



OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)

J. J. NEWBERRY REALTY CO.)

Appearances:

For Appellant: John Desmond, Tax Manager,
J. J. Newberry Co.

For Respondent: W. M. Walsh, Assistant Franchise
Tax Commissioner; Buri D. Lack,
Chief Counsel; Crawford H. Thomas,
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 J. J. Newberry Realty Co. for a refund of tax in the amount of \$382.07 for the taxable year 1946.

Prior to March 15, 1946, Appellant a Delaware corporation, owned various parcels of real property in California and four other states, and the J. J. Newberry Co, of California, a California corporation, operated approximately sixty-nine stores in this State, 100% of the stock of each organization being owned by the J. J. Newberry Co. of Delaware, a Delaware corporation. On February 1, 1946, Appellant filed a franchise tax return with the Commissioner for the taxable year 1946, at the same time paying a tax in the amount of \$509.42. Thereafter, on March 15, 1946, Appellant sold its California realty to the J. J. Newberry Co. of California, and on March 31, 1946, was dissolved and merged in Delaware with the J. J. Newberry Co, of Delaware, the latter thereafter continuing to operate the properties previously owned by Appellant in States other than California. Appellant subsequently filed a claim for a refund of three-fourths of the tax paid, relying in this regard upon Section 13(k)(1) of the Bank and Corporation Franchise Tax Act, which reads in part as follows:

"(k)(1) 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, .."

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In support of his action in denying the claim, the Commissioner asserts that the transactions above described resulted in a reorganization, defined by Section 13(j) as follows:

"The term 'reorganization' as used in this Section means (1) a transfer by a bank or corporation of all or a substantial portion of its business or property to another bank or corporation if immediately after the transfer the transferor or its stockholders or both are in control of the bank or corporation to which the assets are transferred; or (2) a mere change in identity, form or place of organization however effected; or (3) a merger or consolidation... As used in this paragraph the term 'control' means the ownership of at least 30 per centum of the voting stock and at least 30 per centum of the total number of shares of all other classes of stock of the bank or corporation."

and, consequently, that the tax paid was non-refundable in view of the following additional language of Section 13(k)(1):

"...and provided further, that the taxes levied under this act 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."

The Appellant contends, on the other hand, that it did not transact any business in this State after the sale of its California properties on March 15, 1946, that its dissolution on March 31, 1946, represented a complete withdrawal from this State and that even though its business was acquired by J. J. Newberry Co. of Delaware through merger the merger did not occur within the confines of the State of California and accordingly, that there was no corporate merger so far as this State is concerned.

Considering in its entirety the plan embodied in Section 13 of the Act for the allowance or disallowance of refunds to corporations discontinuing business in this State and the treatment of a corporation commencing to do business in this State pursuant to a reorganization, there may well be some basis for the Appellant's position that a merger not affecting operations in this State should not result in the disallowance of its claim for refund. If reference to California is so to be read into Section 13(j), however, a reorganization resulted, by a parity of reasoning; from the sale by Appellant of all its properties in this State to the J. J. Newberry Co. of Delaware. From the standpoint of the real ownership and control of the properties held by Appellant in this and other States prior to March 15, 1946, the transactions of that date and March 31, 1946, involved changes merely of form rather than of substance. See San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254, 259. We conclude, in view of these considerations, that the Commissioner acted

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correctly in denying the claim for refund.

Our decisions in Appeal of Gillette Machine & Tool Co. and Appeal of Waland Lumber Co. (each dated September 18 1946), cited by Appellant, are not material to the disposition of this case inasmuch as they dealt only with the question of the effective date of a dissolution or withdrawal for refund purposes under Section 13.

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, pursuant to Section 27 of the Bank and Corporation Franchise Tax Act, that the action of Chas; J. McColgan, Franchise Tax Commissioner, in denying the claim of J. J. Newberry Realty Co. for a refund of tax in the amount of \$382.07 for the taxable year 1946, be and the same is hereby sustained.

Done at San Francisco, California, this 29th day of March, 1949, by the State Board of Equalization.

George R. Reilly, Member
J. H. Quinn, Member
Thomas H. Kuchel, Member

ATTEST: F. S. Wainhaftig, Acting Secretary