BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

SAN FRANCISCO FUNDING CORPORATION (Petitioner-Appellant)	PRECEDENT TAX DECISION No. P-T-31
DEPARTMENT OF EMPLOYMENT (Respondent)	Case No. T-68-52

The petitioner has appealed from Referee's Decision No. SF-T-2965 which dismissed its petition for reassessment as invalid under the provisions of Unemployment Insurance Code section 1138.

STATEMENT OF FACTS

On June 26, 1968, notice was served on the petitioner of an assessment made against it by the Department of Employment with respect to the period of fourteen calendar quarters extending from October 1, 1963 through March 31, 1968. The assessment was made for $1887.36 in contributions and $188.76 in penalties, together with interest as required by law. Because the assessment was made under the provisions of code section 1137, the notice of the assessment carried the following statement prominently set forth at the top of it:

> "This is a jeopardy assessment under section 1137 of the U.I. Code."

The notice of assessment was accompanied by a written demand upon the petitioner to make a deposit of security in the amount of $2337.64 in the event that the petitioner filed a petition for reassessment. This demand stated that the security might be in the form of a cash deposit, a surety bond, a bank certificate of deposit, or certain designated types of bearer bonds.

On July 9, 1968, the petitioner filed the petition for reassessment-in these proceedings. At no time did it comply with the department's demand for a deposit of security. The referee dismissed the petition without holding a hearing upon it because no security deposit had been made.

The sole question presented by this appeal is whether a valid petition to a referee was filed.

REASONS FOR DECISION

The assessment in question was made as a jeopardy assessment under the provisions of Unemployment Insurance Code section 1137. Under the provisions of that section:

> ". . . The director may in levying the assessment demand a deposit of such security as he deems necessary to insure compliance with this division. . . ."

In accordance with this provision the department has made written demand upon the petitioner to make a deposit of security in the amount of $2337.64 in the event that the petitioner should file a petition for reassessment.

The petitioner did file such a petition within the time required by code section 1138. However with respect to such a petition, that code section explicitly states that:

> " . . . The petition for reassessment shall not be valid unless the employer deposits with the director, within 15 days after the service upon the employer of notice of the assessment accompanied by demand for deposit, such security as the director deems necessary to insure compliance with this division. . . ."

That the petitioner did not comply with this provision of the statute is not disputed.

The petitioner urges that this part of the law is contrary to the due process clause of the United States Constitution. In this connection the petitioner states that it compels a taxpayer to pay over to the taxing agency, without a hearing, amounts of money that are in dispute and to which the taxing agency may not even have any right. Essentially the petitioner is asking us to declare this part of the law unconstitutional and upon that basis to disregard it in reaching our decision.

The petitioner also urges that the department acted unconstitutionally when it made the assessment under code section 1137 on a jeopardy basis without first holding any hearing to serve as a basis for making its "determination" or "finding" that the collection of taxes would be jeopardized by delay. Code section 1137 has no provision that requires that such a hearing be held. In this respect, therefore, the petitioner is urging that the administrative officials have unconstitutionally applied the provisions of that section in a manner that has denied petitioner due process of law.

Let us consider these contentions in order. Naturally if the quoted provision of code section 1138 is unconstitutional legislation, it cannot be given the effect of law. To the best of our knowledge, however, it has never been declared to be so by any court. May we as an administrative agency do so?

We are a board that has been created by the legislature to function within the framework of a constitutional government. We and our referees entertain no doubt in regard to our duty to respect and observe all applicable constitutional provisions in carrying out our functions. Constitutional provisions are supreme law. They are a mandate of the highest order.

The Constitution of California makes provision for a division of the powers of government. Judicial powers are vested primarily in our system of courts. We have not been vested by law with judicial powers (Empire Star Mines Company, Limited v. California Employment Commission (1946), 28 Cal. 2d 33 at page 48, 168 P. 2d 686 at 695), nor can we lawfully be vested with such (Standard Oil Company of California v. State Board of Equalization (1936), 6 Cal. 2d 557 at page 565, 59 P. 2d 119 at page 122).

To declare that the clearly expressed will of the legislature is in violation of the constitution is an exercise of judicial power. Such a declaration is beyond the proper scope of administrative adjudication. We and our referees would not be observing the constitution ourselves if we attempted to adjudicate issues involving the constitutionality of legislation.

This, however, does not mean that we must turn a deaf ear because an issue is raised which involves the application of the constitution. It is within the proper scope of administrative adjudication to determine whether an administrative agency is applying legislation in a constitutional way. This does not involve a conflict with an express legislative will. Rather, it is a

direct search for the legislative intent because we always presume that the legislature intended that its enactment should be constitutional.

This distinction between issues which involve the unconstitutionality of legislation, and those which involve unconstitutional application of legislation by an administrative official, is well stated in Davis' Administrative Law Treatise, volume 3, page 74 (section 20.04). We quote from that section as follows:

> "A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body."

It is beyond our jurisdiction and that of our referees to resolve the issue which petitioner raises in regard to the constitutionality of the quoted provision of code section 1138. We must proceed upon the basis that this legislation is constitutional unless and until the contrary is ever declared by a court of competent jurisdiction. Clearly it is the express will of the legislature that the petition in this matter should not be a valid one without the timely deposit of the security demanded by the department.

Had the petitioner made such a deposit of security, it would have been within our jurisdiction and that of our referees to resolve the issue raised by the petitioner that code section 1137 is being applied by the taxing agency in an unconstitutional manner. This, however, we cannot do in these proceedings because there is no valid petition pending before us. Under such circumstances, the exercise of our jurisdiction is limited to the dismissal of the invalid petition.

Our inability to review the petition filed in these proceedings does not mean that the petitioner no longer has any right to administrative and judicial review of its grievance. The opportunity for a full review is still available to the petitioner after payment of the assessment under the refund provisions of the

code. In particular, we direct the petitioner's attention to code sections 1178 through 1183.

In our Precedent Decision No. P-T-23, at pages 11 to 13, we have pointed out that a taxpayer who is assessed under the provisions of the Unemployment Insurance Code has two administrative remedies that he may pursue. While he may avail himself of both in sequence, it is not necessary for him to exhaust his reassessment remedy before pursuing appropriate refund proceedings. In this respect, jeopardy assessments do not differ from ordinary assessments made under other code provisions.

In fact, a taxpayer assessed under the jeopardy provisions of code section 1137 may find it to his advantage not to deposit security and seek reassessment, but rather to pay the assessment and seek refund. This is because he will, if successful, receive his refund with interest, while he will only receive the return of his deposit if he seeks reassessment. If he is not successful, interest will still accrue on the unpaid assessment, but no further interest accrues after an assessment has been paid.

DECISION

The decision of the referee is affirmed.

Sacramento, California, November 19, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

DONALD D. BLEWETT

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS