



87-SBE-066

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FAIRCO, INC.) No. 86A-1500-VN
)

For Appellant: Paul E. Ferchaud
Secretary-Treasurer

For Respondent: Donald C. McKenzie
Counsel

O P I N I O N

25666¹/ This appeal is made pursuant to section of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Fairco, Inc., against proposed assessments of additional franchise tax in the amounts of \$1,722, \$2,513, and \$4,168 for the income years ended April 30, 1981, 1982, and 1983, respectively.

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

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The threshold issue presented for our decision is whether appellant is properly entitled to prosecute this appeal from the action of the Franchise Tax Board.

With its principal office in New Orleans, Fairco, Inc. (appellant), is a Louisiana corporation engaged in the export business. On April 19, 1976, appellant began doing business in California as a foreign corporation. During the income years in question, appellant maintained an office and employees in this state.

For its income year **ended April 30, 1983**, appellant filed a franchise tax return with the notation, "FINAL RETURN ... corporation ceased business **10/30/82.**" The Franchise Tax Board advised appellant of the general rules that a foreign corporation doing business in California must follow to withdraw from this state, including the requirement to obtain a 'tax clearance certificate. (Rev. & Tax. Code, § 23334.) Appellant subsequently requested issuance of a tax clearance certificate. Appellant thereafter failed to file a return for the 1984 income year.

On February 14, 1985, the Franchise Tax Board acknowledged receipt of appellant's request for a tax clearance certificate and informed appellant that it was required to file a return for every income year that it remained active in this state. 2/ Respondent further notified appellant that it would first have **to** pay proposed assessments of additional franchise tax for the **three** prior income years before it could obtain the certificate. 3/ On February 28, 1985, respondent issued the proposed assessments for the income years 1981 through 1983. Appellant evidently filed a protest against the assessments.

2/ The effective date of withdrawal of a foreign corporation is the date when the certificate of withdrawal is filed with the Secretary of State. (Rev. & Tax. Code, § 23331; Appeal of Surfcomber, Inc., Cal. St. Bd. of Equal., Nov. 12, 1974.)

3/ Section 23334 provides, in part: Within **30** days after receiving a request for a certificate [of tax clearance], the Franchise Tax Board shall either issue the certificate or notify the person requesting the certificate of the amount of tax that must be paid or the amount of bond, deposit **or** other security that must be furnished as a condition of issuing the certificate.

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In May 1985, appellant filed an untimely return for its income year ended April 30, 1984, which included payment in the amount of the minimum tax plus penalty and interest. In July 1985, when it had not yet received appellant's return for 1985, respondent instructed appellant that, unless the return was filed, its corporate powers would be forfeited pursuant to section 23301.5. Ten months later, on May 1, 1986, the Franchise Tax Board, after determining that appellant had failed to file its 1985 return as requested, notified the Secretary of State and appellant's corporate powers were thereby forfeited.^{4/}

On July 15, 1986, respondent issued notices of action. which denied appellant's protest against the proposed assessments. Appellant, thereupon, filed an appeal with this board, presenting arguments against the assessments. In response, the Franchise Tax Board has contended that appellant may not appeal the assessments while its corporate powers are '*suspended.'

Enacted in 1949 to replace former section 32, subdivision (a), of the Bank and Corporation Franchise Tax Act, section 23301 has long provided for the suspension of the corporate powers, rights, and privileges of a domestic corporation and forfeiture by a foreign corporation of the same for the failure to pay franchise tax. Subsequently enacted in 1965, section 23301.5 provides:

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic corporation may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited if a taxpayer fails to file a return.

^{4/} Suspension of a domestic corporation under section 23301.5 is effective whether or not the corporation actually received notice of the suspension., (Appeal of Forrest Freeze Trucking, Inc., Cal. St. Bd. of Equal., Feb. 2, 1976.)

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Section 23302 further states, in part, that the suspension or forfeiture is effective when the Franchise Tax Board transmits the name of a **delinquent** taxpayer to the Secretary of State. (Mediterranean-Exports, Inc. v. Superior Court, 119 **Cal.App.3d** 605, 615 [**174 Cal.Rptr. 169**] (1981).) The purpose of section 23301.5 would appear to be to pressure the delinquent corporation into filing its return. (See Biggs v. California Ins. Guarantee Assn., 126 **Cal.App.3d** 641, 647 (179 **Cal.Rptr. 16**] (1981); La France Enterprises v. Van Der Linden, 70 **Cal.App.3d** 375, 380 [**138 Cal.Rptr. 690**] (1977)), where the courts found that section 23301 was designed to pressure corporation to pay their taxes.

In deciding cases under section 23301, the courts have long held that a domestic corporation suspended for failure to pay franchise tax is deprived of all rights except those expressly reserved by statute. (Ransome-Crummey Co. v. Superior Court, 188 Cal. 393 [**205 P. 446**] (1922).) While its corporate rights are suspended, a corporation may not commence, maintain, or defend an action nor appeal from an adverse decision. (Boyle v. Lakeview Creamery Co., 9 **Cal.2d** 16 [**68 P.2d 968**] (1937).) Similarly, a foreign corporation has no right to defend or even participate in an action during the time that its corporate **rights** have been forfeited. (Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 155 **Cal.App.2d** 46, 50 [**317 P.2d 649**] (1957).)

In Appeal of Atlantic and Pacific Wrecking Company, Inc., decided July 22, 1958, the board relied on these same court cases to find that a California corporation which had not filed a return **or** paid in full the tax due was without authority to prosecute an appeal to this board while suspended under section 23301 for failure to pay tax. Subsequently, the board in Appeal of Lomita Plaza, Inc., decided on March 7, 1961, that there was no exception under the statute to allow a domestic corporation suspended for failure to pay the minimum franchise tax to contest a proposed assessment for a previous year and dismissed the appeal of the taxpayer. Finally, in Appeal of Celeron Realty Corporation, on August 7, 1963, the board likewise dismissed the appeal of a New York corporation which had failed to file a return or pay tax and whose corporate powers were forfeited pursuant to section 23301. The board held there that, since the foreign corporation had not demonstrated that its corporate **powers**, rights, and privileges had been revived, it could not prosecute its franchise tax appeal.

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Based on the preceding decisions and appeals, we therefore find that a foreign corporation whose corporate powers, rights, and privileges have been forfeited under section 23301.5 for failure to file a return lacks authority to appeal to this board. The instant appeal must be dismissed.

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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, that the appeal of Fairco, **Inc., against** proposed **assessments** of additional franchise tax in the amounts of **\$1,722, \$2,513,** and \$4,168 for the income years ended April 30, 1981, 1982, and 1983, respectively, be and the same is hereby dismissed.

Done at Sacramento, California, this 6th day
of October , 1987, by the State Board of Equalization,
with Board Members Mr. Collis, Mr. Dronenburg, Mr. Carpenter
and Ms. Baker present.

Conway H. Collis - , Chairman
- Ernest J. Dronenburg, Jr., Member
Paul Carpenter _____, Member
Anne Baker* _____, Member
_____, Member

***For** Gray Davis, per Government Code section 7.9