BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MISS SAYLORS, INCORPORATED)

Appearances:

For Appellant: R. Ernest Brotherton of Oakland

For Respondent: Reynold E. Blight, Franchise Tax Commissioner

O P I N I O N

This is an appeal pursuant to Section.25 of the California Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929), from the action of the Franchise Tax Commissioner in overruling the protest of Miss Saylors, Incorporated, against a proposed assessment of the minimum tax with interest.

There is no controversy as to the facts but the Commissioner urges that this is not an appealable case because the Commissioner has given no notice of an additional assessment as contemplated by Section 25 of the Act. The matter is in all respects comparable to the Appeal of Magalia Mining Company in which an opinion was filed by our Board on January 7, 1930. In that case the Commissioner argued the merits of the question of whether or not the corporation was doing business and did not raise the point as to the appealable nature of the controversy. However, since he has seen fit to do so in this case, we shall consider the question of the jurisdiction of our Board to determine whether the Commissioner is justified in demanding the payment of the twenty-five dollar tax by the Appellant.

At the time of making its return covering the year 1929, Miss Saylors, Incorporated, did not transmit any payment of the tax but instead filed with the Commissioner an affidavit of its Secretary in which it was stated that the corporation had ceased doing business during the year 1926 and that at no time since that year had it transacted any business whatsoever except such as was incident only as to the perpetuation of its corporate life or incident to the care or preservation of a factory and factory site which it had acquired but was not usin On the basis of these facts the company denied any liability for the minimum tax since it considered that it was not doing business within the meaning of the law. Notwithstanding this denial, the Commissioner sent a notice to the company, indicatir that he expected to hold it responsible for the payment of the minimum tax of twenty-five dollars.

A protest was filed with the Commissioner to such action

on his part and thereafter the Commissioner ruled adversely to the protestant. In due course, an appeal from his ruling was taken to this Board.

It appears to us that the corporation has done everything which it could reasonably be expected to do to put the Commissioner upon notice that it did not consider itself as doing business and, consequently, was taking the position that it was liable for no tax. It is also plain that the Commissioner disagreed with this point of view and was insisting that the minimum tax, at least, was due. Certainly, it cannot be said that the return of the taxpayer accompanied by the affidavit above mentioned and not by any remittance constituted a concession that it owed twenty-five dollars or any part thereof to the state as a tax under this act. Therefore, when the Commissioner sent the company a notice that he expected the payment of the twenty-five dollar tax this constituted an advice of a proposed additional assessment whether or not it was so denominated by the Commissioner. Obviously, if no tax liability is conceded the demand of a twenty-five dollar tax is something additional.

However, the Commissioner contends that if the tax is not paid the corporation could get its liability determined through such suit as the Controller might bring pursuant to Section 31 of the act, Certainly, this would be an unsatisfactory remedy because it would involve suspension of corporate rights and would needlessly prolong the determination of the question. We think that a reasonable interpretation of the law would be to regard this controversy as in the same category as other controversies between a corporation and the Commissioner concerning the correct amount of the tax liability under the law. In our opinion, there is no merit to the Commissioner's contention that we are without jurisdiction to make a determination and we shall proceed accordingly to a consideration of the question of whether or not the Appellant was doing business.

For the purposes of this determination we shall refer to the text of the law as it was originally passed in 1929 because that was its text at the time of the proposed assessment. Since then there have been some changes made in the definition of the term "doing business" but we do not believe that these are applicable to this appeal.

As already indicated, there is no controversy concerning the facts, The incorporators of Miss Saylors, Incorporated, were the owners of all of the outstanding capital stock of Miss Saylor's Chocolates, Inc., a California corporation engaged in the manufacture of candies and confections, having its office and principal place of business at 2420 Encinal Avenue, Alameda, California, It appears that the Appellant was created for the purpose of taking over that part of the business then owned and being conducted by Miss Saylor's Chocolates, Inc., as was considered by these incorporators could be more economically handled from a plant located in Southern California. To that end a factory site was purchased

in Culver City, California, and a factory building erected thereon. These are owned by the Appellant and upon the completion of the building, machinery and equipment was installed for the manufacture of confections in which business the Appellant thereupon engaged.

The venture proved unprofitable and the business was discontinued. The machinery and other equipment were sold and all that remained were the land and the factory which are being held pending an advantageous opportunity for disposal. The company is engaged in no business whatever other than the holding of this property and its final dissolution is awaiting an opportunity for sale of the factory and its site.

These facts bring this appeal squarely within the ruling in the matter of the Appeal of Magalia Mining Company to which reference has already been made. Upon authority of our decision in that case we are of the opinion that Miss Saylors, Incorporated, was not engaged in business at the time of this proposed assessment and should not be taxed. As stated in Lane Timber Co. v. Hynson, 4 Fed. 2d 666, 40 A.L.R. 1448: "Owning land is not doing business, nor is paying taxes. Most owners of land, whether corporations or individuals, would be willing to sell at a profit."

ORDER

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 Miss Saylors, Incorporated, a corporation, against a proposed assessment of the minimum tax and interest thereon under Chapter 13, Statutes of 1929, be and the same is hereby reversed, Said ruling is hereby set aside and said Commissioner is hereby directed to proceed in conformity with this order.

Done at Sacramento, California, this 12th 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