BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
EYRE INVESTMENT COMPANY)

Appearances:

For Appellant: Scott, Mitchell and Herger and E. A. Herger of San Francisco
For Respondent: Reynold E. Blight, Franchise Tax Commissioner

O P I N I O N

Eyre Investment Company has appealed from the action of the Franchise Tax Commissioner in overruling the protest of that corporation against a proposed additional assessment in the sum of $897.93, pursuant to Section 25 of the California Bank and Corporation Franchise Tax Act (Chap. 13, Stats. 1929).

It appears that on March 4, 1930, the Appellant made a return to the Franchise Tax Commissioner pursuant to Section 13 of the Act on a form furnished by the Respondent for that purpose. In this report the corporation supplied information relating to its accounting period ended December 31, 1929, but denied any tax liability whatsoever, claiming that as a "family holding corporation" it was not "doing business" within the meaning of the law. In the space provided for the entry of the tax under the system of self-assessment contemplated by the Act, the reporting company made the notation "no tax."

Mr. Perry Eyre who made this return on behalf of the corporation accompanied it with a letter of explanation in which he said in part: "Eyre Investment Company is simply a family holding corporation! the assets of which consist of real estate (inherited) from which rents are collected and disbursements made to the stockholders (my brothers and sisters) in the form of dividends each month.

"The company is in no way active in the purchase or sale of anything and, therefore, not subject to this tax."

Thereafter at the insistence of the Franchise Tax Commissioner payment of the minimum tax of $25.00 was made and subsequently a notice of additional tax of $897.93, proposed to be assessed, was issued. A protest was filed by the Appellant. This was overruled by the Commissioner who sent notice affirmin, the additional assessment and thereupon this appeal was filed.

The brief of the Commissioner makes the point that the

payment of the 425.00 by the taxpayer should be regarded as a concession that the corporation was doing business so that it should now be precluded from urging the contrary, Under the circumstances as we have above reviewed them, we do not believe that the Commissioner's point is well taken. The Commissioner makes the further point that our Board may not in any event consider the propriety of the initial $25.00 tax assessed for the reason that this was not the result of an additional assessment made by him, and in support of this view he cites the opinion of the Board in the matter of the Appeal of Sullivan Investment and Realty Company (filed November 20, 1930).

In that case no additional assessment had been proposed by the Commissioner and the minimum tax was self-assessed by the Appellant and paid without protest.

Although we held that we had no appellate jurisdiction under such circumstances, we said:

"If the Commissioner had proposed an additional assessment, which had been duly protedted, then an appeal would have given us jurisdiction to determine 'the amount of the tax,' which necessarily involves deciding whether any tax was due."

As stated in our opinion in the matter of Miss Saylor's Chocolates, Inc. (filed August 4, 1930), we think that once an appeal has been duly prosecuted, it is our duty to determine from the facts before us,. through the exercise of our own judgment, what the correct amount of the tax should be. . This was our view in the matter of the Appeal of Portland California Steamship Co., in which we filed an opinion on November 20, 1930, determining that the corporation was not engaged in business and consequently was entitled to the return of the $25.00 tax which it had previously paid as well as to the abatement of' the proposed additional tax of $2,677.63. The fact that our Board is mentioned in connection with the refunds to be made under Section 27 of the Act is significant in that it gives us authority to determine that the taxpayer has paid more tax than is really due. Otherwise, there would be no occasion to mention the Board in connection with refunds. Moreover, since we have authority to determine the correct amount of the tax, it should not be circumscribed within the limits of any previous position in the matter taken either by the taxpayer or the Commissioner. This was the view expressed in our opinion filed in the matter of the Appeal of R. J. Reynolds Tobacco Company (filed January 19, 1931). Therefore, we conclude that it is our duty in the instant case to decide for ourselves whether or not the Appellant has been engaged in' business in this state within the meaning of the Act and to make such orders as may be consistent with our findings. There appears to be no controversy as to the facts. Subsequent to its organization as a family holding corporation in 1911, Eyre Investment Company has reduced its holdings until at the time of the assessment now questioned it owned only one piece of property located on the southwest corner of Kearny and Sutter Streets in the City and

County of San Francisco, The land and the entire building situate thereon was leased to Sherman, Clay & Company before the enactment of Chapter 13, Statutes of 1929, and the lease is still in effect. There is then just one tenant which has full management and control over the property and operates the building thereon for the purposes of its own business. As explained by Mr. Perry Eyre in his letter mentioned earlier in this opinion, the activity of the Appellant has been confined to the collection of the rents from this property and the disbursement to the stockholders made therefrom in the form of dividends.

These facts seem to bring the case squarely within the rule enunciated by the United States Supreme Court in the case of United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, 35 S. Ct. 499, 59 L. Ed. 825, cited in our opinion in the matter of the Appeal of Magalia Mining Company, (filed January 7, 1930). To the same effect is the holding in Nunnally Investment Co. v. Rose, 14 Fed. (2d) 189, cited in our opinion in the matter of the Appeal of Portland California Steamship Co., (filed November 20, 1930). These decisions demonstrate clearly that a corporation otherwise inactive does not engage in business merely through leasing its property. As stated in the Nunnally Investment Co. opinion:

"If the only substantial corporate activity is the ownership and preservation of real and personal property, the receipt of its ordinary income, which arises from the property itself, rather than from the active use and management of it, and the distribution of such income to the stockholders, with only such corporate organization and activity as is necessary thereto, there is not such a doing of business as is meant by the Act. (Federal Revenue Act). While such activity is 'business' in a broad sense, a tax upon such business would be in substance one on the mere ownership of property, becoming thus a direct tax *********."

We have already pointed out the parallel existing between the Federal Revenue Act, mentioned in the Nunnally Investment case, and the California Bank and Corporation Franchise Tax Act, (Chapter 13, Statutes of 1929), in our opinion in the matter of the Appeal of Magalia Mining Company, above cited. While there have been some recent amendments to the law, these have been made subsequent to the assessment now before us and we do not believe that it could have been intended to make these retroactive. There is nothing from which that intention could be construed from the language of the recent enactments.

We conclude that the Appellant was not "doing business" within the meaning of the Bank and Corporation Franchise Tax Act at the time of the proposed assessment and, therefore, that it was not subject to taxation thereunder.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the action of the Franchise Tax Commissioner in overruling the protest of Eyre Investment Company, a corporation, against a proposed additional assessment based upon a return of said corporation for the year ended December 31, 1929, be and the same is hereby reversed. Said ruling is hereby set aside and said Commissioner is further directed to refund to said corporation any tax collected form it on the basis of said return as provided in Section 27 of said Chapter, all in conformity with the foregoing opinion of this Board.

Done at Sacramento, California, this 11th day of May, 1931, by the State Board of Equalization.

Jno. C. Corbett, Chairman
H. G. Cattell, Member
R. E. Collins, Member
Fred E. Stewart, Member

ATTEST: Dixwell L. Pierce, Secretary