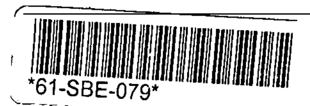
61-SBE-079

BEFORE THE STATE: BOARD OF EQUALIZATION

OF THE STATE; OF CALIFORNIA

In the Matter of the Appeals of)
)
TAI YUEN CO., CHONG KEE JAN CO.)
and CHONG SING CO.)

Appearances:

For Appellants: Zeppelin W. Wong, Attorney at Law

For Respondent: A. Ben Jacobson, Associate Tax Counsel

OPINION

These appeals are made pursuant to Section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Tai Yuen Co., Chong Kee Jan Co. and Chong Sing Co. for refund of corporation income tax and interest as follows:

Year	Tai Yuen Co.	Chong Kee Jan Co.	Chong Sing Co.
1943	$237.70	$624.11	$387.82
1944	162.24	556.14	384.13
1945	134.00	549.65	293.44
1946	119.51	556.48	211.27
1947	122.57	501.49	170.49
1948	7.12	478.69	131.05
1949	31.97	310.06	126.91
1950	90.56	316.79	165.36
1951	109.01	249.35	28.40

The question presented is whether the Appellants were associations which were taxable as corporations during the years involved.

Each of the Appellants was organized pursuant to a written agreement and engaged in selling Chinese dry goods and food products in San Francisco. Tai Yuen Co. was formed in 1909 with 48 members, Chong Kee Jan Co. was formed in 1934 with 35 members and Chong Sing Co. was formed in 1932 with 43 members. All of the members were Chinese.

The aforementioned agreements of the three Appellants were virtually identical. In each case the capital contribution was divided into $500 units. The agreements were written in the Chinese language and provided that "on this date, we have united our friends together in a partnership"; that the active partners elected to the various positions shall discharge their duties

unselfishly for the good of the company; that any active partner dismissed from his duties shall be a silent partner and not allowed to withdraw his capital from the company; that the treasurer and cashier will not borrow from the capital; that the cashier shall act as bookkeeper and accountant and prepare an annual statement for the partners' inspection; that misconduct of the manager or the treasurer will immediately call for their dismissal; that profits are to be distributed or retained at the discretion of all partners; that all employees are to be paid on a monthly basis; that no officer will use the company seal for raising a loan or for co-signing purposes; that any partner who wishes to terminate his investment in the company must consult the partners as a group and let it be determined by the group whether the company or any other partner will buy his interest; that the value of a withdrawing partner's interest in the partnership shall be based on 70% of book value shown on the last annual balance sheet; that any friend or relative of a partner wishing to use the name of the company for bonding purposes must make the request to the company openly; that self-serving transactions by officers not on behalf of the company or not approved by the treasurer will not be recognized by the company; that a partner's interest shall not be used for collateral, security, or any outside personal purposes; that a manager wishing to resign his position must give adequate advance notice to the partnership in a meeting called for that purpose, and will not be allowed to leave until the position is filled; that any officer of the company who wishes to retire and return to China will give advance notice to the partnership so a proper person may be appointed to fill his position; and that a partner, if his interest in the company is $500 or more, may use the good offices of the company in securing mercantile status for immigration and other travel purposes.

The manager was elected by the active members to carry out the routine business matters of the firm. All major decisions were reserved for the general meetings of the members which were held at intervals during the year, One of the principal functions of the manager was to maintain necessary contacts with the business community, since a majority of the members could not speak or write in the English language.

Any amendment to the agreement could be made only with the full consent of the members. In any case not covered by the agreement of partnership, it was understood that the customs and traditions established among Chinese businessmen should prevail. Among Chinese businessmen it is a custom and tradition that the widow or heir of a deceased partner be admitted to the firm in his place if all the surviving partners consent. Ordinarily, these heirs or widows are admitted without opposition, However, in the case of Chong Sing Co., the business has been terminated because

of the death of the manager and the inability of his widow and the surviving members to agree on a valuation of the decedent's interest.

Each member received a copy of the agreement indicating his interest in the company. A book was kept in the custody of the manager, which showed the names of the members, their capital investment, the dates on which new members were admitted, and dates of issuance of immigration affidavits to members of the firm desiring to travel to China. Since the organization of each company, there have been several changes in membership. Tai Yuen Co. has had seven such changes, Chong Kee Jan Co. has had ten and Chong Sing Co. has had two.

Of the active members, one kept books, quoted prices and executed orders for imports; one attended to the telephone and orders; one attended to cashiering; one attended to banking, signing of checks and other money matters; one took care of the Chinese correspondence; and one took care of the English correspondence. The remaining active members did clerical work or sold merchandise. Of the inactive members, during the years in question, the majority resided in China, and the remainder lived in San Francisco or Oakland.

