

STATE BOARD OF EQUALIZATION

OFFICE CORRESPONDENCE

465.0040

To: Principal Tax Auditor

September 4, 1964

From: Tax Counsel (JHK)

Re: "L" & "D"

You returned the file of the above named taxpayer to me so I could look further into the matter of whether the Board could make a refund in this case. You will recall that "L" is a management consultant who advised "D" in setting up a business. Our West Los Angeles office determined that the corporate status could properly be disregarded. However, at the preliminary hearing we were convinced that "L" was improperly included in the determination as an interested party.

The problem here is that a tax is clearly due from the business. If "L" paid the tax voluntarily he may not be entitled to a refund. In the leading property tax case, Southern Service Co., Ltd. V. County of Los Angeles (1940) 15 Cal. 2d 1, the Supreme Court stated:

"It is the settled law of this state that illegal taxes voluntarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof; and in the absence of such statute, only illegal taxes paid under duress, coercion or compulsion are considered to be involuntarily paid and therefore recoverable."

The Legislature has provided in the case of the sales tax a statutory means for refund (Rev. & Tax. Code § 6901). It provides:

"If the board determines that any amount, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board...(shall approve the refund according to statutory means)."

Since refunds are a matter of statutory grace, the question devolves into whether "L" comes within our claim for refund statute.

We believe a claim for refund is proper in this instance because the amount was illegally collected within the meaning of Section 6901. You will recall that "L" only paid the tax, after a jeopardy determination was issued and a lien recorded on his real estate in Los Angeles County. A jeopardy assessment differs from a normal determination in that it is immediately due and payable. Extraordinary means of collection are available to the state. In fact, on extraordinary remedy was utilized by our recording the lien. Payment of the tax in order to stop further collection procedures does not constitute a voluntary payment. The state's efforts were, in our opinion, coercive. It should also be noted that "L" paid the determination under protest and accompanied his check with a petition for redetermination. The coerced payment of monies in question constitutes an illegal collection under Section 6901 making a claim for refund proper.

JHK:mm [1b]