

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
Al Tirpa & Associates, Inc.) No. 95A-0488
)
)

Representing the Parties:

For Appellant: Peter Young, Attorney

For Respondent: Brian Putler, Counsel

Counsel for Board of Equalization: Selvi Stanislaus, Tax Counsel

OPINION

This appeal is made pursuant to section 19045¹ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Al Tirpa & Associates, Inc., against proposed assessments of additional franchise tax in the amounts of \$800 per year for income years ended April 30, 1991, 1992, 1993, 1994, and August 30, 1994, respectively.

The sole issue discussed in this opinion is whether appellant is qualified to maintain this appeal before the Board.² Appellant is an Oregon corporation which never qualified to do business in California. During the income years in question, respondent received information which showed that appellant owned and disposed of multiple parcels of real property in San Bernardino County, California. As described by appellant, this business originated in 1990 when appellant received a sales brochure from the San Bernardino County Treasurer and Tax Collector, soliciting the purchase of more than 600 tax delinquent properties at public auctions. Appellant purchased 55 pieces of property as evidenced

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.

² Because the first issue is dispositive, we need not address the remaining issues raised by the parties.

by documents denominated "Tax Deed to Purchaser of Tax Defaulted Property." Appellant alleges that, although it was customary to issue a single paper title to all properties acquired at a single auction, the county officials erroneously issued separate deed documents for each piece of property. Appellant further states that it retained independent California licensed real estate brokers and other persons to handle all aspects of its California real estate transactions. Based on this information, on July 28, 1994, respondent mailed a Notice and Demand (Notice) to appellant's last known address as reflected on respondent's official records, that being " PO Box 1418 Sandy, Oregon 97055;" the Notice was returned marked "refused." On August 12, 1994, respondent issued Notices of Jeopardy Tax Assessment (NJA) to appellant for the income years at issue. Although appellant protested the assessments, respondent reaffirmed the NJA via Notices of Action, giving rise to the appeal at hand.

Respondent's primary contention is that appellant is barred from maintaining this appeal before the Board as it is a foreign corporation not qualified to do business in California. (Corp. Code, § 2105.) Respondent also states that since appellant regularly acquired, held, and disposed of California real property, but failed to pay the required minimum franchise tax, appellant has forfeited any corporate rights and privileges it may have had and should be precluded from proceeding with this appeal.

Appellant argues that it only engages in passive investments which require no active management. Appellant points out that its passive investments are limited to the purchase of "paper title" to vacant, unproductive land, which title is represented by deeds and similar instruments. Appellant further contends that since these security documents are the equivalent of notes, bonds or shares of stock, the holding of them would not constitute "doing business" by any definition whatsoever. Appellant also states that, prior to investing its funds in California, it allegedly consulted experienced real estate attorneys and obtained from the Secretary of State copies of relevant statutes (Corp. Code, § 191), which appellant believes confirmed that its business would be deemed as "not doing business" in California. Therefore, appellant argues that it was exempt from California registration requirements. Finally, appellant contends that it could not be doing business in California when all funds used for such (allegedly) passive paper investments originated from out of state sources, and it did not maintain business offices, bank accounts or even hire employees in California.

Not until this appeal has the question been presented to this Board as to whether a foreign corporation that has never qualified to do business in California, and has never filed or paid California taxes, may bring and maintain an administrative (Board) appeal. Since this is a case of first impression for the Board, the question requires a direct construction of the applicable California law.

We are persuaded that California did not intend to allow a foreign corporation, that has never qualified to do business in California, to exercise the right to bring or maintain an administrative appeal. Our conclusion is based upon California courts' refusal to entertain legal actions instituted by unqualified foreign corporations³ and, more importantly, this Board's treatment of suspended corporations.

³ A foreign corporation is prohibited from transacting intrastate business without first obtaining from the Secretary of State a certificate of qualification. (Corp. Code, § 2105, subd. (a).) In order to obtain the certificate, the foreign corporation must file a statement including its name, state of incorporation, address of its principal executive office, address of its principal office within the state, agent for service of process in the state and consent to service of process. It must also file a statement from its state of incorporation confirming that it is an existing corporation in good standing. (*Ibid.*) If a foreign corporation transacts intrastate business without qualifying, it is subject to a

Since the 1929 enactment of the Bank and Corporation Franchise Tax Act, California has imposed a tax on those corporations “doing business” in California for the privilege of exercising a corporate franchise in this state. Revenue and Taxation Code section 23151, subdivision (a), provides, in relevant part, that:

“[E]very corporation doing business within the limits of this state . . . shall annually pay the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income. . . or if greater, the minimum tax specified in Section 23153.”

