BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CONTROL SUPPLY COMPANY
LOS ANGELES AGENCY CENTER
(Petitioner-Appellant)

DEPARTMENT OF EMPLOYMENT
(Respondent)

PRECEDENT
TAX DECISION
No. P-T-23
Case No. T-68-32

Appellant has appealed from Referee's Decision No. LA-T-2712 which held that there was no petition pending before a referee.

STATEMENT OF FACTS

On January 24, 1968 the Department of Employment mailed notice of an assessment to the appellant. He responded on February 19, 1968 by mailing a memorandum to an audit district office of the department in Los Angeles. The memorandum read as follows:

> "Reference your assessment against Account No 150-0404 dated Jan 24th I have been hospitalized for an undetermined period for infectious hepatitis and will be unable to be available to anyone for up to 90 days. Please make arrangements for a 90 day extension of the processes which would normally occur were I not hospitalized - Thank you
>
> T. O. Brandon"

This memorandum was referred through the department to a referee of the Appeals Board at the Los Angeles Referee Office for consideration as a request by the appellant for an extension of time for filing a petition for reassessment. On March 7, 1968 the referee advised the appellant by letter in pertinent part as follows:

"The referee office does not have the authority to grant the extension you requested. Under section 1133 of the Unemployment Insurance Code a petition for reassessment must be filed within 30 days after service of the notice of the assessment, which in this case was on January 24, 1968. However, an addition of 30 days for filing may be granted on a showing of good cause.

"Since you are hospitalized you have shown good cause for an extension of 30 days for filing your petition. Accordingly, such petition must be filed on or before March 24, 1968 to be considered timely. Failure to comply will result in the assessment becoming final.

"The petition for reassessment may be filed by a letter setting forth, without elaboration, the reasons why you consider the assessment to be levied improperly."

On April 15, 1968 a referee issued the decision appealed from, holding that no petition had been filed within the period for petitioning as extended and that the assessment was final.

In his letter of appeal to us, the appellant states in part that:

" . . . Unfortunately I was in the County General Hospital with viral Hepetitus at the time I filed my informal appeal to the board. Since a case number and account number had been assigned by the board I assumed that my appeal had been received and that I would get a hearing. Your letter of March 7th indicated another 30 day extension of time could be had; unfortunately I did not need another 30 days since I was then out of the hospital and I assumed a date would now be set for my hearing because the case was on file."

The appellant does not otherwise identify the "informal appeal" to which he refers. The only communications that we or our referees have received from the appellant are the two referred to above and a letter postmarked June 16, 1968 formally requesting a jury trial in order that he may present in full his side of the case.

The issues presented by this appeal are:

1. Whether a petition to a referee has been filed within the time limits prescribed by law;

2. If not, then whether the circumstances of this case present a basis for invoking an estoppel in appellant's favor against the assertion of these time limits;

3. If so, whether the appellant may have a jury trial in these administrative proceedings.

REASONS FOR DECISION

The time within which a petition for reassessment may be filed is limited by Unemployment Insurance Code section 1133. In the absence of an extension granted by the referee upon a showing of good cause, such a petition must be filed within 30 days after service of the notice of assessment. The maximum extension of time which the referee can grant upon a showing of good cause is an additional period of 30 days.

These, of course, are all legal periods of time which must be computed in accordance with the provisions of Government Code section 6800 which provides that:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Moreover, these periods of time must be extended in accordance with other appropriate provisions of law. Among these we are particularly concerned here with Government Code sections 6700 and 6707, and Code of Civil Procedure section 1013.

Government Code section 6700 sets forth the days that are legal holidays in California. Among others these include February 12 and February 22, and also every Sunday. Government Code section 6707 provides that when the last day for the filing of any instrument or other document with a state agency falls upon a Saturday or a holiday, such act

may be performed upon the next business day with the same effect as if it had been performed on the day appointed.

Unemployment Insurance Code section 1131 requires that the Director of Employment give written notice of the assessment to the employing unit against whom it is made. The director may delegate this duty to an officer or employee of the department in accordance with Unemployment Insurance Code section 311. When the notice provided by code section 1131 is served by mail, code section 1140 requires that the service must be made pursuant to Code of Civil Procedure section 1013. Therefore, in computing the filing period, due allowance must be made for the extension of time provided by that latter section. Pesce v. Department of Alcoholic Beverage Control (1958), 51 Cal. 2d 310, 33 P. 2d 15.

