



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
AVON PRODUCTIONS, INC., AND)
LAWRENCE A. WEINGARTEN AND)
PANDRO S. BERMAN, ASSUMERS)
AND/OR TRANSFEREES)

For Appellants: Edmund M. Kaufman,
Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel
A, Ben Jacobson, Associate Tax
Counsel

O P I N I O N

This appeal is made pursuant to section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Avon Productions, Inc., and Lawrence A. Weingarten and Pandro S. Berman, Assumers and/or Transferees, against a proposed assessment of additional franchise tax in the amount of \$9,101.76 for the taxable year ended January 31, 1959.

Prior to 1957 Lawrence A. Weingarten and Pandro S. Berman were employed by Loew's, Inc., as motion picture producers. In 1956 or early 1957 it was decided that they should terminate their employment with that company and begin independently producing various films to be distributed by Loew's, Inc. Accordingly, their employment contracts with Loew's, Inc., were officially terminated on February 3, 1957.

By February 4, 1957, Weingarten, Berman and Loew's, Inc., had reached an informal agreement regarding the production, distribution and financing of twelve motion pictures which Weingarten and Berman were to produce. Production activities then began, though the terms of the agreement with Loew's, Inc., were not finalized and reduced to writing until much later in 1957.

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Avon Productions, Inc., (hereafter "Avon" or "appellant"), a California corporation, was created by Weingarten and Berman to handle their independent production activities. Avon's articles of incorporation were mailed to the Secretary of State's office, accompanied by a letter of transmittal dated February 13, 1957, and were filed by the Secretary of State on February 15, 1957. The first meeting of Avon's board of directors was held on February 25, 1957.

Weingarten and Berman were president and secretary-treasurer, respectively, of Avon and together they owned the majority of its stock, Avon adopted a fiscal year ending January 31 for purposes of filing its tax returns, It engaged in the motion picture production business until it was dissolved and liquidated in 1962,

The proposed additional assessment giving rise to this appeal is based upon respondent's determination that appellant's franchise tax liability for the taxable year ended January 31, 1959, was measurable by its net income for the same year, since that was the first year in which appellant did business for a full 12-month period. (Rev. & Tax. Code, § 23222,) It is appellant's contention that its tax liability for the taxable year ended January 31, 1959, should be based on its net income for the preceding year ended January 31, 1958, as it did engage in business for a 12-month period in that year. It is undisputed that appellant's existence as a de jure corporation began on February 15, 1957, when its articles were filed with the Secretary of State. (Corp. Code, § 308.)

Appellant's first argument in support of its position is that if its first taxable year commenced on February 15, 1957, the date on which the Secretary of State filed its articles of incorporation, and ended on January 31, 1958, it did business for 11-1/2 months, which is all that is required under the law.

Though section 23222 of the Revenue and Taxation Code makes no express provision for treating part of a month as a whole month in determining whether or not a commencing corporation did business for a 12-month period in its first taxable year, respondent, by regulation, has relaxed the literal requirement of, that section. Respondent's regulation, effective for the year on appeal, provides that in making this computation:

... after qualification or having filed its articles of incorporation with the Secretary of State, a period of one-half month may be disregarded provided the corporation was not doing business in and

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received no income in the State during such period, and a period of more than one-half a calendar month may be treated as a period of *one month*, (Cal. Admin. Code, tit. 18, reg. 23221-23226, subd. (b).)

From February 15, 1957, the date of appellant's incorporation, to and including February 28, 1957, the end of that calendar month, was a period of 14 days. Fourteen days of a 28-day month is not "more than one-half" of that month and cannot; therefore, be treated as a period of one month. Since appellant has failed to meet the requirements of the statute, as relaxed by respondent's administrative regulation, we are unable to sustain appellant on this ground,

Appellant's alternative argument is that its pre-incorporation activities constituted it *a de facto* corporation prior to February 15, 1957, the date of actual incorporation,

Under California law the requisites to constitute a de facto corporation are: (1) A law under which such a corporation as it purports to be might lawfully be organized; (2) a bona fide attempt to organize thereunder; and (3) an actual use of the corporate franchise, (Tulare Irrigation District v. Shepard, 185 U.S. 1 [46 L. Ed. 773]; Midwest Air Filters Pacific, Inc. v. Finn, 201 Cal. 587 [258 P. 882].)

Appellant contends that for some weeks prior to February 15, 1957, the date on which the Secretary of State filed its articles of incorporation, it had conducted business as a corporation. It is alleged that various agreements were entered into during that pre-incorporation period, it being understood by all concerned that appellant was acting in its corporate capacity. Appellant contends further that in compliance with the law it mailed its articles of incorporation to the Secretary of State's office in Sacramento on February 13, 1957, by airmail from Los Angeles, and that in the normal course of the mail a letter so posted would have been received in Sacramento the following day, February 14, 1957, and would have been filed by the Secretary of State on that same day. Appellant argues that by so acting it had made a bona fide attempt to organize prior to February 15, 1957, the date on which it was actually incorporated,

Logically, and under the law, the bona fide attempt to organize which will suffice in establishing that a de facto corporation was formed must be "a colorable attempt to comply with the statutes authorizing the formation of such a corporation ... followed by an actual exercise of corporate functions in good faith." (Emphasis added.) (Westlake Park Investment Co. v. Jordan, 198 Cal. 609, 614 [246 P. 807].)

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In the instant case the attempt to organize was made on February 13, 1957, when appellant's articles were mailed to the Secretary of State's office, Actual incorporation occurred two days later, If the incorporators believed the articles were filed the day after they were mailed the earliest time when there could have been an actual good faith exercise of corporate functions would have been on February 14, 1957. The record reveals no corporate activity on that date.

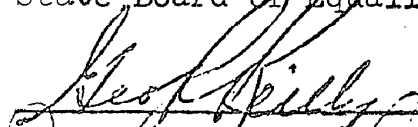
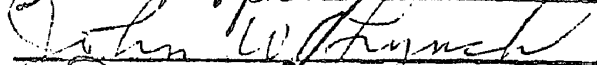
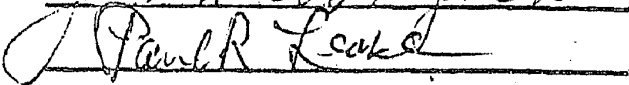
. Having reviewed all the evidence in the light of relevant statutes, regulations and other authority, it is our opinion that appellant has failed to prove that its first taxable year ended January 31, 1958, constituted a full 12-month period,, Respondent's determination on this matter must therefore be sustained,

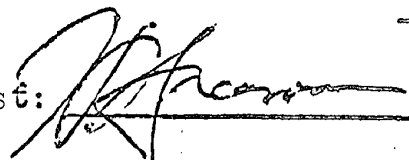
O R D E R

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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Avon Productions, Inc., and Lawrence A, Weingarten and Pandro S. Berman, Assumers and/or Transferees, against a proposed assessment of additional franchise tax in the amount of \$9,101.76 for the taxable year ended January 31, 1959, be and the same is hereby sustained,

Done at Sacramento, California, this 4th day of January, 1966, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member
_____, Member
_____, Member

Attest: 
_____, Secretary