4 of the Government Code, as previously quoted, creates such right in the state.

Your third question: If at some future date REDACTED TEXT makes an overpayment in any one quarter, may we use that overpayment to offset this debt? Assuming that there is a corresponding underpayment for another quarter, could we still use the overpayment as an offset and issue a deficiency determination for the quarter with an underpayment?

If the overpayment is unidentified, it may be offset against this debt provided it satisfies conditions (1) and (2) stated above. If, by a "corresponding" underpayment for another quarter,

you mean that the overpayment and underpayment are of an identical, or near identical amount, such offset should not be made due to above condition (1).

Your final question: If at some future date, REDACTED TEXT makes an overpayment on a return later determined to have occurred through clerical error, may we use this overpayment as an offset against the debt? The answer is yes.

None of the above procedures can be used once the court judgment covering the period of the debt is final (Pope Estates v. Johnson, 43 CA2d 170). The superior court judgment for the period is now on appeal and is at the briefing stage. If the above procedures are invoked against REDACTED TEXT's debt they should, of course, be invoked against all like debts of all taxpayers.

DJH:po

cc: G. J. Jugum
M. H. Howard
P. K. Taylor
P. C. Griffin - The debt resulting in the above opinion is approximately $11,000 in interest which REDACTED TEXT failed to pay for the period now being briefed for the Appellate Court. We ask that you consider the possibility of an offset or recoupment of the debt versus any judgment received by REDACTED TEXT. Of course, if you have any comments on the above opinion, we would appreciate them.