Under the provisions of Code of Civil Procedure section 1013 the service of a mailed notice is complete at the time of its deposit in a regularly maintained postal facility. If, thereafter, a right is to be exercised or an act is to be done, the time for exercising the right or performing the act is extended one day because of the mailing. Also, if the place of deposit and place of address are served by different post offices, the time is further extended one additional day for every full 100 miles of distance between these two places. The maximum extension of time, however, may not exceed 30 days in all.

There is no provision of law defining the order in which successive extensions should be applied when there are several that are applicable. Pursuing the policy of the law that favors disposition of a proceeding on its merits where possible, we apply successive extensions in the order that will provide the greatest permissible overall extension when a question of timeliness of filing is involved. Robinson v. Hiles (1953), 119 Cal. App. 2d 666 at page 673, 260 P. 2d 194 at page 198.

In the matter before us, notice of the assessment was mailed to the appellant on January 24, 1968. Under the provisions of Unemployment Insurance Code section 1140, as well as those of Code of Civil Procedure section 1013, this service of the notice was complete at the time of its deposit on that date in a regularly maintained postal facility. However,

under Government Code section 6800, that day is excluded from the count of 30 days within which a petition to a referee may be filed as a matter of right.

Commencing the count then with the next day, January 25, 1968, as the first day, we proceed without excluding the two special holidays and four Sundays which came within the first 29 days. Accordingly, the thirtieth day that we count turns out to be Friday, February 23, 1968. Since that day is not a holiday, it becomes the last day of the period computed in accordance with Government Code section 6800.

Since notice of the assessment was served on the appellant by mail, we are required by Unemployment Insurance Code section 1140 to extend this filing period in the manner set forth in Code of Civil Procedure section 1013. So for the mailing, the period is extended one day to Saturday, February 24, 1968. No further extension can be given under this provision of law since there is no indication in the record that the place of deposit and place of address of the mailed notice of assessment were served by different post offices, or that if they were, that the two places were separated from each other by a full 100 miles or more of distance between them.

Since this last day of this extended filing period falls on a Saturday, the filing could have been made with the same effect on Monday, February 26, 1968, under the provisions of Government Code section 6707. Any filing beyond that date would have to be supported by an adequate explanation that would show good cause for the delay. However, when such an explanation is made, the referee then has authority under the provisions of Unemployment Insurance Code section 1133 to grant an additional 30 days (but no more) for the filing of a petition for reassessment.

The Unemployment Insurance Code does not define the term "good cause." The courts have held that it cannot be determined in the abstract, but depends largely upon the facts and circumstances of each case. Bartlett Hayward Company v. Industrial Accident Commission (1928), 203 Cal. 522 at page 532, 265 Pac. 195 at page 199; California Portland Cement Company v. California Unemployment Insurance Appeals Board (1960), 178 Cal. App. 2d 263 at page 274, 3 Cal. Rptr. 37 at page 44. It imports something more than a mere excuse. It must be a substantial reason that affords a legal excuse accompanied by that degree of diligence

which men of ordinary prudence would have used under similar circumstances. Zurich General Accident & Liability Insurance Company v. Kinsler (1938), 12 Cal. 2d 98 at page 102, 81 P. 2d 913 at page 915; Evelyn, Inc. v. California Employment Stabilization Commission (1957), 48 Cal. 2d 588 at page 591, 311 P. 2d 500 at page 502.

The appellant's confinement in a hospital with a serious infectious disease was a circumstance that the referee certainly could accept as good cause for delay by the appellant in filing a petition. Thus, the referee had authority to grant to appellant the maximum amount of additional time permitted by law for doing so. It appears to us that this is the intention expressed by the referee in his letter of March 7, 1968 to the appellant.

Accordingly, we may resume our count of days with Tuesday, February 27, 1968, as the first day of this additional period. In accordance with the statutory rules set forth above, the thirtieth day of this additional period becomes Wednesday, March 27, 1968. This then is the last day upon which the appellant could have filed a valid petition, unless some basis has been shown upon which an estoppel would arise in his favor against the application of the statutory time limitations in his situation.

