

Heinz C. & Waltraud Prechter,)	
) Appellants,)	CASE NO. 95-M-1214
) vs.)	
) Roger W. Tracy,)	(INCOME TAX)
) Tax Commissioner of Ohio,)	
) Appellee.)	DECISION AND ORDER

APPEARANCES:

For the Appellants-	Brian W. FitzSim ons Arter and Hadden 925 Euclid Avenue 1100 Huntington Bldg. Cleveland, Ohio 44115-1475
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For the Appellee-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General State Office Tower 30 East Broad Street 16th Floor Columbus, Ohio 43266-0410
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Entered: April 4, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concurring.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the appellants, Heinz C. and Waltraud Prechter. The appeal is from two final determinations of the Tax Commissioner, appellee herein, wherein the Commissioner dismissed claims for income tax refunds as being filed outside the appropriate statutes of limitations.

The income tax years in issue are 1986 and 1987. The refunds were filed March 26, 1993. The Commissioner dismissed both claims pursuant to R.C. 5747.10 and R.C. 5747.11.

The specifications of error, as provided in appellants' notice of appeal, are as follows:

"I. The Commissioner's findings that the 60-day time period of O.R.C. Sec. 5747.10 had expired at the time Appellants filed their amended returns and applications for refund were erroneous because even though Appellants were in receipt of tentative refunds from the Internal Revenue Service at the time of filing their amended returns and refund applications, neither those refunds nor any IRS determinations as to the Appellants' federal income tax liabilities were final at the time the tentative refunds were received and thus the 60-day period had not yet commenced.

"II. The Commissioner's findings that under O.R.C. Sec. 5747.11 Appellants had until October, 1991 to file a refund application for their 1986 tax year and until October, 1992 to file a refund application for their 1987 tax year were erroneous when in fact Appellants were not aware of their excessive payments of tax until the filing of their federal income tax returns for their 1989 and 1990 tax years."

(Emphasis in Original)

It appears from the record before us that the appellants timely filed their 1986 and 1987 personal income tax returns in accordance with extensions received. (S.T. I p. 1, 3; S.T. II p. 1, 5) On August 9, 1990, appellants filed their 1989 federal income tax return. For the 1989 tax year, appellants reported significant losses. Federal law permitted those losses to be used to reduce taxes previously paid in the three years prior to the year in which the losses arose. Accordingly, appellants applied for a federal tax refund, utilizing the net operating loss (NOL) carryback. (S.T. p. 16) On July 8, 1991, appellants filed their 1990 federal income tax return. The NOL reported that year were also carried back three years, to 1987. A refund was also claimed for that tax year. (S.T. II, p.18)

On September 14, 1990, appellants received their 1986 refund, triggered by their 1989 NOL carryback. (S.T. I, p.7) On July 29, 1991, appellants received their 1987 refund, also triggered by NOL, this time, from 1990. (S.T. II, p.9)

The record also includes a "Collateral Agreement" between the appellants and the Internal Revenue Service (IRS), wherein it was agreed that, in consideration of a "standby letter of credit" furnished by the appellants, the IRS would issue refunds for tax years 1987 and 1989. That agreement appears to have

been executed by the appellants on November 20, 1990, after the issuance by the IRS of the 1986 refund.

As stated above, on March 26, 1993, appellants filed with the State of Ohio both amended income tax returns for tax years 1986 and 1987 and claims for refund. Those returns reflected an overpayment of tax for both 1986 and 1987 resulting from the NOL carrybacks, which originally accrued in 1989 and 1990. The Commissioner found he was without jurisdiction to consider the refund claims because they had not been filed within the time period allowed by R.C. 5747.11.

This matter is considered by the Board of Tax Appeals upon the notice of appeal, the Statutory Transcripts certified to this Board by the Tax Commissioner (S.T. I and S.T. II), a single exhibit submitted by the parties in lieu of hearing, and the legal arguments provided by the parties.

