



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
IDA ARVIDA ROGERS, SUCCESSOR)
IN INTEREST OF LESLIE F.)
ROGERS COMPANY

Appearances:

For Appellant: Horton and Knox,
Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel;
Paul L. 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 (now succeeded by the Franchise Tax Board) in allowing only to the extent of \$1,181.02 the claim in the amount of \$4,133.50 of Ida Arvida Rogers, Successor in Interest of Leslie F. Rogers Company, for a refund of tax paid by said Leslie F. Rogers Company for the taxable year 1948.

The Leslie F. Rogers Company, a California corporation doing business in this State, paid a franchise tax for 1948 in the amount of \$7,086.09. Leslie F. Rogers, the principal stockholder, died in 1947, and it was decided on May 31, 1948, to dissolve the corporation without court proceedings. Steps were taken towards that end, and on October 14, 1948, under Section 5201 of the Corporations Code, the Secretary of State received for filing a certificate of dissolution signed by Appellant as President and Peter J. Schartz as Vice-President. On October 15, 1948, the Secretary of State returned the certificate with the statement that it had not been executed by a majority of the directors as required by Section 5200 of the Corporations Code. On October 28, 1948, the corporation again mailed the certificate to the Secretary of State with the explanation that its articles of incorporation provided for a board of directors of three persons, and that the certificate "was signed by two persons who naturally constitute a majority of the board of directors."

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In the light of that information the Secretary of State accepted the certificate for filing on November 1, 1948.

AS a result of the dissolution the corporation became entitled to a refund of a portion of its 1948 tax in accordance with the following provisions of Section 13(k) of the Bank and Corporation Franchise Tax Act:

"(k)(1) Any bank or corporation which is dissolved. . . 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. ..

"(2) For the purpose of this section, the, effective date of dissolution of a corporation is. . .the date on which the certificate of winding up and dissolution is filed in the office of the Secretary of State. .."

Appellant and the Franchise Tax Board agree that the dissolution of the corporation was coincident with the date on which the certificate of dissolution was filed with the Secretary of State, but disagree as to the date of such filing. The claim for refund was originally filed on the basis of a dissolution occurring on May 31, 1948, that being the date of the filing of an election to dissolve pursuant to Section 4603 of the Corporations Code. The Appellant now takes the position, however, that the date of dissolution was October 14, 1948, since that was when the Secretary of State first received the certificate of dissolution for filing. The Franchise Tax Commissioner, on the other hand, allowed a refund of only 2/12 of the 1948 tax payment, believing that November 1, 1948, was the filing date. The Franchise Tax Board concedes that Appellant is entitled to an additional refund of \$590.51 if the position of the latter is upheld.

It might be thought that we would be precluded from entertaining a collateral attack, such as that here made by Appellant, upon the action of another State department. The Franchise Tax Commissioner and Franchise Tax Board have not so argued, however, presumably in view of Section 22.1 of the Bank and Corporation Franchise Tax Act, which provides:

"In the determination of any issue of law or fact under this act, neither the commissioner, nor any other officer or department having any administrative duties under this act nor any court shall be bound by the determination of any other officer or department of the State. . ."

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We shall proceed, accordingly, to a consideration of the issue as presented to us by the parties.

Sections 5200 and 5201 of the Corporations Code contain the following provisions:

"5200. When a corporation has been completely wound up without court proceedings therefor, a majority of the directors or trustees shall sign and acknowledge a certificate of winding up and dissolution. ..

"5201. The certificate of winding up and dissolution shall be filed in the office of the Secretary of State, and thereupon corporate existences shall cease except for the purpose of further winding up if needed..."

In a letter addressed to the Franchise Tax Board on January 20, 1950, the Secretary of State set forth as his reason for the rejection of the certificate offered for filing on October 14, 1948, the fact that the certificate did not clearly set forth that the two individuals signing as directors constituted a majority of the board of directors of the corporation. It is nevertheless true, however, that the Secretary of State accepted the same certificate for filing on November 1, with the explanation, not a part of the certificate itself, that the two individuals signing were in fact a majority of the directors. Since the Secretary of State regarded the certificate as adequate on November 1, apparently it should have been considered adequate for his purposes when it was first offered for filing on October 14. This being the case, the certificate may be regarded as filed as of October 14, 1948. Heberling v. Day, 59 Cal. App. 13, 26. It follows, then, that the position of the Appellant must be upheld.

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 the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in allowing only to the extent of \$1,181.02 the claim in the amount of \$4,133.50 of Ida Arvida Rogers, Successor in Interest of Leslie F. Rogers Company, for a refund of tax paid by said Leslie F. Rogers Company for the taxable year 1948 be modified as follows:

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The Franchise Tax Board is hereby directed to allow to said Ida Arvida Rogers, Successor in Interest to Leslie F. Rogers Company, an additional refund in the amount of \$590.51 for said year; in all other respects the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) is hereby sustained.