First let us consider whether the appellant has filed a petition for reassessment within the statutory time. Appellant in his letter of appeal to us refers to having filed an informal one. A petition to a referee may be informal, but under the provisions of Title 22, California Administrative Code, section 5022, it is required to be in writing.

During the statutory filing period, there was only one written communication from the appellant. This was his memorandum postmarked February 19, 1968, which he sent to an audit district office of the department, and which that office referred on to the Appeals Division for consideration as a request for an extension of time within which to file a petition. We must examine this communication very carefully to see if it might, itself, be a petition.

This memorandum contains a reference to the assessment against account number 150-0404. It goes on to state that the appellant is ill and

hospitalized, and unavailable for up to 90 days. The only request for relief is in the appellant's own words to:

> "Please make arrangements for a 90 day extension of the processes which would normally occur were I not hospitalized"

There is no direct indication in the memorandum that it is intended to be a petition to a referee, nor is there any indirect indication to that effect, such as might arise out of an expression of dissatisfaction with the assessment, or some request for relief from it beyond mere delay. In fact, the direct request for delay is, itself, an indication that the memorandum is not a petition for reassessment, because as the appellant, himself, points out in his letter of appeal to us, if it were such, no delay would be needed. At the very minimum, something more is necessary beyond what is present. Standing alone, the memorandum is not sufficient to be characterized as a petition for reassessment. It is nothing more than a request for an extension of time within which to file such a petition, and it was appropriately processed as such.

This type of communication has to be distinguished from the type in which an attempt to petition is manifest in its contents, but there is a failure to include the grounds for doing so. In that situation, Title 22, California Administrative Code, section 5023, requires that the petitioner be notified of this failure and given ten days within which to file an amended petition. However, before opportunity can be accorded to amend a petition under this provision, there must first be some written communication, however informal, that can be characterized as a petition. That is what is lacking here.

There being no other written communication from the appellant during the statutory time period for filing a petition even as extended by a showing of good cause for delay, it is our conclusion that no petition for reassessment was filed by the appellant within the time allowed by law. We must next consider whether any basis has been shown upon which an estoppel might arise in favor of the appellant that would prevent the statutory time limits from being invoiced against him. In an appropriate case, estoppel relief is available independent of statutory provisions. La

Societe Francaise de Bienfaisance Mutuelle v. California Employment Commission (1943), 56 Cal. App. 2d 534 at page 551, 133 P. 2d 47 at page 55, certiorari denied by U. S. Supreme Court, 320 U.S. 736, 88 L. Ed. 436, 64 S. Ct. 35.

It is now well settled that estoppel will run against a governmental agency where justice and right require it. However, not every instance of an error by a governmental agency, nor every interpretation given to its advice or conduct is basis for an estoppel. It is the unusual case in which estoppel is found to exist. Holden v. California Employment Stabilization Commission (1950), 101 Cal. App. 2d 427 at pages 435 and 436, 225 P. 2d 634 at page 639; United States Fidelity and Guaranty Company v. State Board of Equalization (1956) 47 Cal. 2d 384 at pages 388 and 389, 303 P. 2d 1034 at page 1037.

In Driscoll v. City of Los Angeles (1967), 67 A.C. 295 at pages 303 and 304, 431 P. 2d 245 at page 250, 61 Cal. Rptr. 661 at page 666, the California Supreme Court said that, generally speaking, four elements must be present in order to apply the doctrine of estoppel:

1. The party to be estopped must be apprised of the facts;

2. He must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was as intended;

3. The other party must be ignorant of the true state of facts; and

4. He must rely upon the conduct to his injury.

There is a similar statement of the elements of estoppel in California Cigarette Concessions, Inc. v. City of Los Angeles (1960), 53 Cal. 2d 865 at page 869, 350 P. 2d 715 at page 718, 3 Cal. Rptr. 675 at page 678, and in a number of other cases.

Using this statement of estoppel elements as our guide, let us consider appellant's contention that;

> "Since a case number and account number had been assigned by the board I assumed that my appeal had been received and that I would get a hearing."

