



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of Appeal of)
EDWARD M. ORNITZ & CO., INC.)

Appearances:

For Appellant : Louis S. Pileger, Certified
Public Accountant

For Respondent : Burl D. Lack, Chief Counsel;
Mark Scholtz, Associate Tax
Counsel; Paul I. Ross,
Associate Tax Counsel

OPINION

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 (now succeeded by the Franchise Tax Board) in denying the claim of Edward M. Ornitz & Co., Inc., for a refund of the tax in the amount of \$479.50 for the taxable year 1947.

Edward M. Ornitz did business as a sole proprietor through December 31, 1945. On January 14, 1946, pursuant to a plan to incorporate his business, he mailed the articles of incorporation for Edward M. Ornitz & Co., Inc., to the Secretary of State. The articles were filed by the Secretary of State on January 17, 1946, and a certificate of incorporation was issued to Appellant that time. Appellant asserts, however, that the business organization conducted by Edward M. Ornitz as an individual prior to 1946 commenced doing business as a corporation on January 1, 1946. Proceeding, then, on the theory that it had done business in 1946 for a full period of twelve months, Appellant included the income of the business for the entire year 1946 in its franchise tax return for the taxable years 1946 and 1947 and measured its tax for those years by that income. This, it contends, is wholly in accord with Section 13(c) of the Bank and Corporation Franchise Tax Act since its first taxable year (1946) was a period of twelve months.

The Commissioner, on the other hand, is of the view that Appellant did not do business in 1946 for a full twelve-month period inasmuch as it had no corporate existence until its articles of incorporation were filed in January 17, 1946; and that, consequently, as a commencing corporation doing business for less than a period of twelve months in its first taxable year, its tax for its second taxable year (1947) was to be computed, pursuant to Section 13(c), on the basis of its income for that year.

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Under Section 4(3) of the Bank and Corporation Franchise Tax Act a tax is imposed on every ordinary business corporation "for the privilege of exercising its corporate franchise within that State..." The tax is not on the mere doing of business but rather "on the privilege of 'doing business as a corporation. It is imposed on the privilege of using the corporate mechanism, with its consequent advantages over the form of doing business in this state." Edward Brown & Sons v. McColgan, 53 Cal. App. 2d 5504, 508. The question then is -- when does the privilege arise? In our opinion, it is usually the date on which the State sanctions its exercise; In this case that was January 17, 1946, for it was then that Appellant's articles of incorporation were filed with the Secretary of State and its corporate existence began. Civil Code; Section 292; now Corporations Code, Section 308. We believe, accordingly, that Appellant did not bring itself within the scope of Section 13(c) as doing business for a full period of twelve months during 1946 and that the position of the Commissioner must be sustained.

ORDER

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 Chapter 13, Statutes of 1929, as amended, that the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claim of Edward M. Ornitz & Co., Inc., for a refund of tax in the amount of \$479.50 for the taxable year 1947 be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of May, 1950,
by the State Board of Equalization.

George R. Reilly, Chairman
J. H. Quinn, Member
J. L. Seawell, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Pierce, Secretary