



89-SBE-023

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
SAVOY HOTEL, INC.) No. **86A-0602-CB**

Appearances:

For Appellant: William M. Smith
Attorney at Law

For Respondent: Robert Koehler
Counsel

O P I N I O N

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 Savoy Hotel, Inc., against a proposed assessment of additional franchise tax in the amount of \$156,921 for the income year ended October 31, 1981.

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.

The issue presented by this appeal is whether appellant distributed its assets within 12 months in accordance with a plan of complete liquidation.

On March 31, 1981, appellant's board of directors adopted a formal plan of liquidation under Internal Revenue Code (**I.R.C.**) section 337. On that same day, the shareholders consented to the plan, and elected to wind up and dissolve appellant. Also, on March 31, 1981, appellant sold its principal asset, a hotel, on the installment basis. A liquidating trust was created on March 19, 1982, and immediately received the promissory notes from the sale of the hotel. Appellant's final distribution in liquidation to the shareholders occurred on March 31, 1982. Respondent required appellant to recognize the gain on the sale of the hotel, stating that final distribution took 12 months and 1 day instead of being within 12 months as required by statutory authority.

The applicable statutory law for the year at issue is Revenue and Taxation Code section 24512, the California counterpart of I.R.C. section 337. It provides:

If -

(a) A corporation, other than a corporation described in section 23222 or **23222a**, adopts a plan of complete liquidation **on** or after December 31, 1954; and

(b) Within the **12-month** period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims;

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

Appellant contends that a correct application of section 24512 provides that the **12-month** liquidation period extends through the corresponding time on the same date of the year following the adoption of the plan of liquidation. Appellant argues that it adopted its resolution at 5:00 p.m. (PST) on March 31, 1981, and had until **4:59** p.m. (PST) on March **31, 1982**, to distribute its assets. Appellant contends that the United States Tax Court concluded in two cases, Casa Loma, Inc. v. Commissioner, ¶ 80,078 T.C.M. (P-H) (1980), and Ethel B. Stevenson v. Commissioner, ¶ 75,257 T.C.M. (P-H) (1975), that the 12-month period includes the corresponding day

of the year following the year in which a plan of liquidation is adopted.

However, those two cases are not determinative of the issue. In Casa Loma, supra, the corporation adopted a plan of complete liquidation on August 22, 1971. As of August 22, 1972, the corporation possessed cash and receivables of approximately \$33,000, a liquor license, and a claim against the Commonwealth of Pennsylvania. The tax court observed that the corporation failed to comply with the distribution requirements of I.R.C. section 337(a) because the corporation "still had substantial assets on hand on August 22, 1972, when the 12-month period expired." (Casa Loma, Inc. v. Commissioner, supra.) The court did not specify whether the period expired by 12:01 a.m. on August 22, 1972, as opposed to some other time during the day. In Stevenson, supra, the corporation adopted a plan of complete liquidation on May 9, 1967. The corporation distributed assets totaling more than \$73,000 well after expiration of the 12-month period. Again, it is not clear whether the court's view was that the period expired by 12:01 a.m. on May 9, 1968, or at some other time of the day. In neither case was a close reading of I.R.C. section 337(a) necessary to compute the 12-month period, because both cases had disqualifying acts well beyond the 12-month period.

Respondent's position is that the 12-month period ends at 12 o'clock midnight on the day in the corresponding month of the following calendar year that comes immediately before the day on which the plan was adopted. (See Rev. Rul. 79-3, 1979-1 C.B. 143.) Respondent states that appellant was required to, but did not, distribute all of its assets not later than midnight on March 30, 1982.

The specific language of section 24512 seems to support respondent's position. It provides that the 12-month period begins "on the date of the adoption of the plan." Twelve months from that date would seem to conclude on the date just prior to the first anniversary date of the plan adoption. The anniversary date itself would be the first day of a new 12-month period. This interpretation of section 24512 is supported by Revenue Ruling 79-3, supra. This ruling dealt explicitly with the same issue, that is, when the 12-month period referred to in I.R.C. section 337 ends. An example provided by the revenue ruling states that if the plan of liquidation is adopted on October 17, 1977, the 12-month period ends at 12 o'clock midnight on October 16, 1978. The aforementioned revenue ruling was published well in advance of the events taking place in the present case. Therefore, appellant's tax advisors should have known the consequences of waiting the additional day. March 30, 1982, was a Tuesday, so

there is no excuse available such as a holiday or the **critical** date falling on a weekend. (See Atlee D. Snyder v. Commissioner, ¶ 81,216 T.C.M. (P-H) (1981).) It is important that the same rule be applied for both state and federal purposes to avoid needless inconsistencies in treatment and to help prevent a trap for the unwary taxpayer.