It is apparent from the statement of estoppel elements that the mere assumption which appellant contends that he made from the assignment of an account number and a case number is not alone sufficient to serve as a basis for invoking an estoppel. Among other things, it will also have to appear that the assignment and use of a case number or an account number was conduct intended to indicate to appellant that a petition had been received from him and filed, or at least that appellant had a right to believe that it was conduct so intended.

The account number was the first in order. It was assigned by the department no later than January 24, 1968, and had been used in the notice of assessment which the department mailed to the appellant on that date. Appellant himself had also used the account number as a reference in his memorandum postmarked February 19, 1968. The previous use of the account number lends no support to the idea that its later use was intended to be an indication to appellant that a petition had been received from him and filed.

The case number was assigned by the referee office sometime after the receipt of appellant's memorandum. It was first made known to the appellant by its use (along with the account number) in the referee's letter of March 7, 1968. That letter was the only communication from a referee to the appellant during the statutory filing period.

Both numbers are set forth at the beginning of that letter as a reference in connection with its content. Then the referee begins his letter by explaining that he does not have authority to grant the extension requested. He goes on to acknowledge the existence of good cause for delay in filing a petition and grants appellant an extension of time <u>for that purpose</u>.

The referee then proceeds to designate an exact future date on or before which a petition must be filed to be considered timely. He then states that:

> "Failure to comply will result in the assessment becoming final."

Lastly, the referee points out that the petition may be filed by letter setting forth, without elaboration, the reasons why appellant considered the assessment improperly made.

The referee's explanation of what the appellant needed to do and by what future date in order to file a petition, and what would occur if this were not done, leaves no room for any inference that his reference to a case number and an account number was intended to indicate that a petition had already been received from the appellant and filed. Nor does it leave any room for any inference that the appellant's memorandum was then being accepted and filed as a petition. Appellant had no right to believe this to be the case. The assignment and use of the case number and account number have not been shown to be any basis for an estoppel in appellant's favor against invoking the statutory time limitations.

The referee did err by a few days in his statement of the calculation of the last day on which a petition might have been filed. However, to serve as a basis for invoking an estoppel, the appellant must have relied upon this erroneous statement to his injury. That he did not do so is indicated by appellant's letter of appeal to us in which he states that:

> "I did not need another 30 days since I was then out of the hospital and I assumed a date would now be set for my hearing because the case was on file."

Under these circumstances the error in the statement of the final filing date is no basis for invoking an estoppel.

In a proceeding of this type, it would be most unusual in any event to invoke an estoppel against the operation of the statutory time limits. This is because there is still another administrative remedy available to the

appellant by which he may obtain a review of his grievances on their merits. By failing to file a petition for reassessment, the appellant has not lost all right to administrative review of his tax liability, but only the right to such a review before paying the department's tax demand.

A taxpayer who has been assessed under the provisions of the Unemployment Insurance Code has two administrative remedies that he may pursue. He may seek reassessment of the tax by filing a petition to a referee in accordance with the provisions of code section 1133. He may also, after paying the tax, seek the refund of any amount that he believes he should not have been required to pay.

These two remedies of reassessment and refund are generally found in most tax laws today. Historically, the refund remedy is the oldest. It had its origin in the principle of tax jurisprudence that when one disputes the sovereign's tax claim, he must pay before he argues. Reassessment came into being because of the sometimes harsh effects of the application of this principle. It permits the taxpayer to argue at the administrative adjudicatory level before he pays. If he chooses to do so, an assessed taxpayer may avail himself of both of these administrative remedies in sequence. However, it is not necessary for him to exhaust his reassessment remedy before pursuing appropriate refund proceedings, nor will the mere exhaustion of his reassessment remedy (without subsequent refund proceedings) be sufficient to enable him to seek a judicial review. Modern Barber Colleges, Inc. v. California Employment Stabilization Commission (1948), 31 Cal. 2d 720 at pages 722 and 723, 192 P. 2d 916 at pages 917 and 918. On the other hand, the mere exhaustion of his refund remedy (without prior reassessment proceedings) is sufficient to enable him to institute a suit for judicial review under code section 1182. Scripps Memorial Hospital, Inc. v. California Employment Commission (1944), 24 Cal. 2d 669 at pages 673 and 674, 151 P. 2d 109 at page 112, 155 A.L.R. 360 at page 364.

