BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MCQUAY AIRCRAFT CORPORATION)

Appearances:

For Appellant: M. A. Samuelson, Certified Public Accountant.

For Respondent; W. M. Walsh, Assistant Franchise Tax Commissioner; Paul Ross, Associate 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 claim of McQuay Aircraft Corporation for a refund of tax in the amount of $1,487.31 for the taxab2.e year ended June 30, 1946.

On December 17, 1945, the Appellant, a California Corporation,. discontinued operations, converted substantially all its assets into cash and canceiled all its leases for property used in connection with its manufacturing business. On December 26, 1945, pursuant to a resolution of its Board of Directors and with the consent of its shareholders it filed a certificate of election to wind up and dissolve the Corporation as provided for in Civil Code Section 400 (now Corporations Code Section 4603). Appellant did not engage in any business thereafter, Cash distributions in the aggregate amount of $35,000 were made to its shareholders in March, April and May, 1946, and one of $15 000 was made in August, 1946. Practically all the assets retained after these distributions were held for the settlement of federal taxes and liquidating expenses. A certificate of winding up or final dissolution was filed with the Secretary of State and a certified copy thereof filed with the County Clerk of Los Angeles County, pursuant to Civil Code Section 403c (now Corporations Code Section 5201), during July, 1947.

Appellant filed its claim for refund on the theory that under Section 13(k) of the Bank and Corporation Franchise Tax Act, as it read during the taxable year in quecvion, it should be liable for franchise tax only for the portion of the taxable year preceding January 1, 1946. It contends that it was dissolved within the meaning of this Section in December, 1945 when its assets were sold, its loases cancelled and its business operations discontinued. Tha Section then provided

> "Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution or withdrawal..."

The position of the Appellant, in our opinion, cannot be sustained. The only statutory authority for the allowance of a refund to it is to be found in Section 13(k) of the Act. Even if it be assumed, as appears to be the case, that it did not engage in business after December, 1945, within the meaning of Section 4, imposing a tax on corporations doing business in the State, and Section 5, defining the term "doing business," that fact would not entitle Appellant to the refund claimed for Section 13(k) fixes the cut off date as the effective date of dissolution and not the date of discontinuance of business.

The real question presented in this appeal, therefore, is whether there was such an effective dissolution of the corporation prior to the close of the taxable year in question within the meaning of Section 13(k) of the Act. In construing this Section the District Court of Appeal in Bank of Alameda County v. McColgan, 69 Cal. App. 2d 464, 471, said

> "From a practical standpoint a corporation may be considered dissolved when it irrevocably loses its right to do business other than that necessary to wind up its affairs."

The Appellant's selling of its assets for cash, which it retained beyond December, 1945, and the cessation of its manufacturing operations do not constitute an irrevocable giving up of its corporate right to do business, for it could still at any time have decided to recommence business operations and repurchase new operating assets. Although the Appellant later distributed most of its assets to its shareholders, it retained sufficient assets throughout the taxable year to be able so to recommence operations.

Similarly, there is nothing of an irrevocable nature involved in the voluntary filing by the corporation of a certificate of intention to wind up and dissolve, for this certificate may berevoked by the corporation, when it has not distributed its assets to its shareholders, by a similar vote or consent of its shareholders or directors as originally authorized the winding up and dissolutioh as provided in Civil Code Section 400a (now Corporations Code Section 4606). In effect, therefore, theAppellant did rot give up the privilege of exercising its corporate franchise or its right to do business during the taxable period, for the corporation could have started to use its franchise and do business again at any tine the directors and shareholders so desired. The case of Bank of Alameda County v. McColgan, supra, and the Appeal of Gillette Machine and Tool Company, decided by this Board on September 18, 1946, are

distinguishable on this point for in both of these matters the assets were distributed to the shareholders at what was found to be the time of effective dissolution. The corporations, therefore, were not in a position to recommence operations and thus an irrevocable step had been taken in their. dissolution. The Appeal of Waland Lumber Company, decided September 18, 1946, is not in point for it is not concerned with the effective date of dissolution of a domestic corporation, but rather it determined that the date for pro-rating the tax under Section 13(k) in regards to a foreign corporation was the date of dissolution in the state of incorporation.

We conclude, accordingly, that the Appellant has failed to show an effective dissolution during the taxable year ended June 30, 1946, and, therefore, is not entitled to a refund of tax under Section 13(k) of the Act.

O R D E R

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

IT IS HEREBY ORDERED, ADJUDGED,AND DECREED, pursuant to Section 27 of the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes of 1929, as amended) that the action of Charles J. McColgan, Franchise Tax Commissioner, in denying the claim of McQuay Aircraft Corporation for a refund of tax in the amount of $1,487.31 for the taxable year ended June 30, 1946, be and the same is hereby sustained.

Done at Sacramento, California, this 15th day of December, 1948, by the State Board of Equalization.

Wm. G. Bonelli, Chairman
J. L. Seawell, Member
J. Ii. Quinn, Member
Geo. R. Reilly, Member
Thomas H. Kuchel, Member

ATTEST: Dixwell L. Pierce, Secretary