R.C. 5747.11 allows for refund of income taxes which are paid erroneously or in excess of that required by law. The section also sets forth the time period in which an application for refund must be filed. R.C. 5747.11(A)(2) provided, in part, during the audit period:

"Applications for refund shall be filed with the tax commissioner, on the form prescribed by him, as follows:

"(a) Within four years from the date of the illegal, erroneous, or excessive payment of the tax; or

"(b) With regard to an overpayment resulting from a recomputation or determination, by the internal revenue service or due to litigation initiated by the taxpayer, of the taxpayer's federal adjusted gross income, in the case of an individual, *** that reduces the taxpayer's tax liability under this chapter *** the refund application form, accompanied by the amended return required by section 5747.10 of the Revised Code, shall be filed within the sixty days prescribed in that section *** ."

(Emphasis Added)

The four years provided for applications for refund is absolute. Coca Cola Bottling Corp. v. Lindley (1978), 54 Ohio St. 2d 1 (Construing statute of limitations for franchise tax refunds). The grant of time may, however, be extended by legislation, as it is in R.C. 5747.11(A)(2)(b). Under that section, a taxpayer may receive additional time in which to file if the refund sought is a

result of a change to a federal tax report.

Appellants first claim that their refund requests are timely because the time for filing amended returns has not yet begun to run. As support for their claim, appellants cite R.C. 5747.10. That section delineates the circumstances under which an amended return must be filed and also sets forth the time frame for filing. That section provided, during the audit period:

"If any of the facts, figures, computations, or attachments required in a taxpayer's annual return to determine the tax charged by this chapter *** must be altered as the result of an adjustment to the taxpayer's federal income tax returns *** and such alteration affects the taxpayer's tax liability under this chapter ***, the taxpayer shall file an amended return with the tax commissioner *** . The amended return *** shall be filed not later than sixty days after the adjustment has been agreed to or finally determined for federal income tax purposes or any federal income tax *** refund *** has been assessed or paid, whichever occurs first."

(Emphasis added)

Appellants contend that, as of the date of filing the notice of appeal, their federal tax refund claims had not been "finally determined". Appellants argue that the refunds received are only "tentative refunds," subject to review by the IRS. Appellants further argue that the letter of credit which was created pursuant to the Collateral Agreement further establishes that the refunds paid by the IRS had not been finalized.

The logic of appellants' argument is that, as there has been no final determination for federal income tax purposes, the 60 day period in which a refund must be filed after finalization of an IRS assessment or refund has not yet begun to run. Thus, they argue, their refund claims are timely filed. We do not agree.

R.C. 5747.10 provides for alternative triggering events for the running of the sixty day period. The Tax Commissioner may look to the finality of a federal determination or to the actual payment of a refund. As the record contains copies of the IRS refunds paid to appellants, this Board must find that at least one triggering event has occurred. Thus, under R.C. 5747.10, an amended return was due within sixty days of the receipt of the refund check, or September 14, 1990 for the 1989 NOL carryback and July 29, 1992 for the 1990 NOL carryback.

While appellants argue that any refunds received are merely "tentative," the statute does not impose a finality requirement on the refund itself, only upon the IRS determination. We also find little merit to appellants' reliance on the letter of credit as establishing the tentative nature of the refunds. Initially, we must note that the 1986 refund check was issued prior to the execution of the "collateral agreement." Moreover, the agreement executed by appellants appears to this Board to be no more than a guarantee of repayment. The letter(s) of credit required by the agreement will be drawn upon only if the taxpayers do not act to satisfy any tax liability which may be found to be due. (S.T. I, p. 55, Section 3(b)) Thus, the letter of credit does not affect appellants' receipt of the refund checks, or limit appellants' apparent ability to cash said checks.

Through their second assignment of error, appellants assert that their refund claims are timely filed without resort to the additional sixty day period provided by R.C. 5747.11(A)(2)(b). As their refund claims are based on NOL carrybacks, appellants urge this Board to find that the event triggering the running of the limitations period did not occur until the year in which the NOL accrued.

