

Appeals of Kraft Liquidating Company, et al.

<u>Appellant</u>	<u>Income Year</u>	<u>Tax</u>	<u>Proposed Assessment</u>	
			<u>Penalty</u>	<u>Total</u>
Kraft Liquidating Co.,	12/31/71	\$ 6,747.53	\$ -0-	\$ 6,747.53
and Philip O. Kraft,	12/31/72	11,209.53	2,802.38	14,011.91
Assumer and/or	12/31/72	1,039.33	2519.83	1,299.16
Transferee				
Hayes Liquidating Co.,	3/31/72	\$15,273.84	\$ -0-	\$15,273.84
and Philip O. Kraft,	3/31/73	8,891.34	2,222.83	11,114.17
Assumer and/or				
Transferee				

On June 20, 1972, Kraft Liquidating Company and Hayes Liquidating Company (hereinafter "**Kraft**" and "Hayes," respectively, and "appellants" jointly), pursuant to plans of liquidation and dissolution, sold their assets, distributed the proceeds to their shareholders, and ceased doing business. On July 6, 1972, appellants filed a certificate of election to dissolve with the Secretary of State and at about the same time requested that respondent issue tax clearance certificates. Beginning in April 1972 and continuing at least through December of that year, Kraft was being audited by respondent.. The audit was being conducted through respondent's Los Angeles office to accommodate appellant, and the returns for both Kraft and Hayes were apparently transferred there. Therefore, on July 13, 1972, respondent acknowledged appellants' requests for tax clearance certificates and suggested that the Los Angeles office be contacted "to determine the amount of a surety bond or other security required" for the certificates to be issued at that time.

Appellants, however, made no further contact with either of respondent's offices regarding the tax clearance certificates until December 12, 1972, when appellants' attorney again contacted respondent's Sacramento office requesting issuance of the certificates. He was advised that the certificates could be issued immediately if acceptable assumptions of tax liability were filed. Thereafter, acceptable assumptions were filed and the certificates were issued on February 1, 1973. Five months later, on July 11, 1973, appellants filed their final certificates of winding up and dissolution with the Secretary of State, which marked the formal date of dissolution for both corporations. (See Rev. & Tax. Code, § 23331.)

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During this period appellants filed claims for refund which were partially allowed based on appellants' representations that they were dissolved in July 1972. However, in 1974 respondent determined that appellants were not formally dissolved until July 11, 1973, and had not filed returns for their final income years. As the result of a statutory change, appellants' final tax liability would have been less had they formally dissolved prior to January 1, 1973, than had they formally dissolved after that date. Accordingly, respondent issued notices of proposed assessment to recover the erroneous refunds and assessed penalties for failure to file timely returns. With respect to Kraft, respondent also determined that it had improperly deducted California franchise taxes paid (Rev. & Tax. Code, Sec. 24345, subd. (a)(1)) and issued a notice of proposed assessment to reflect this determination. Respondent now concedes that the failure to file was due to reasonable cause and that the penalties should be abated.

The primary issue to be decided is whether appellants' failure to formally dissolve prior to January 1, 1973, was due to actions of respondent which would estop it from assessing the tax in issue.

Revenue and Taxation Code section 23334 makes the issuance of a tax clearance certificate by the Franchise Tax Board a prerequisite to an effective corporate dissolution. That section also 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 **certifi-**
cate 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.

Appellants contend that respondent failed to comply with the mandatory requirements of this section: that respondent's failure to so comply delayed the issuance of the tax clearance certificates necessary for formal dissolution to appellants' detriment: and that respondent should therefore be estopped from asserting that appellants' dissolutions were not completed until July 11, 1973. Appellants maintain that the dissolution should be considered to have occurred within a reasonable time after their requests for tax clearance **certif-**

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icates were received, thereby **relieving them** of the proposed tax liability.

As a general rule, estoppel is invoked against governmental entities only in rare and unusual circumstances, where grave injustice would otherwise result. This rule is stressed in tax cases. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal.2d 865, 869 [350 P.2d 715] (1960); U.S. Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384, 389 [303 P.2d 1034] (1956); see also, California State Board of Equalization v. Coast Radio Products, 288 F.2d 520 (9th Cir. 1955).) Estoppel, however, is an affirmative defense, and the burden is on the party asserting it to establish the facts necessary to support it. (Joyce v. Gentsch, 141 F.2d 891, 896 (6th Cir. 1944); Appeal of U.S. Blockboard Corp., Cal. St. Bd. of Equal., July 7, 1967.) Moreover, the doctrine of estoppel does not erase the duty of due care and therefore is unavailable for the protection of one who has suffered loss because of his own failure to act or inquire. (Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960).)

Considering the foregoing principles, we conclude that the facts here do not warrant the application of the doctrine. Even though respondent may not have complied strictly with the statutory language, it did provide appellants with the means to acquire the necessary information. Since the records required for determining the amount of security were in Los Angeles and appellants' representatives were presumably in close contact with that office due to the audit, we believe that respondent's suggestion was a reasonable one, intended to expedite the process, rather than impede it. Appellants, who were admittedly in continual contact with respondent's Los Angeles office, had only to inquire of that office to receive the requested information. If they had, they would doubtless have known exactly what was required of them within 30 days from their request. Appellants have not shown that they made the effort to follow respondent's suggestion. Rather they rely on an inquiry directed to respondent's Sacramento office five months later as evidence of their diligence. We do not believe that this is sufficient "due care" to entitle appellants to rely on estoppel to prevent the imposition of tax.

Appellants postulate that their attorney "was under the understanding that the certificates could not

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be issued until the audits had been completed." They state that "[i]t would appear that [their attorney] was advised that the conclusion of the audit was a necessary prerequisite for the issuance of the certificate." Appellants, however, have not shown that they contacted respondent's office for any further advice between July 13, 1972 and December 12, 1972, that their postulation as to their attorney's understanding was correct, or that they were in fact advised that completion of the audit was necessary before certificates could be issued. We can hardly say that they have thus established any justifiable detrimental reliance on misleading statements of respondent, a **necessary element** of estoppel. (California State Board of Equalization v. Coast Radio Products, supra, 228 F.2d at 525.) The statute and regulations were also available to appellants' counsel, and as appellants point out, they are clear in setting forth what is necessary for issuance of tax clearance certificates.

[W]here one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, especially where represented by counsel, he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel. (Joseph George, Distr. v. Department of Alcoholic Beverage Control, 149 Cal.App.2d 702, 712-713 [308 P.2d 773] (1957).)

We find, therefore, that respondent is not estopped from asserting the tax and so sustain respondent's actions.

Since Kraft has not challenged the adjustment made by disallowance of a deduction for California franchise taxes, we find that respondent's action in that regard should also be sustained.

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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 actions of the Franchise Tax Board on the protests against proposed assessments of additional franchise tax as follows:

<u>Appellant</u>	<u>Income Year,</u>	<u>Proposed Assessment</u>		
		<u>Tax</u>	<u>Penalty</u>	<u>Total</u>
Kraft Liquidating Co.,	12/31/71	\$ 6,747.53	\$ -0-	\$ 6,747.53
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be and the same are hereby sustained, subject to respondent's concession regarding abatement of penalties.

Done at Sacramento, California, this 19th day of May, 1981, by the State Board of Equalization, with all Board members present.

Ernest J. Dronenburg, Jr., Chairman
George R. Reilly, Member
William M. Bennett, Member
Richard Nevins, Member
Kenneth Cory, Member