Revenue and Taxation Code section 23301 states that any foreign corporation which fails to pay any tax, penalty, or interest which is due and payable, forfeits all corporate rights and privileges. The policy underlying the pertinent statutory provisions “is clearly to prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes.” (Belle Vista Investment Co. v. Hassen (1964) 227 Cal.App.2d 837, 840.) In United Medical Management Ltd. v. Gatto (1996) 49 Cal.App.4th 1732,⁴ the Court of Appeal reiterated the importance of a foreign corporation qualifying with the Secretary of State, prior to commencing an action in the state court. The court stated that the

“purpose of the certificate of qualification is to facilitate service of process and to protect against state tax evasion. [Citation omitted.] . . . The qualification statute is enforced, in part, by temporarily halting lawsuits. The objective of the lawsuit suspension enforcement mechanism is to encourage qualification, rather than to penalize. . . .”

(United Medical Management Ltd., supra, at p. 1741.)

Moreover, this Board has repeatedly held that a suspended corporation was without authority to prosecute, bring or maintain an appeal before the Board. (Appeal of Atlantic and Pacific Wrecking Co., Inc., Cal. St. Bd. of Equal., July 22, 1958; Appeal of Western Miracle Water Softener, Inc., Cal. St. Bd. of Equal., Oct. 13, 1959; Appeal of Celeron Realty Corporation., Cal. St. Bd. of Equal., Aug. 7, 1963.) While under suspension for non-payment of taxes a corporation is “shorn of all rights save those expressly reserved by the statutes.” (Ransome-Crummey Co. v. Superior Court (1922) 188 Cal. 393, 397.) It may not commence or defend an action, nor appeal from an adverse decision. (Boyle v. Lakeview Creamery Co. (1937) 9 Cal.2d 16.)

number of penalties. It is subject to a penalty of \$20 for each day it transacts unauthorized intrastate business. (Corp. Code, §2203, subd. (a).)

⁴ In this case, the court considered whether the foreign corporation may maintain a breach of contract action without first complying with Corporations Code section 2203, subdivision (c), which requires the foreign corporation to provide proof of payment of state taxes. The court concluded that a qualified (not suspended) foreign corporation may bring and maintain a state action, even though it failed to pay its taxes; the forfeiture of corporate powers occurs only at the time of notice of forfeiture by the Franchise Tax Board. (United Medical Management Ltd., supra, at p. 1741.)

Based on the foregoing, we conclude that there is no statutory, regulatory or case law basis to support appellant's claimed right to an administrative appeal with this Board. We cannot take it upon ourselves to cleave a distinction (in regards to the appeal mechanism) between our treatment of suspended corporations and foreign corporations not qualified to do business in California, even though such a taxpayer may have a legitimate business reason to appeal respondent's action. Therefore, we find that appellant has missed the crucial intermediate step in its appeal process: failing to qualify with the Secretary of State before commencing the instant appeal. We note that we need not address the possibility that appellant may somehow qualify to do business in California during the pendency of this appeal, because those facts are not before this Board. Therefore, this appeal is hereby dismissed.

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 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Al Tirpa & Associates, Inc. against a proposed assessment of additional franchise tax in the amount of \$800 per year for income years ended April 30, 1991 through 1994, and August 30, 1994, be and the same is hereby sustained.

Done at Culver City, California, this 26th day of February, 1997, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Halverson and Mr. Chiang present

_____, Chairman

Johan Klehs _____, Member

Dean F. Andal _____, Member

Rex Halverson* _____, Member

John Chiang** _____, Member

Opinion adopted at San Diego, California, this 24th day of April, 1997 by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Klehs, Mr. Halverson and Mr. Chiang present.

Ernest J. Dronenburg, Jr. _____, Chairman

Johan Klehs _____, Member

_____, Member

Rex Halverson* _____, Member

John Chiang** _____, Member

*For Kathleen Connell per Government Code section 7.9.

**Acting Member, 4th District.