Originally, appellant asserted that California Civil Code section 10, California Code of Civil Procedure section 12, and California Government Code section 6800 control because they provide that the time in which any act is to be done **is** computed by excluding the first day. **Now**, appellant contends that the intent of the California Legislature in enacting the above three statutes was that fractional days be counted whenever time becomes essential. (See People v. Beatty, 14 Cal. 566 (1860).) Furthermore, appellant asserts that section 24512 does not specifically exclude the use of fractional days.

However, appellant's contention is fatally flawed because, under California law, the method of computing time prescribed in a general statute is not used if the particular statute involved specifically requires the application of a different rule (See Clements v. Pasadena Finance Co., 376 F.2d 1005 (9th Cir. 1967).) That is the case here. **Section 24512 controls the computation of the time period in this appeal because it sets forth a specific rule different from that prescribed by the statutes of general application relied upon by appellant. Section 24512 mandates that the time period is limited to 12 months, and the period begins on the date of the adoption of the plan, not the ensuing day.** In addition, the use of fractional days under section 24512, as appellant seeks, would create an inconsistency with federal law, since there is no indication that fractional days are permissible for purposes of I.R.C. section 337. **Such an inconsistent interpretation of similar statutes should not be adopted, unless clearly required by legislative direction. No such indication appears in section 24512.**

Finally, appellant argues that the shareholders constructively received their final distributions on March 19, 1982, when provisions were made to cover appellant's debts and liabilities through a liquidating trust. The doctrine of constructive receipt is described in the federal regulations as follows:

Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he

may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. ...

(Treas. Reg. § 1.451-2(a).)

In Vern Realty, Inc. v. Commissioner, 58 T.C. 1005 (1972), the tax court stated that nothing in I.R.C. section 337 suggested that assets have been distributed by the corporation if they have been "made available" to the shareholders so that the shareholders may "draw upon" the funds at any time. The tax court found no case applying the doctrine of constructive receipt to an I.R.C. section 337 liquidation.

Even assuming the constructive receipt doctrine is applicable, appellant has not shown that a timely constructive distribution occurred. Cases cited by appellant, such as William T. Male v. Commissioner, ¶ 71,301, T.C.M. (P-H) (1971), affd. per curiam, 31 A.F.T.R.2d 73-834, (4th Cir. 1973), Gensinger v. Commissioner, 208 F.2d 576 (9th Cir. 1953), and Richard Pastene v. Commissioner, 52 T.C. 647 (1969), are factually distinguishable from this appeal. In Gensinger, unlike this appeal, there was a single-shareholder/officer who treated the undistributed assets as his own. In William T. Male, the court found a **constructive** distribution within the **12-month** period because all of the assets which were within the control of the liquidating corporation were distributed within the **12-month** period. The assets which were not distributed, i.e., two certificates of public convenience, had been sold and, in effect, distributed within the statutory period pending the approval of the appropriate regulatory agencies. In the instant appeal, almost all of the undistributed assets as of March 30, 1982, were in an interest-bearing money market account, and it has not been shown that they were outside of appellant's control. In Richard Pastene, checks were drawn timely but the funds were distributed untimely. In this appeal, appellant issued checks which were not drawn timely.

Since appellant failed to distribute its assets before 12:01 a.m. on March 31, 1982, it may not avail itself of the nonrecognition provision contained in section 24512. Therefore, appellant must recognize gain on the sale of assets which occurred while it attempted to follow the plan of liquidation.

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 protest of Savoy Hotel, Inc., against a proposed assessment of additional franchise tax in the amount of \$156,921 for the income year ended October 31, 1981, be and the same is hereby sustained.

Done at Sacramento, California, this 16th day of August, 1989, by the State Board of Equalization, with Board Members Mr. Carpenter, Mr. Collis, Mr. Dronenburg, and Mr. Davies present.

_____, Chairman
 _____, Member
 _____, Member
 _____, Member
 _____, Member

*For Gray Davis, per Government Code section 7.9

****Abstained**