

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA



In the Matter of the Appeal of)
JOHNSON FOUNDRY & MACHINE CO. .)

Appearances:

For Appellant : Mr. Leonard Jacobson, Certified
Public Accountant

For Respondent : W. M. Walsh, Assistant Franchise
Tax Commissioner; Milton Huot,
Assistant Tax Counsel

O P I N I O N

This appeal is made pursuant to section 27 of the Bank and Corporation Franchise Tax Act (Chapter. 13, Statutes of 1929, as amended) from the action of the Franchise Tax Commissioner in denying the claim of Johnson Foundry & Machine Company for a refund of tax in the amount of \$976.53 for the taxable year ended December 31, 1944.

At the close of 1943, the Appellant sold all its assets, except its accounts receivable, for the purpose of discontinuing its business. Its accounts were maintained and its returns filed on the accrual basis. The corporation remained in existence during 1944 solely for the purpose of collecting its accounts receivable (which were not interest bearing), discharging its accounts payable, and pursuing a claim for relief from excess profits taxes under Section 722 of the United States Internal Revenue Code. Upon the ground that these activities did not constitute "doing business" in the State during the year 1944, within the meaning of that term as defined in Section 5 of the Act, Appellant filed its claim for a refund of the tax paid by it based upon its net income for the year 1943, less the minimum tax, which it concedes to be due under Section 4 (5) of the Act. The Commissioner denied the claim, asserting that the Appellant was in fact doing business in California during 1944 for the purposes of the statute.

Section 5 defines the term "doing business" as used in the Act as

". . . actively engaging in any transaction
for the purpose of financial or pecuniary
gain or profit.71

Clearly, the payment of debts is not a transaction of the type contemplated by the statute, for pecuniary gain or profit is not the object of the act. Nor do we think the filing of an application for relief from an excessive and discriminatory excess

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profits tax under Section 722 of the Internal Revenue Code is in the nature of a transaction entered into for pecuniary gain. The object of the claim is the recapture of a portion of an excessive amount of tax paid by the claimant. The allowance of the claim would only restore that which rightfully belonged to the Appellant before the proceeding was undertaken. See Merriam v. Commissioner, 55 Fed. 2d 879, holding that a suit prosecuted to establish an interest in an estate did not constitute a "transaction entered into for profit" for purposes of what is now Section 23(e) (2) of the Internal Revenue Code. See also Gertrude D Walker, 31 B. T.A., 1146.

Similarly, the collection of non-interest bearing accounts receivable by a corporation operating on the accrual basis after its active operations have been entirely discontinued does not, in our opinion, constitute doing business. The transactions entered into for profit were at an end. The subsequent activity served only to reduce those profits to actual possession and neither the purpose nor the result was pecuniary gain or profit. Under the circumstances, gain or profit was no more the purpose of the activity of collection than would be the withdrawal of non-interest bearing funds by a depositor from a bank.

All cases relied upon by the Commissioner are distinguishable. In each, the transactions in question were aimed at the production of gain or income. In Hise v. McColgan, 24 Cal. 2d 147, there were sales and rentals on behalf of an insolvent building and loan association. The corporation involved in Golden State Theatre & Realty Corporation v. Johnson, 21 Cal. 2d 493, purchased and rented real estate, endorsed notes and made large borrowings to promote the business of its subsidiaries. Francis Land Company, under consideration by the Court in Carson Estate Company v. McColgan, 21 Cal. 2d 516, engaged extensively in the purchase and sale of stocks and bonds for profit. In People v. Alexander Goldstein Co., 66 Cal. App. 771, the Court similarly found that the defendant bought and sold securities and managed investments on a substantial scale.

No such activities were engaged in by the Appellant here, and we conclude, therefore, that it was not "doing business" within this State during the year 1944, and, accordingly is not liable for franchise tax for that year measured by its net income for the year 1943.

It is, of course, immaterial that the Appellant continued its corporate existence after December 31, 1943. Section 4(3) imposes a tax on corporations doing business within this State. Bare corporate existence or qualification to act as a corporation is not made the object of the tax measured by net income; that, with nothing more, gives rise only to liability for the minimum tax imposed by Section 4(5). The Act clearly contemplates the status of a corporation which has discontinued doing business without dissolving or withdrawing from the State, for Section 13(1) sets forth the manner in which its tax shall be computed for the year in which it resumes business.

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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 27 of the Bank and Corporation Franchise Tax Act, that the action of Charles J. McCollgan, Franchise Tax Commissioner, in denying the claim of Johnson Foundry & Machine Company for a refund of tax in the amount of \$976.53 for the taxable year ended December 31, 1944, be and the same is hereby reversed. The Commissioner is hereby directed to credit said amount of \$976.53 against any taxes due from said Johnson Foundry & Machine Company and to refund the balance to it and otherwise to proceed in conformity with this order,

Done at Sacramento, California, this 17th day of November, 1948.

Wm. G. Bonelli, Chairman
J. H. Quinn, Member
J. I. Seawell, Member
G. R. Reilly, Member

ATTEST: D. L. Pierce, Secretary