Prior to and during the period in question Appellants always held themselves out as partnerships. They filed partnership returns with the federal tax authorities and the Franchise Tax Board, In the mercantile community, Appellants have been regarded as partnerships. When Appellants applied for loans at the Bank of America and the Bank of Canton, they did so as partnerships. Various companies extended credit to them as partnerships. Each Appellant filed with the United States Customs Bureau a power of attorney designating Joseph Paredes as its attorney for the purpose of facilitating and releasing shipments of imported merchandise. These powers indicated that Appellants were partnerships and the members' names were designated therein. In 1951 the members of Tai Yuen Co. and Chong Kee Jan Co. voted to incorporate their respective businesses.

It is on the basis of these facts that we are required to determine whether Appellants were associations taxable as corporations during the years in question.

Section 23038 of the Revenue and Taxation Code (formerly Section 2 of the Corporation Income Tax Act) provides that for purposes of the corporation income tax, the term "corporation" includes associations. Regulations 23038-23039, Title 18, California Administrative Code, in subdivision (b) provide:

> ... The term "association" is not used in the law in any narrow or technical sense. It includes any organization, created for the transaction of

> designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity .... It includes a ... partnership association, and any other type of organization (by whatever name known) which is similar to an ordinary corporation.
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> Subdivision (d) provides:
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> A limited partnership is classified for the purpose of the law as an ordinary partnership, or, on the other hand, as an association taxable as a corporation, depending upon its character in certain material respects. If the organization is not interrupted by the death of a general partner or by a change in the ownership of his participating interest, and if the management of its affairs is centralized in one or more persons acting in a representative capacity, it is taxable as a corporation. For want of these essential characteristics, a limited partnership is to be considered as an ordinary partnership notwithstanding other characteristics conferred upon it by local law.
>
> The Uniform Limited Partnership Act has been adopted in several states, including California. A limited partnership organized under the provisions of that act may be either an association or a partnership depending upon whether or not in the particular case the essential characteristics of an association exist.

Each of the Appellants had aspects both of a partnership and of a corporation. However, upon review of all the evidence, we are of the opinion that they were partnerships. The agreements were not essentially different from articles of copartnership usual with partnerships, and the term "partner" was repeatedly used,

The United States Supreme Court has said that the "salient features" in determining whether there is a substantial resemblance to a corporation include continuity of organization, centralization of management, assignability of interest and limitation of personal liability. (Morrissey v. Commissioner, 296 U.S. 344.)

Respondent urges that there was continuity of organization in that Appellants were secure from termination of interruption by the death of an owner of an interest. There were, however, no

provisions in the agreements with respect to the death of a member. In the case of Chong Sing Co, the business was terminated upon the death of a partner because the widow and the surviving partners could not agree on the value of the interest of the deceased partner. In other instances, the heirs of deceased partners were admitted to the group by consent of all of the surviving partners.

Respondent urges that there was centralized management. There was centralized management in a sense, but we believe there was closer resemblance to a partnership with a manager and assistants than to a corporation. As was pointed out in George Bros. & co., 41 B.T.A. 287, a partnership not infrequently has a manager. The power of the manager was limited to routine matters and the manager was appointed by, and accountable to, the partners.

There was some similarity to corporate form in the the capital was divided into units of $500 and a copy of the agreement indicating his interest was delivered to each member. The agreements by their terms, however, negated the idea of free assignability since they required a member desiring to terminate his interest to submit it to the rest of the members as a group. At the discretion of the group, the retiring member's interest could be purchased by the group or by an individual member at 70% of book value as shown on the latest annual balance sheet. There was, in fact, no specific provision by which a share could be sold outside of the company. Appellants have stated that new members could be admitted only with the approval of the existing members and there is no allegation or evidence to the contrary. Moreover, the agreements expressly provided that an interest could not be used for collateral, security or any outside personal purpose.

In regard to liability of an individual partner, there was no provision, as in the case of an ordinary corporation, limiting liability to the amount of investment,

The facts before us are strikingly similar to those presented in George Bros. & Co., supra, and in Fung Chong Co., B.T.A. Memo., Dkt. No. 93817, entered February 9, 1940, where in each case it was held that there was not an association taxable as a corporation, These cases were decided under the federal counterparts of the law and regulations here involved and they concerned organizations of Chinese persons in San Francisco under agreements substantially the same as those before us.

In accordance with the above decisions, we conclude that Appellants were not basically different from ordinary partnerships having inactive or silent partners and that they were not associations taxable as corporations.

Appeals of Tai Yuen Co., Chong Kee Jan Co. and Chong Sing Co.

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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Tai Yuen Co., Chong Kee Jan Co. and Chong Sing Co. for refund of corporation income tax and interest in the amounts and for the years indicated below be and the same is hereby reversed.

Year	Tai Yuen Co.	Chong Kee Jan Co.	Chong Sing Co.
1943	$237.70	$624.11	$387.82
1944	162.24	556.14	384.13
1945	134.00	549.65	293.44
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1948	7.12	478.69	131.05
1949	31.97	310.06	126.91
1950	90.56	316.79	165.36
1951	109.01	249.35	28.40

Done at Sacramento, California, this 13th day of December, 1961, by the State Board of Equalization.

John W. Lynch, Chairman

Geo. R. Reilly, Member

Paul R, Leake, Member

6 ____________, Member

____________, Member

ATTEST: Dixwell L. Pierce, Secretary