BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
RICHMOND FURNITURE COMPANY)

Appearances:

For Appellant: R. E. Brotherton, Attorney and F. A. Oldes

For Respondent: Chas. J. McColgan, Franchise Tax Commissione

OPINION

This is an appeal pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Stats. 1929, Chapter 13, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Richmond Furniture Company, a corporation, against a proposed assessment of additional tax in the amount of $25.00 for the fiscal year beginning March 1, 1932, and ending February 28, 1933.

For a number of years, Appellant has not been actively engaged in doing business, and has received no net income, but it has had or enjoyed the right to do business up to February 8, 1932, at least, when it commenced proceedings for winding up, and consequently was subject to the Act and was taxable thereunde subsequent to February 27, 1931, the effective date of an amendment to the definition of the term "doing business" as used in the Act, providing that the term should include the "enjoyment of the right to do business" (Stats, 1931, p. 64; an amendment effective on August 14, 1931 in effect omitted the words "enjoyment of" from the amendment effective on February 27. See Stats, 1931, p. 2225). On February 8, 1932, Appellant, with the consent of its stockholders, commenced winding up prceedings as above noted, and filed with the Secretary of State a certificate to that effect as required by Section 400 of the Civil Code.

The Appellant contends that by virtue of commencing winding Up proceedings and filing a certificate to that effect with the Secretary of State it removed itself from the application of the Act and consequently should not pay a tax under the Act for the fiscal year beginning March 1; 1932 and ending February 28, 1933. In support of this contention, Appellant calls to our attention. Section 400(a) of the Civil Code which provides that

> When a proceeding for winding up has commenced the corporation shall cease to carry on business, except insofar as may be necessary for the beneficial winding up thereof".

Appellant argues that under the above quoted provision of Section

400(a) of the Civil Code; it lost the right to do business in this State on February 8, 1932 and consequently cannot be considered as "doing business" in this State thenceforth, notwithstanding the 1931 amendment to the definition of "doing business" providing that the term shall include the "right to do business". For this reason, Appellant concludes that it is not liable for a minimum tax for the fiscal year ending February 28, 1933.

Section 4 of the Act provides for a tax upon every corporation doing business in this State, for the privilege of exercising its corporate franchise in this State, to be measured by its net income for the next preceding fiscal or calendar year, and further provides that

> "In any event, each such corporation shall pay annually to the state, for the said privilege, a minimum tax of twenty-five dollars".

It seems clear that the minimum tax provided for in Section 4 is required only of corporations which are doing business in this State within the meaning of that term as defined in the Act If Appellant lost the right to do business in this State by commencing winding up proceedings, it follows that Appellant is not required to pay the minimum tax provided for in Section 4.

However, it is to be noted that the fourth paragraph of Section 13 provides as follows:

> "If any bank or corporation discontinues actual operations within the state in any year and thereafter has no net income but does not dissolve or withdraw from the state, it shall in the succeeding year and thereafter until dissolution, withdrawal or resumption of operations, pay an annual tax to the state of twenty-five dollars".

Under the above quoted provisions, it seems that although a corporation discontinues operations and has no net income, it must nevertheless pay a tax of twenty-five dollars for each year intervening between the year it discontinues operations and the year in which it either dissolves, withdraws from the state, or resumes operations. There is nothing in the Act which indicates that it was the intention of the Legislature that a corporation otherwise subject to this tax should be exempt from it simply because it commenced winding up proceedings even though it thereby lost the right to do business. Consequently, it seems that under the above quoted provisions Appellant is required to pay the tax in question in this appeal, inasmuch as Appellant discontinued operations, did not thereafter receive any net income, and did not, prior to the beginning of the fiscal year for which the tax was proposed, dissolve or withdraw from the state.

Appellant faintly suggests that commencement of winding up proceedings should be considered for the purposes of the Act as tantamount to dissolution, In this suggestion, we are unable to concur. Commencment of winding up by filing a certificate to that effect with the Secretary of State as required by Section 400 of the Civil Code is simply the initial step in the process

of dissolution. Dissolution cannot be effected until the corporation is completely wound up. Authority for this statement, if authority is needed, is to be found in the following provisions of Section 403(c) of the Civil Code:

> "(1) When a corporation has been completely wound up, and all its known debts have been paid, and its known property distributed, the court, if application is made to the court, may make an order declaring the corporation wound up and dissolved. If the proceeding is out of court, a majority of the directors shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved".

We must conclude that under the above quoted provisions of the fourth paragraph of Section 13, literally construed, Appellant is liable for the tax in question in this appeal even though it commenced winding up proceedings by filing a certificate with the Secretary of State giving notice of its election to wind up or dissolve as required by Section 400 of the Civil Code and even though the Appellant thereby lost the right to do business in this State. However, we are not convinced that Appellant should be considered insofar as the Act is concerned as having lost its right to do business in this State by obtaining the consent of its stockholders to wind up and by filing a certificate of its intention to wind up with the Secretary of State. It is true that Section 400(a) of the Civil Code provides that when a corporation has commenced to wind up it "shall cease to carry on business." But there is nothing in this Section or in any other provision of the laws of this State of which we are aware which prohibits a corporation which has elected to wind up and which has filed a certificate to that effect with the Secretary of State from revoking its intention or election to wind up and thereafter carrying on its business. If the election to wind up is effected by obtaining the consent of a majority of the shareholders, what is to prevent the shareholders from later retracting their consent? Or if the election is effected by a resolution of the board of directors, why may not the board of directors subsequently, at any time prior to dissolution, revoke the resolution for winding up?

In a technical sense, it may be argued that as long as the election to wind up stands, the corporation has not the right to do business. But if the election to wind up *is* revocable, as appears to be the case, the corporation is in a position, at any time prior to actual dissolution, to regain the right to do business if it so chooses. In our opinion? a corporation which is entitled to regain the right to do business at any time it chooses, is, insofar as the right to do business is concerned, for all practical purposes in the same position as a corporation, which has elected to discontinue its business but which has not elected to wind up, If the latter corporation is subject to the Act and must pay at least a $25.00 tax thereunder annually, as is unquestionably the case, then we think the same should be true of the former corporation.

O R D E R

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

IT IS HEREBY ORDERED, ADJUDGED AMD DECREED that the action of Honorable Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Richmond Furniture Company, against a proposed assessment of additional taxes under Chapter 13, Statutes of 1929 as amended.for the fiscal year beginning March 1, 1932 and ending February 28, 1933, be and the same is hereby sustained.

Done at Sacramento, California, this 10th day of October, 1932.

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

ATTEST: Dixwell L. Pierce, Secretary