We find this claim to be well taken. R.C. 5747.11 is not only a statute of repose, but also provides for the payment of interest on refund claims and, within the interest provision, sets forth the following:

"Interest shall be allowed and paid upon any illegal or erroneous assessment in excess of one dollar in respect of the tax imposed under this chapter *** at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of the payment of the illegal or erroneous assessment until the date the refund of such amount is paid. If such refund results from the filing of a return or report, or the payment accompanying such return or report, by an employer or taxpayer, rather than from an assessment by the commissioner, such interest shall run from a period ninety days after the final filing date of the annual return until the date the refund is paid.

"Interest shall be allowed and paid at the rate per annum prescribed by section 5703.47 of the Revised Code upon any overpayment in excess of one dollar in respect of the tax imposed by this chapter or under Chapter 5748. of the Revised Code from the date of the overpayment until the date of the refund of the

overpayment, except that if any overpayment is refunded within ninety days after the final filing date of the annual return or ninety days after the return is filed, whichever is later, no interest shall be allowed on such overpayment. If the overpayment results from the carryback of a net operating loss or net capital loss to a previous taxable year, the overpayment is deemed not to have been made prior to the filing date, including any extension thereof, for the taxable year in which the net operating loss or net capital loss arises. "

(Emphasis Added)

The General Assembly, in limiting the period for which interest would be refunded, acknowledged the true nature of the NOL carryback. By delaying the state's requirement to refund interest until the year in which the NOL arose, the General Assembly recognized that, while the NOL could be carried back three years, the return filed three years earlier was a proper reflection of the income earned in that year; the losses accruing in the later year did not really affect the earlier report. Thus, the earlier return had not been erroneously filed, and the tax paid at that time was not illegally paid, only excessive when later losses were taken into consideration. To assure that a taxpayer would not be unjustly enriched by receiving interest upon properly paid tax, the legislature "deemed" an overpayment based upon a NOL not to have been made prior to the year in which the NOL arose.

While the Commissioner argues that the language here under consideration only refers to the payment of interest, we do not agree. For purposes of the running of the limitations period for the refund application, if the overpayment is deemed not to have been made until the year in which the NOL arose, then for all purposes, the "deemed" date controls and the four year period must also run from that time. Therefore, this Board finds that the statute allows for a different beginning point for the running of the limitations period if the overpayment resulted from the carryback of a NOL.

It is well settled law that statutory provisions for the refund of taxes erroneously paid should be liberally construed in favor of the taxpayer. Phoenix Amusement Co. v. Glander (1947), 148 Ohio St. 592, paragraph one of the syllabus; Hanna Mining Co. v. Limbach (1985), 20 Ohio St. 3d 3. Further, as the

appellants point out, words used more than once in the same statutory provision must have the same meaning through the provision, unless there is clear evidence to the contrary. State ex rel. Maurer v. Sheward (1994), 71 Ohio St. 3d 513. As the overpayment in this matter resulted from a carryback of NOL, we must consider the year in which the NOL arose to be the year in which the overpayment was made.

Thus, we find the appellants' second assignment of error compelling. Appellants' 1989 federal income tax return (upon which the NOL arose) was filed in August, 1990. Thus, the appellants had until August, 1994 in which to file a refund with the state. As the amended return and request for refund appear to have been filed March 26, 1993, the refund claim was within the four years of the date of the excessive payment. Appellant's 1990 federal income tax return was filed on July 8, 1991. Thus, their request for refund made March 23, 1993 was again within the four year limitations period. Therefore the Commissioner had the authority to consider the claims.

Considering the entire record before us, the statutes and case law, the Board of Tax Appeals finds and determines that the Tax Commissioner erred when he determined he was without legal authority to consider appellants' refund claims. Therefore, the Commissioner's final determinations must be, and hereby are, reversed. The matter is remanded to the Tax Commissioner for consideration of the refund claims. ohiosearchkeybta