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OFFICE OF THE ATTORNEY GENERAL
State of California

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Attorney General

OPINION	:	No. 79-311
	:	
of	:	<u>April 26, 1979</u>
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SUBJECT: CANCELLATION OF DELINQUENT PENALTY—Payment of a delinquent penalty on property is not a necessary precondition to the cancellation thereof where the principal amount of the tax has been paid within the applicable period.

The Honorable Edward F. Buckner, County Counsel, County of Sutter, has requested an opinion on the following question:

Is the payment of a delinquent penalty on property a necessary precondition to the cancellation thereof under the provisions of section 4985.2 of the Revenue and Taxation Code?

CONCLUSION

Under the provisions of section 4985.2 of the Revenue and Taxation Code, payment of a delinquent penalty on property is not a necessary precondition to the cancellation thereof where the principal amount of the tax, exclusive of such penalty, has been paid within the applicable period specified in subdivision (a) of said section. Relief under subdivision (b) of that section is predicated upon the payment of the principal and penalty.

ANALYSIS

Section 4985.2 of the Revenue and Taxation Code¹ provides as follows:

“(a) Any uncollected delinquent penalty on property provided for in Section 2617, 2618, 2704, 2705, or 2922 may be canceled by the tax collector or the auditor, with the approval of the board of supervisors upon a finding that (1) the assessee’s failure to make a timely payment is due to reasonable cause and circumstances beyond the assessee’s control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, provided the principal payment for the proper amount of the tax due is made within 90 days after the first delinquency date or within 30 days after the second delinquency date, or, (2) there was an inadvertent error in the amount of payment made by the assessee, provided the principal payment for the proper amount of the tax due is made within 10 days after the notice of shortage is mailed by the tax collector.”

“(b) Any assessee seeking to be relieved of the penalty shall file with the board of supervisors a claim for refund conforming with the provisions of Article I (commencing with Section 5096) of Chapter 5 of Part 9. The claim for refund shall be accompanied by a statement under penalty of perjury setting forth the facts upon which the claim for relief is based. The statement shall be filed with the board of supervisors within 60 days after the penalty is paid, or within 60 days following the effective date of this act, whichever is later.”

“(c) Nothing herein shall affect the powers of a tax collector or redemption officer pursuant to Section 2512, 2512.5 or 2513.”

Subdivision (a) of section 4985.2 provides for the *cancellation* of an *uncollected* penalty, provided that the *principal payment* for the proper amount of the tax is made within a specified period. The terms “cancellation” and “uncollected” clearly connote the existence of an outstanding obligation. The term “principal payment” suggests a remission of an underlying obligation exclusive of penalty. Thus, under the provisions of section 4985.2, payment of a delinquent penalty on property is not a necessary precondition to the cancellation thereof where the principal amount of the tax has been paid within the applicable period specified in subdivision (a). Where the principal amount has not been paid within said period, however, relief under subdivision (a) is not available. Of course,

¹ Hereinafter, all section references are to the Revenue and Taxation Code unless otherwise indicated.

one of the two findings specified in subdivision (a) must be made in order to support the order of cancellation. Subdivision (b) of section 4985.2 prescribes the procedure for claiming a refund of a penalty which has been paid by the taxpayer. Subdivision (b) refers to section 5096 et seq. providing an administrative remedy for the recovery of taxes paid (*cf. Roth v. City of Los Angeles* (1975) 53 Cal. App. 3d 679, 684) including penalties, interest and costs (§ 5107). Payment of a delinquent penalty is, of course, a necessary precondition to its refund.

It is concluded, therefore, that under the provisions of section 4985.2, payment of a delinquent penalty on property is not a necessary precondition to the cancellation thereof where the principal amount of the tax, exclusive of such penalty, has been paid within the applicable period specified in subdivision (a) of said section. Relief under subdivision (b) of that section is predicated upon the payment of the principal and penalty.
