

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }  
APEX ROTAREX MANUFACTURING CO. }

Appearances:

For Appellant: Richard L. Sloss, Attorney at Law

For Respondent: Harrison Harkins, Assistant Franchise Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 27 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner in denying the application of Apex Rotarex Manufacturing Co. for a refund of taxes for the taxable year ended December 31, 1938, in the amount of \$249.09.

It appears that the Appellant was dissolved on October 18, 1938, upon which date the statutory proceedings for dissolution were completed and its corporate existence terminated under Section 403c of the California Civil Code, and that as a part of the dissolution proceedings all of Appellant's assets were distributed to its sole stockholder, Apex Electrical Manufacturing Corporation, which thereupon sold the same. The only question presented by this appeal is whether Appellant is entitled to a refund, under Section 13(k) of the Bank and Corporation Franchise Tax Act, of a proportionate amount of the tax paid by it for the year 1938. This question, in turn, depends upon whether the dissolution proceedings constituted a "reorganization, consolidation, or merger" within the meaning of said section.

This Section, as amended in 1937, provides that in cases in which a bank or corporation dissolves or withdraws from the state during a taxable year there shall be a pro rata reduction of its tax liability for that year, "provided that the taxes . . . shall not be subject to abatement or refund because of the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger." These provisions were recently construed by the Supreme Court of this State in San Joaquin Ginning Co. v. McColgan, 20 A.C. 2'79, where it was pointed out that the purpose of the above quoted proviso of Section 13(k) was to preclude the abatement or refunding of taxes in cases in which the proceedings did not effect any substantial change in a business enterprise or the interests involved therein, but merely a change in the form of the corporate structure by which the enterprise was carried on, In view of this purpose and of the fact that the Appellant's parent did not carry on the activities formerly conducted by the Appellant, but immediately

Appeal of Apex Rotarex Manufacturing Co.

after the dissolution sold the assets distributed to it, we believe that the proceedings in question are not to be regarded as a "reorganization, consolidation, or merger" within the meaning of Section 13(k). It follows that the Appellant is entitled to the refund provided by this Section.

This construction of the statute finds support in decisions of the United States Supreme Court holding that under the provisions of the Federal income tax acts relating to reorganizations an exchange may not be made tax-free where the transferor does not retain a substantial interest in the property transferred., See Groman v. Commissioner, 302 U. S. 82; Lefulle v. Schofield, 308 U. S. 415. The relevancy of these decisions in construing Section 13(k) of the Bank and Corporation Franchise Tax Act was recognized in the San Joaquin Ginning case, supra at pp. 286, 287.

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 Chas. J. McColgan, Franchise Tax Commissioner, in denying the claim of Apex Rotarex Manufacturing Co., a corporation, for a refund of taxes in the amount of \$249.09 paid by said corporation for the year ended December 31, 1938, based upon the income of said corporation for the year ended December 31, 1937, be and the same is hereby reversed. Said ruling is hereby set aside and the said Commissioner is hereby directed to proceed in conformity with this order.

Done at Sacramento, California, this 7th day of July, 1942, by the State Board of Equalization.

R. E. Collins, Chairman  
Wm. G. Bonelli Member  
George R. Reilly, Member  
Harry B. Riley, Member

ATTEST: Dixwell L. Pierce, Secretary