

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of
COLUMBIA SUPPLY CO.

Appearances:

For Appellant: Oscar L. Grossman, Attorney at Law

For Respondent: A. Ben Jacobson, Associate Tax
Counsel

O P I N I O N

This appeal is made pursuant to Section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the protest of the Columbia Supply Co. to a proposed assessment of additional franchise tax in the amount of \$1,694.17 for the taxable period September 1, 1951, to March 10, 1952.

Appellant was incorporated in the State of Nevada. It commenced doing business in California in 1946. Its activities consisted of the sale and distribution of beauty supplies. During August of 1951 negotiations were conducted between Appellant's president, Oscar L. Grossman, owner of 25% of Appellant's shares, and the Seaboard Investment Fund, owner of the remaining 75%, for the sale of the entire business to Mr. Grossman or to a corporation which he might form. It was agreed to sell the inventory at cost and the fixed assets at their appraised value but not to exceed \$40,000.

Mr. Grossman organized a new corporation in August, 1951, under the name "The Dunster Corporation," to take over Appellant's business. Mr. Grossman was the sole shareholder and the president of the new corporation. Appellant terminated the employment of its approximately fifty employees on August 31. It canceled all of its insurance on its assets as of September 1. The Dunster Corporation insured these assets as of the same date. On September 1, Dunster employed Appellant's former employees and began operating the business in the same location and with the same equipment as before. No written agreement to evidence the sale was ever executed by the parties. A certificate of withdrawal from transacting business in California was filed by the Appellant with the Secretary of State on March 10, 1952.

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Appellant filed a franchise tax return for the income year ended August 31, 1951, showing a net income of \$70,708.91. It made no prepayment of tax measured by this income for the following taxable year, explaining in an accompanying letter that it had discontinued business in California on August 31, 1951.

Respondent's subsequent examination of Appellant's books revealed audit reports and financial statement, prepared by certified public accountants, for the fiscal years ended August 31, 1951 and 1952. In these statements the inventory and fixed assets that were the subject of the sale were shown among the assets owned by Appellant at the close of the year ended August 31, 1951, and the loss on the sale of such assets, in the amount of \$10,523.44, was included in the fiscal year ended August 31, 1952. Appellant's California franchise tax return for the income year ended August 31, 1951, and its Federal income tax return for the year ended August 31, 1952, reflected the ownership of these assets in the same manner as did these statements. In addition, a letter was found, dated September 1, 1951, billing The Dunster Corporation for assets valued at \$40,000. Based upon these findings, Respondent determined that Appellant was doing business in the State during the taxable year beginning September 1, 1951.

The sole question to be determined is whether Appellant was "doing business" within the meaning of Section 23101 of the Revenue and Taxation Code on or after September 1, 1951.

Section 23101 of the Revenue and Taxation Code provides as follows:

"'Doing business' means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

Appellant's majority shareholder undoubtedly saw to it that Appellant obtained the best possible price for its assets. Therefore, the purpose of the Appellant in selling its assets was one of pecuniary gain within the meaning of the above section and the sale constituted doing business even though it did not result in a profit as that term is ordinarily understood (*Hise v. McColgan*, 24 Cal. 2d 147; *People v. Alexander Goldstein Co.*, 66 Cal. App. 2d 771). On the other hand, the activity of merely collecting the price after the sale was completed would not alone constitute doing business (see *Appeal of Johnson Foundry & Machine Co.*, Cal. St. Bd. of Equal., November 17, 1948 (P-H, St. & Loc. Tax Serv., Cal., Par. 13,087)). Consequently the narrow

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issue for our determination is whether the sale of the assets occurred in the fiscal year ended August 31, 1951, or in the following fiscal year.

Under an agreement to sell personal property, the property is transferred to the buyer at the time the parties to the transaction intend it to be transferred (Civil Code, Section 1738; Everly v. Creech, 139 Cal. App. 2d 651). In the absence of a written contract of sale, the intention of the parties is to be determined by their conduct and the surrounding circumstances (Nead v. Specimen Hill Mining Co., 52 Cal. App. 2d 475).

In support of its position that the sale was completed on August 31, Appellant relies primarily upon the facts that that was the last day on which it conducted its regular operation of selling and distributing beauty supplies and that The Dunster Corporation began its operation of the business with the same equipment and inventory on the following day. Without exception, however, all of the documentary evidence of the ownership and transfer of the assets indicates that the parties intended the transfer to be made on September 1, after Appellant ceased its regular operations and on the day that The Dunster Corporation took over.

The insurance on the assets in question was canceled as of September 1, 1951; Appellant's own financial records indicate that it owned the assets at the close of business on August 31, 1951; and these records and Appellant's Federal return show that the loss resulting from the sale was incurred and claimed for tax purposes in the fiscal year ended August 31, 1952. By way of explanation for having claimed the loss in the year ended in 1952, Appellant has stated that the fixed assets had not been appraised and the sales price determined before the due date of its return for the year ended August 31, 1951. This explanation, however, fails to account for the letter of September 1, 1951, billing Dunster in the amount of \$40,000 for the fixed assets.

Although the application of the tax in these circumstances appears harsh, upon the facts before us, a conclusion that the sale of the assets was made on September 1, 1951, seems inescapable. The action of the Franchise Tax Board, accordingly, must 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 action of the Franchise Tax Board in denying the protest of Columbia Supply Co. to a proposed assessment of additional franchise tax in the amount of \$1,694.17 for the taxable period September 1, 1951, to March 10, 1952, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of June, 1960, by the State Board of Equalization.

John W. Lynch, Chairman

Alan Cranston, Member

Richard Nevins, Member

_____, Member

_____, Member