

May 1964, appellant's three original stockholders, George Hall, Carl Roepke, and H. Quayle Petersmeyer, each held 33 1/3 percent of appellant's stock. Petersmeyer was president of appellant. In May 1964, Carl Roepke transferred the major part of his one-third stock interest to his two sons, retaining only 13 1/3 percent of appellant's total stock in his own name.

On October 31, 1965 appellant dissolved, liquidated its assets, and distributed the proceeds to its shareholders. Hall-Roepke Co. began servicing appellant's accounts on November 1, 1965, and it also purchased appellant's office equipment for cash. H. Quayle Petersmeyer was employed thereafter by Hall-Roepke Co., at the same salary he had been receiving as president of appellant. By January 31, 1966, all proceeds of the liquidation had been distributed to appellant's stockholders.

Appellant had prepaid franchise tax in the amount of \$344.18 for the taxable year beginning March 1, 1966 and ending February 28, 1967, based upon its income for the preceding year. Appellant contends it is entitled to a refund of that entire prepayment because its corporate existence ended before the commencement of the taxable year beginning March 1, 1966. Respondent's denial of appellant's claim for refund gave rise to this appeal.

Section 23332 of the Revenue and Taxation Code provides generally that a corporation which dissolves or withdraws from California is liable for the franchise tax only for the months of the taxable year preceding its dissolution or withdrawal from the state. This general provision is thereafter limited as follows:

The taxes levied under this chapter shall not be subject to abatement or refund because of the cessation of business or corporate existence of **any** taxpayer pursuant to a reorganization, consolidation or merger (as defined by Section 23251).

Respondent contends that appellant is not entitled to a refund of the franchise tax which it prepaid for the taxable year beginning March 1, 1966, because its dissolution was pursuant to a reorganization within the meaning of section 23251 of the Revenue and Taxation Code. In this regard respondent relies on the following portions of that section:

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The term "reorganization" as used in this chapter means (a) a transfer by a bank or corporation of all or a substantial portion of its business or property to another bank or corporation if immediately after the transfer the transferor or its stockholders or both are in control of the bank or corporation to which the assets are transferred; ... or (c) a merger or consolidation; ... As used in this section the term "control" means the ownership of at least 80 percent of the voting stock and at least 80 percent of the total number of shares of all other classes of stock of the bank or corporation.

Respondent must be sustained if there was a reorganization under either subdivision (a) or subdivision (c) of section 23251. We shall first consider whether the subject transaction was a merger within the meaning of subdivision (c).

A merger, as that term is used in section 23251, has been defined as follows:

Generally speaking a merger is the absorption of one corporation by another which survives, retains its name and corporate identity together with the added capital, franchises and powers of the merged corporation and continues the combined business. (Heating Equipment Mfg. Co. v. Franchise Tax Board, 228 Cal. App. 2d 290, 302 [39 Cal. Rptr. 453].)

It was determined by the California Supreme Court in San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254 [125 P.2d 36], that merger as a form of reorganization should be liberally construed and is not restricted to a statutory merger, but includes a de facto merger as well. (See Heating Equipment Mfg. Co. v. Franchise Tax Board, supra,)

Relying in part on constructions of analogous federal statutes, we have held that the primary requisite of a merger is that the former stockholders of the transferor retain a proprietary interest in the transferee, (Appeals of Diamond Gardner Corp., etc., Cal. St. Bd. of Equal., Feb. 5, 1963.) Although such a continuing interest must be definite and substantial, it need not be a majority or controlling interest. (See Heating Equipment Mfg. Co. v. Franchise Tax Board, .) In addition the federal courts

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have held that in determining whether a merger has occurred it is unimportant that some of the stockholders in the transferring corporation acquire no interest in the transferee. (Miller v. Commissioner, 84 F.2d 415.)

In our opinion the events which occurred in the instant case fall directly within the judicially developed concept of merger. Upon dissolution of appellant, Hall-Roepke Co. purchased appellant's office equipment and immediately began servicing appellant's accounts. Hall-Roepke Co. also employed Mr. Petersmeyer to continue his services with Hall-Roepke Co. at the same salary he had been receiving as president of appellant. Appellant's business was "absorbed" by Hall-Roepke Co., which continued the combined business without interruption.

The requisite continuity of ownership was present. Hall-Roepke Co. was wholly owned by George Hall and Carl Roepke, former stockholders of appellant. The fact that Mr. Petersmeyer and the two Roepke sons did not acquire stock in Hall-Roepke Co. is not controlling, since all stockholders need not retain a continued interest in order for a merger to occur. (Miller v. Commissioner, supra.)

We conclude that the dissolution of appellant and the transfer of its business to Hall-Roepke Co. were pursuant to a "merger," as that term is used in section 23251, subdivision (c), of the Revenue and Taxation Code. In view of this conclusion, we need not decide whether the action of respondent could also be sustained on the ground that the present transaction constituted a reorganization as defined in subdivision (a) of section 23251.

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,