Done at Sacramento, California, this 10th day of
August, 1950.

, Chairman

J. H. Quinn, Member
J. L. Seawell, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Fierce, Secretary

Appeal of Consolidated Vultee aircraft Corporation

On January 12, 1940, Vultee Aircraft, Inc., sold 300,000 additional shares to underwriters at \$8.50 a share, the intent being that the underwriters should resell the stock to the general public. On the same day Aviation Corporation issued warrants to the underwriters calling for the sale of 100,000 shares of Vultee stock at \$10.00 a share. Vultee Aircraft, Inc., also authorized the reservation and option for sale of 37,500 shares of its stock to its present and future officers. The total number of shares authorized as an original issue was, therefore, 787,500.

Prior to their consummation, all these steps had been decided on as part of a general plan and approved by Aviation Corporation. The steps and plan were set forth in a letter agreement from Aviation Corporation to Aviation Manufacturing Corporation dated November 10, 1939. The letter was placed in the minutes of the meetings of the directors of both Corporations, and at the first meeting of the directors of Vultee Aircraft, Inc., held on November 15, 1939, the plan was discussed and the officers were authorized to negotiate with the underwriters in accordance with the plan.

It is asserted by Appellant, and not denied by the Commissioner, that the time that passed between the formation of the new company and the sale of its stock was barely long enough to enable the company to prepare and file a registration statement and the various other documents which had to be filed with the Securities and Exchange Commission and certain state regulatory commissions before the stock could be offered for sale to the public.

With regard to the same factual situation here involved, the United States Tax Court decided (Aviation Manufacturing Corporation, T.C. Memo. Op., Dkt. No. 754, March 22, 1944) that the plan resulted in a taxable transaction and did not fall within Section 112(b)(4) of the Internal Revenue Code (similar to Section 20(b)(4) of the Bank and Corporation Franchise Tax Act), which provides for the non-recognition of gain or loss in a certain type of corporate reorganization.

The Commissioner maintains, however, that the acquisition by Vultee Aircraft, Inc., of the assets of the Vultee Aircraft Division of Aviation Manufacturing Corporation in exchange for its (Vultee's) stock was a tax-free exchange under Section 20(b)(5), which provides:

"No gain or loss shall be recognized if property is transferred to a corporation by one or more taxpayers solely in exchange for stock or securities in such corporation, and immediately after the exchange such taxpayer or taxpayers are in control of the corporation ..."

Section 20(h) defines control as follows:

"As used in this section the term 'control' means the ownership of stock possessing at least 80 per

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"centum of the total combined voting power of all classes of stock entitled to vote and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

The Tax Court decision was based on the ground that the transaction was not a reorganization, as defined by Section 112(g)(1)(C), inasmuch as Aviation Manufacturing Corporation and its sole shareholder, Aviation Corporation, were not in control of Vultee Aircraft, Inc., "immediately after the transfer," since they did not, as of the date of the completion of the Plan on January 12, 1940, own 80% of the stock of Vultee Aircraft, Inc. The Court concluded, in this connection, that there was but one transaction consisting of several steps and that, therefore, the question of control "is to be determined by the situation existing at the time of the completion of the plan." Considering the evidence before us, we see no reason for differing with this conclusion.

It is to be observed that a transaction falls outside both Subdivisions (b) (4) and (b) (5) of Section 20 unless immediately after the transfer or exchange the transferor or transferors, in the case of (b) (5), or, by virtue of the definition of "reorganization" in Section 20(g), the transferor or its shareholders or both, in the case of (b) (4), are in control of the corporation to which the assets are transferred. Prior to the completion of the transaction under consideration and as a part of that transaction, however, aviation Manufacturing Corporation had sold to Aviation Corporation 350,000 of the 450,000 shares received by it from Vultee Aircraft, Inc. Quite irrespective of the status as transferors under Section 20(b) (5) of the holders of the 300,000 shares of Vultee Aircraft, Inc., sold to the underwriters, it follows that the transferors of property to Vultee Aircraft, Inc., were not in control of that corporation immediately after the transfer inasmuch as they then held far less than 80% of its stock., Columbia Oil & Gas Co., 41 B.T.A. 38.

The transaction does not, accordingly, constitute a tax-free transfer under Section 20(b) (5) and the position of the Appellant as to the basis for amortization of certain assets acquired in that transaction must be sustained.

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 (now succeeded by the Franchise Tax Board), in denying the claim of Consolidated Vultee Aircraft Corporation (Successor to Vultee Aircraft, Inc.,) for a refund of tax in the amount of \$10,222.87

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for the income year ended November 31, 1941, be and the same is hereby reversed.

Done at Los Angeles, California, this 3rd day of October, 1950, by the State Board of Equalization.

Geo. R. Reilly, Chairman

J. H. Quinn, Member

J. L. Seawell, Member

Wm. G. Bonelli, Member

ATTEST: F. S. Wahrhaftig, Acting Secretary