



OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
 CANHAM DAIRIES , INC.)

'Appearances:

For Appellant: Maurice E. Hibbert, Attorney
 at Law

For Respondent: W. M. Walsh Assistant Franchise
 Tax Commissioner; Burl D. Lack,
 Chief Counsel; Mark Scholtz,
 Associate 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 Canham Dairies, Inc., for a refund of tax in the amount of \$295.02 for the taxable year ended November 30, 1947.

On February 17, 1947, Appellant filed a franchise tax return for the year in question showing a tax due in the amount of \$1,190.09. At the time of the return Appellant, in accordance with law, paid one-half of the tax, or \$595.05, as a first installment, and on August 6, 1947, it paid the remaining half. Thereafter, on August 29, 1947, Appellant was dissolved and all its assets were distributed to the Challenge Cream & Butter Association, which had in February, 1947, acquired all Appellant's capital stock. Following such dissolution and distribution, the Challenge Cream & Butter Association continued the operation of Appellant's facilities.

A consequence of these facts was a "reorganization" as defined by Section 13(j) of the Act, a circumstance which, under Section 13(k) prevents the making of the tax refund ordinarily allowable to a corporation dissolved prior to the expiration of the taxable year. Appellant contends, however, that notwithstanding the reorganization, it is entitled to a refund under Section 13(k) by reason of its dissolution inasmuch as the Challenge Cream & Butter Association is an agricultural cooperative marketing association exempt from Federal income tax under Section 101(l2) of the Internal Revenue Code and being without any income of its own on which to base a tax, is subject only to the minimum tax specified in Section 4(5) of the Act.

It may well be, considering the policy underlying Section 13 (see San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254)

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that the Appellant's position would be sound if the Challenge Cream & Butter Association were an exempt corporation. Additional support for this position is to be found in the fact that an exempt corporation is not included within the meaning of the term "corporation" as defined in Section 5 of the Act, and it would seem to follow that a merger with an exempt corporation or a total distribution of assets to such a corporation would not constitute a reorganization within the meaning of Section 13.

Although certain cooperatives are exempt from taxation under the Federal Income Tax Law, it should be observed that cooperatives are not included in the list of exempt corporations in Section 4(6) of the Bank and Corporation Franchise Tax Act. Under Section 8(1) of that Act agricultural marketing cooperatives are merely permitted to deduct from gross income "all income resulting from or arising out of such business activities for or with their members carried on by them or their agents; or when done on a nonprofit basis for or with nonmembers."

It is apparent, accordingly, that the Act distinguishes between exempt corporations and corporations such as the Challenge Cream & Butter Association which are allowed a deduction from gross income not available to ordinary business corporations. In view of this distinction, we would not be warranted, in **our** opinion, in regarding the Association as an exempt corporation to the end that a refund would not be denied to Appellant by reason of the acquisition of its assets by that Association.

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 (Chapter 13, Statutes of 1929, as amended) that the action of Charles J. McColgan, Franchise Tax Commissioner, in denying the claim of Canham Dairies, Inc., for a refund of tax in the amount of \$295.02 for the taxable year ended November 30, 1947, be and the same is hereby sustained.

Done at San Francisco, California, this 29th day of March, 1949, by the State Board of Equalization.

George R. Reilly, Member
Thomas H. Kuchel, Member
J. H. Quinn, Member

ATTEST: F. S. Wahrhaftig, Acting Secretary