In order to pursue this latter remedy, the taxpayer, after paying the tax, must first file a timely claim for refund with the department itself in accordance with the provisions of Unemployment Insurance Code sections 1178 and 1179. If the department denies him the refund he seeks, he may then file a petition to a referee in accordance with the provisions of code section 1180. Ordinarily a referee has no authority to review a matter on a refund basis unless the taxpayer has previously applied to and been denied

a refund by the department. However, in certain special situations set forth in code section 1179.5 this will be deemed to have been done, and in such instances a pending reassessment proceeding will be transformed into a refund proceeding.

The clear separation of these two types of proceedings is important because the assertion of a claim of tax liability (in the form of an assessment) is separated in the administrative sequence from the assertion of an overpayment of taxes (in the form of a claim for refund) by an intervening process of tax collection. It is again a well established principle of tax jurisprudence that the collection of a tax should not be impeded by judicial restraint. In this state there is a specific constitutional provision which embodies this principle and a specific provision of the Unemployment Insurance Code which applies it to employment taxes (California Constitution, Article XIII, section 15; Unemployment Insurance Code section 1851; Modern Barber Colleges, Inc. v. California Employment Stabilization Commission (1948), 31 Cal. 2d 720 at pages 722 to 724, 192 P. 2d 916 at pages 917 and 918; Louis Eckert Brewing Company v. Unemployment Reserves Commission (1941), 47 Cal. App. 2d 844 at pages 845 to 847, 119 P. 2d 227 at page 228.

Essentially the reassessment proceeding serves as a permitted restraint upon tax collection pending a review of the matter by a referee and this Appeals Board. The immediate outcome of such a proceeding to the extent that it is adverse to the petitioner is a final determination only of the department's right to collect and hold the amount in dispute against the taxpayer's will. The unsuccessful taxpayer in a reassessment proceeding is not precluded thereby from further contesting his liability for the tax in subsequent administrative and judicial proceedings after he has paid it. It is only after and in the event that the taxpayer does not avail himself of this opportunity that a reassessment proceeding becomes a final determination on the merits.

The appellant has not complained that it would work a hardship upon him to be compelled to pay the tax first, but that is generally why a taxpayer prefers to petition for reassessment. We must remember, however, that invoking an estoppel against the application of the statutory time limits for filing such a petition can operate in effect to restrain the collection of a tax.

In Modern Barber Colleges, Inc. v. California Employment Stabilization Commission (1948), 31 Cal. 2d 720 at page 732, 192 P. 2d 916 at page 923, an appellate court expressed the view that:

> "The argument that compliance with the statute may cause hardship in some instances is one which can be addressed only to the legislature."

It seems clear, therefore, that no basis has been shown upon which an estoppel might arise in appellant's favor.

This conclusion may make it unnecessary for us to consider whether the appellant may have a jury trial in these administrative proceedings as he has requested. We might, however, make the following comment upon his request.

There is nothing in the Unemployment Insurance Code, nor to our knowledge in any other statute governing our procedure that makes provisions for jury trials. On the contrary, code section 404 explicitly provides for the appointment of:

". . . impartial referees who shall hear and render a decision in every matter in which a petition is filed with . . . a referee . . ." (emphasis added)

More specifically, code section 1134(a) provides that a referee shall render a decision in a reassessment proceeding. We or our referees would have no authority under the law to impanel a jury, nor any funds that we could use for this purpose. A referee could not delegate to a jury the duty which the Unemployment Insurance Code imposes upon him to decide the matter before him. There is no way in which we, or he, could comply with the appellant's request.

Kenneth Culp Davis in his Administrative Law Treatise states in his section 8.16 (Volume 1, page 594) that:

> "The Sixth Amendment requires jury trials in all criminal prosecutions, and the Seventh Amendment requires jury trials

> 'in suits at common law, where the value in controversy shall exceed twenty dollars.' Administrative agencies do not impose criminal penalties, and proceedings before such agencies are not suits at common law."

If appellant does not feel that the ultimate administrative resolution of his grievances on their merits is fair and just, even though made without a jury, he may by taking appropriate steps after the exhaustion of his administrative remedies have a complete right to judicial review of all administrative action.

DECISION

The decision of the referee is affirmed.

Sacramento, California, August 20, 1968

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS