



SC TECHNICAL ADVICE MEMORANDUM #89-3

TO: Mr. William F. Bray, Director
Field Services Division

FROM: John Swearingen, Manager
Tax Policy and Procedures Department

DATE: January 4, 1989

SUBJECT: Income Tax Refunds - Statute of Limitations Provision

REFERENCE: S.C. Code Ann. Section 12-54-30 (1976 Supp.)
S.C. Code Ann. Section 12-47-410 (1976)
S.C. Code Ann. Section 12-47-440 (1976)
S.C. Code Ann. Section 12-7-2240 (1976)

AUTHORITY: S.C. Code Ann. Section 12-3-170(1976)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

When a taxpayer advises that incorrect information was given by the S.C. Tax Commission through oral communication, may the limitations of S.C. Code Section 12-47-440 be waived to allow the taxpayer recovery of taxes erroneously paid more than three years ago?

Facts:

In October of 1981, Mr. and Mrs. B moved from Florida to South Carolina where they resided until June, 1987. During such time Mrs. B, a retired school teacher, collected her annual pension from the Florida Teacher's Retirement Fund. Although such pension funds were not taxable in Florida, Mrs. B allegedly contacted the South Carolina Tax Commission to ascertain whether such funds were considered taxable income in South Carolina.

Mrs. B has stated that she was informed by a Tax Commission employee that her annual pension was considered taxable income in South Carolina. As a result, Mrs. B included the pension funds as taxable income in her 1982 thru 1986 state tax returns. Mrs. B states that she contacted the Tax Commission several times during 1982-1986 and was consistently given the same incorrect information upon which she relied.

After moving to Georgia and while preparing her 1987 tax return, Mrs. B was informed by H & R Block that the Tax Commission's advice was incorrect and that her pension funds were not taxable income. Mrs. B filed an amended return for the years 1984-1986 to recover the taxes "erroneously, improperly or illegally assessed, collected or other-wise paid over to the Commission." However, recovery of such taxes paid on pension funds for 1982 and 1983 is precluded by S.C. Code Section 12-47-440 which contains a three year statute of limitations provision.

Mrs. B requests that the three year statute of limitations be waived since it was the Tax Commission's incorrect advice which caused her hardship. Mrs. B claims that but for the Tax Commission's in-correct advice, she would not have paid taxes on her annual pension.

Discussion:

Title 12 of the S.C. Code contains several sections which provide for the recovery of taxes "erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission" by a taxpayer. A careful examination of these sections in conjunction with the prior findings of the Tax Commission indicates that the three year statute of limitations may not be waived as requested by Mrs. B.

The S.C. Tax Commission applied several of these sections in their June 30, 1988 finding which denied a refund requested by X Corp. (See, S.C. Tax Commission Findings of Fact, June 30, 1988).

Like Mrs. B, X Corp. sought to recover taxes "erroneously...paid over to the Commission" more than three years prior to their request for a refund. X Corp. relied primarily upon the provisions of S.C. Code Section 12-7-2240, now superseded by S.C. Code Section 12-54-30 which provides:

"If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the Commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12-54-20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on refunds provided for under Section 12-9-380 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later."

Thus, S.C. Code Sections 12-7-2240 and 12-54-30 do not contain a statute of limitations provisions and would therefore support X Corp's. refund request.

The Tax Commission, however, cited S.C. Code Section 12-47-440 which provides:

"Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid."

The Commissioners gave considerable weight to the statute of limitations provision and denied X Corp's. refund since their request was not filed within three years from the date the tax was due to be paid.

X Corp. argued that S.C. Code Section 12-54-30 modified S.C. Code Section 12-47-440 and, as well, its statute of limitations provisions. Noting a difference between the requirements of the two sections, the Commissioners mitigated the difference through a well settled rule which holds that "all statutes relating to the same subject should be considered together and whenever possible, harmonized." Thus, when both sections were considered together, S.C Code Section 12-47-440's statute of limitations provision was not modified by S.C. Code Section 12-54-30 and the provision was applied in its full force. S.C. Tax Commission Findings of Fact, June 30, 1988, p.2.

The Commissioners were also quick to point out that,

"it would be illogical to find and conclude that the General Assembly intended the Tax Commission to have the power to grant refunds beyond a three year period from the date of payment. A person, as a matter of right, may pursue a refund claim timely instituted under Section 12-47-440. Section 12-54-30 confers no greater rights. In our view, the limitation applies, other-wise there would be an irreconcilable conflict between the statutes and perhaps unequal treatment of the state's taxpayers." *Id.*, at 3

Thus, the Commissioners held that a taxpayer's right to a refund and any limitations imposed upon that right are matters which rest in the powers of the General Assembly. Therefore, as with X Corp., Mrs. B must be bound by the provisions of the statutes enacted by the General Assembly, for the Tax Commission does not have the power to infringe upon their authority or stated intentions. See also, S.C. Tax Commission Finding of Fact, April 1, 1988.

S.C. Code Section 12-47-410 may also be used as a vehicle for the recovery of taxes. This section provides:

Whenever it shall appear to the satisfaction of the Commission that any tax has been erroneously, improperly or illegally assessed against any person within this State, the Commission may order any officer having authority to assess or collect taxes to abate the whole or any part of such taxes that may have been erroneously, improperly or illegally assessed.

However, the S.C. Supreme Court has held that the provision applies only to the rebate or refund of property taxes. See *Columbia v. Glen Falls Ins. Co.*, 245 S.C. 119, 139 S.E. 2d 529 (1964); *Vance v. S.C. Tax Commission*, 249 S.C. 214, 153 S.E. 2d 841 (1967); and *American Hardware Supply v. Whitmore*, 278 S.C. 607, 300 S.E. 2d 289 (1983). Since the tax refund requested by Mrs. B does not regard property taxes, S.C. Code Section 12-47-410 may not be relied upon.

Mrs. B's request stresses that the Tax Commission supplied her with incorrect information on several different occasions. However, Mrs. B's letter indicates that this advice was obtained from the Commission via the telephone. S.C. Code Section 12-3-170, however, provides in part:

"...The Commission may, upon written application, determine in advance the tax effects of other transactions and the tax liability of taxpayers other than those referred to herein, and it may revoke or modify such advance ruling if the facts later should develop differently. The Commission may publish such of the above rulings as, in its discretion, may be of assistance in administering the laws of this state."

Thus, the language of the above section implies that the Commission may be held liable only for information given in response to a taxpayer's written application for such. Since the alleged information given by the Commission to Mrs. B was not in response to a written application for such, the Commission may not be held liable.

The fact that Mrs. B relied to her detriment upon the Commission's apparent advice does not create a remedy for recovery under the doctrine of estoppel. The common law of South Carolina has long held the Tax Commission free from liability under the estoppel doctrine. See *Heyward v. Tax Commission*, 240 S.C. 347, 126 S.E. 2d 15 (1962) and *Texaco v. Wasson*, 269 S.C. 255, 237 S.E. 2d 75 (1977).

Conclusion:

Based upon the above discussion, Mrs. B's request for recovery of taxes paid to the Tax Commission in 1982 and 1983 must be denied.