BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
BRAGG CRANE SERVICE, INC.,) No. 84A-651
ASSUMER AND/OR TRANSFEREE OF)
DIXON CRANE SERVICE, INC.)

For Appellant: Michael D. Willer

For Respondent: Patricia Hart
Counsel

OPINION

This appeal is made pursuant to section 25666[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Bragg Crane Service, Inc., Assumer and/or Transferee of Dixon Crane Service, Inc., against a proposed assessment of additional franchise tax in the amount of $27,627.56[2] for the income year ended January 31, 1980.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the income year in issue.

2/ While the amount of the proposed assessment is $27,627.56, that amount has been paid and is agreed by the parties to be the proper amount of tax due from appellant for the income period at issue here. However, as explained below, what is actually at issue here is the propriety of interest of $1,662.20 on that assessment which respondent has determined to be due. While the underlying deficiency notice is not exactly a model of clarity, it does appear to have been adequate enough for appellant to make an intelligent protest and it, therefore, is sufficient and adequate notice. (Appeal of Paul A. Laymon, Inc., Cal. St. Bd. of Equal., Oct. 6, 1976.)

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The core issue presented in this appeal is whether appellant made a timely filing of the 1980 franchise tax return it filed on behalf of Dixon Crane Service, Inc. (Dixon). If it did, no interest for late payment is due and respondent's action must be reversed. On the other hand, if it did not, interest of $1,662.20 for late payment is due and respondent's action must be sustained. In order to decide this issue, we must first decide whether Dixon was merged into appellant pursuant to section 24562, subdivision (a)(1) ("statutory merger"), as appellant contends, or completely liquidated into appellant pursuant to section 24502 ("complete liquidations of subsidiaries") 3/ as respondent contends.

Appellant acquired all of the outstanding shares of Dixon on January 2, 1979, thereby making Dixon its wholly owned subsidiary. On January 1, 1980, appellant filed a certificate with the Secretary of State of California which stated that its board of directors had adopted a resolution to merge Dixon into it. On October 14, 1980, appellant filed a return on behalf of Dixon which stated that Dixon had been "merged or reorganized" on January 1, 1980, and which also indicated that this return was its "Final Return." 4/ As indicated above, the tax computed by appellant at $27,627.56 was paid and credited to Dixon as of October 15, 1980.

Upon audit, respondent concluded that while the tax had been computed properly, the subject transaction represented a dissolution within the meaning of section 24502, rather than a merger. (April 29, 1983, letter from Tax Compliance Representative, L. Humphrey.)

3/ The parties agree that the characterization of the subject transaction as a complete liquidation would be dispositive of this appeal. Indeed on page nine of appellant's reply brief, appellant states: "[W]e admit that if a liquidation/distribution actually took place (as opposed to being 'deemed' to have occurred, 'in substance'), then . . . FTB would be correct . . . in asserting interest to be due."

4/ Appellant's taxable year ends January 31 while, before the subject transaction, Dixon's had ended July 31. Respondent notes that appellant had not requested an extension to file the return on behalf of Dixon.

Accordingly, respondent determined that pursuant to section 25401, subdivision (c),[5] the due date of that final return was on April 15, 1980, and that interest from that date until the tax was paid on October 15, 1980, amounting to $1,662.20 was due. On January 5, 1984, a notice of proposed assessment was sent to appellant. Denial of appellant's protest led to this appeal.

As indicated above, appellant contends that Dixon was merged into it. Indeed, respondent appears to concede that Dixon was, in form, statutorily merged into appellant. On page 3 of its brief, respondent states that it "does not dispute the fact that appellant complied with the filing requirements for a merger under California Corporations Code § 1101, et seq." However, respondent argues that "[t]he substance of this transaction is more analogous to a complete liquidation of a subsidiary and a dissolution." (Resp. Br. at 4; see also Rev. & Tax. Code, § 24502.)[6]

At this juncture, the discussion of the parties focuses on the particular facts to determine whether or not Dixon suffered a corporate death and therefore a dissolution from the subject transaction. (See Vulcan Materials Company v. United States, 446 F.2d 690, 694 (5th Cir. 1971).) However, it seems to us that for tax purposes, many of the factors discussed are actually similar for statutory mergers and for section 24502 dissolutions. Indeed, one commentator noted that 'the transferor corporation or corporations in a statutory merger or consolidation disappear as legal entities, with the result that this form of reorganization involves a

5/ Section 25401, subdivision (c), provides in relevant part that the return is due "within 2 months and 15 days after the close of the month in which the dissolution or withdrawal takes place . . ."

6/ It is well settled that in interpreting or characterizing a transaction, "the taxing authority is not necessarily bound by the language the taxpayer chose to describe it or by the bookkeeping entries chosen to record it." (W.-E. Hall Company v. Franchise Tax Board, 260 Cal.App.2d 179, 183 (1968).) Accordingly, respondent has the authority to determine the substance of the subject transaction.

technical dissolution of the acquired corporation." (Bittker and Eustice, Federal Income Taxation of Corporations and Shareholders, ¶ 14-12, p. 14-32 (4th ed. 1979).) On close review, we find that the subject transaction can be equally well characterized as either a statutory merger or a complete dissolution. 7/ If a transaction is both a reorganization and a complete liquidation, "it is to be treated as a liquidation . ..." (Bittker and Eustice, Federal Income Taxation of Corporations and Shareholders, supra, ¶ 14-12, p. 14-37, fn. 67; see also Treas. Reg. § 1.332-2(d) (1968).) An example of these rules involving the substantially identical federal statute is provided in Treasury Regulation section 1.332-2(e):

> On September 1, 1954, the M Corporation had outstanding capital stock consisting of 3,000 shares of common stock, par value $100 a share, and 1,000 shares of preferred stock, par value $100 a share, which preferred stock was limited and preferred as to dividends and had no voting rights, On that date, and thereafter until the date of dissolution of the M Corporation, 'the 0 Corporation owned 2,500 shares of common stock of the M Corporation, By statutory merger consummated on October 1, 1954, pursuant to a plan of liquidation adopted on September 1, 1954, the M Corporation was merged into the O Corporation, the 0 Corporation under the plan issuing stock which was received by the other holders of the stock of the M Corporation, The receipt by the 0 Corporation of the properties of the M Corporation is a distribution received by the 0 Corporation in complete liquidation of the M Corporation within the meaning of section 332, and no gain or loss is recognized as the result of the receipt of such properties,

Accordingly, based upon the record before us, we find that the subject transaction should be treated as a complete liquidation, and, therefore, respondent's action must be sustained.

7/ The tax due under a section 24502 transaction is substantially similar to the tax due under a section 24562 transaction,

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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 section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Bragg Crane Service, Inc., Assumer and/or Transferee of Dixon Crane Service, Inc., against a proposed assessment of additional franchise tax in the amount of $27,627.56 for the income year ended January 31, 1980, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of July, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

_____, Chairman

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9