



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
HARRY FINK & COMPANY, and LERNICH, INC.)

Appearances:

For Appellants: A. B. Rosenthal, Attorney

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

O P I N I O N

This is an appeal pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Harry Fink & Company, and Lernich, Inc., to proposed additional assessments based upon their returns for the year 1933. The proposed additional assessment in the case of Harry Fink & Company is in the amount of \$25, and in the case of Lernich, Inc. is in the amount of \$296.94. Inasmuch as the Appellants are affiliated corporations and filed their appeals jointly, we have considered the proceedings as a consolidated appeal.

Lernich, Inc. was organized on April 1, 1933 and immediately upon incorporation acquired all the stock of Harry Fink & Company a corporation which had been doing business within the state for several years. The operations of Lernich, Inc. for the remainder of the year 1933 resulted in the corporation realizing a substantial net income. Harry Fink & Company, however, sustained a loss for the year.

Appellants contend that since they were affiliated corporations within the meaning of Section 14 of the Act, they were entitled to file a consolidated return for the year. Since the loss of Harry Fink & Company amounted to a sum greater than the net income of Lernich, Inc. they further contend they should not be required to pay any tax, based upon their 1933 activities in excess of the minimum.

Although Section 14 of the Act provides that affiliated corporations may file a consolidated return, an amendment to the section which became effective May 1, 1933 (Cal. Stats. 1933, Ch. 209) provides that Where a member of an affiliated group filing a consolidated return is a bank or corporation commencing to do business in this State for the first time after the effective date of this Act, its tax for its first and second taxable years shall be computed without regard to this section but in accordance with the provisions of Section 13 of the Act".

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The above quoted provision, we think, clearly requires that the taxes for the first and second taxable years of a commencing bank or corporation be computed, in accordance with Section 13, in the same manner as if the Act had contained no provision for consolidated returns.

Section 13 of the Act, as amended in 1933 (Cal. Stats. of 1933, Chapters 210 and 303, effective May 1, and May 12, 1933, respectively) provides that the tax for the first taxable year of a commencing corporation shall be computed upon the basis of its net income for that year. It further provides that the corporation must pay as a **prepayment of** the tax for its second taxable year, an amount equal to the tax for its first taxable year,

Lernich, Inc. commenced doing business in 1933. Thus the year 1933 constituted its first taxable year and the year 1934 its second taxable year. In accordance with the provisions of Sections 13 and 14 as amended, it must pay a tax for the year 1933 based upon its income for that year, irrespective of the fact that the combined activities of it and its affiliated corporation for that year resulted in a loss. Further, it must also pay an amount equal to the tax for the year 1933 as a prepayment of its 1934 tax,

Appellants point out that Lernich, Inc. commenced doing business on April 1, 1933, whereas the above quoted amendment to Section 14 did not become effective until May 1, 1933. They argue that the Legislature could not have intended that the amendment should be retroactively applied to a corporation which commenced doing **business** prior to the effective date of the amendment.

It is to be observed, however, that the Act effecting the amendment provided that it should be applied in the computation of taxes accruing subsequent to December 31, 1932. There can be no question but that the taxes for the first and second taxable years of Lernich, Inc. accrued subsequent to this date.

But, independently of the express provision in the Act requiring such a result, we are of the opinion that the amendment in question was applicable to the computation of the taxes for Lernich, Inc.'s first and second taxable years. **We have repeatedly held** that unless the Legislature otherwise provides, amendments to the Act govern the computation of taxes for the year in which the amendments become effective and for subsequent years. See Appeal of United States Oil and Royalties Company (decided by this Board on May 10, 1932), and Appeal of Bankamerica Company (decided by this Board on October 12, 1932). This view, we believe, was upheld by the California Supreme Court in Fullerton Oil Company vs. Johnson, 89 Cal. Dec. 35.

Although the amendment to Section 14 became effective subsequent to the time Lernich, Inc. commenced business, it nevertheless became effective during the corporation's first taxable year. Accordingly, consistent with our previous decisions, we

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must hold that the taxes for that year and subsequent years should be computed in accordance with the amendment.

Apparently, Appellants object to the proposed additional assessments in question only on the grounds that the Commissioner acted wrongfully *in* following the amendments to Sections 13 and 14. Since we are of the opinion he acted correctly in so doing, we must sustain his action in overruling Appellants protest to the proposed additional assessments.

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 Charles J, **McColgan**, Franchise Tax Commissioner, in overruling the protest of Harry **Fink & Company, and Lernich, Inc.**, corporations, against proposed assessments of additional tax in the amounts of **\$25** and **\$296.94**, respectively, based upon their return for the year **1933**, pursuant to Chapter **13**, Statutes of **1929**, as amended, be and the same is hereby sustained.

Done at Sacramento, California, this 25th day of October, **1935**, by the State Board of Equalization.

R. E. Collins, Chairman
John C. Corbett, Member
Fred E. Stewart, Member
Orfa Jean Shontz, Member
Ray L. Riley, Member

ATTEST: Dixwell L, Pierce