

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
TIP TOP DELIGHTS, INC.)

For Appellant: Jess W. Bowers
Assistant Treasurer-Taxes

For Respondent: Crawford H. Thomas
Chief Counsel

John D. Schell
Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying to the extent of \$200 the claim of Tip Top Delights, Inc., for refund of tax paid in the amount of \$1,100 for the year 1967.

The question presented is whether appellant Tip Top Delights, Inc., became liable for the minimum \$100 tax by qualifying to do business in this state.

Appellant is a Delaware corporation in existence since April 6, 1966, with headquarters in Umatilla, Florida. Part of its inventory is manufactured to its specifications within California by independent suppliers. The inventory located in this state is sold to purchasers both within and without this state by independent brokers. Appellant owns no other property in California and maintains no offices or employees in this state.

On April 20, 1967, appellant paid \$1,393.82 in corporation income tax on its allocated California net income for 1966, and also made an estimated corporation income tax payment of \$1,000 for 1967. On

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September 21, 1967, appellant obtained a certificate of qualification from the Secretary of State to transact intrastate business in California and paid the minimum \$100 tax through the office of the Secretary of State. Appellant obtained the certificate so as to gain access to the California courts and has not actually engaged in any intrastate business in this state.

On its 1967 corporation income tax return appellant reported an allocated net loss and requested the refund of the \$1,000 estimated tax payment and the \$100 minimum tax paid to the Secretary of State in 1967. Respondent denied the claim to the extent of \$200 on the basis that appellant became subject to the annual minimum tax upon qualifying to do business during 1967, and thus was liable for the minimum tax payment of \$100 for the income year 1967, taxable year 1967, and the minimum \$100 tax prepayment for the taxable year 1968. Appellant then filed this appeal.

Appellant contends that it is not liable for the \$100 minimum tax.

Section 23221 of the Revenue and Taxation Code provides in part:

A corporation which incorporates or **organizes under the laws of this State or** qualifies to do business **in this State shall** thereupon prepay the minimum tax provided in Section 23153,... The prepayment shall be made before the corporation files with the Secretary of State its articles of incorporation or a duly certified copy thereof.

Section 23153 of the Revenue and Taxation Code provides in part:,

Every corporation not otherwise taxed under this chapter and not expressly exempted by the provisions of this part or the Constitution of this state shall pay annually to the state a tax of one hundred dollars (\$100),...

Regulation 23151-23154, subdivision (b), title 18, California Administrative Code, states in part:

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If a foreign corporation qualifies to engage in intrastate activities, it is subject to, the minimum tax until it files a certificate of withdrawal with the Secretary of State or dissolves in the state of incorporation, even though it never engages in intrastate activities.

Section 23221 requires the payment of a minimum tax by a foreign corporation when it files a certified copy of its articles. In addition, section, 23153 justifies the imposition of a minimum tax on foreign corporations not doing an intrastate business in this state in years subsequent to the year of qualification. It is true that section 23153 excludes from its operation corporations expressly exempted from its provisions by the Bank and Corporation Tax Law or by the state Constitution and that the section9 application is, of course, also subject to the limitations of the federal Constitution. However, there is no express statutory exemption from the provisions of section 23153 with respect to foreign corporations deriving income from sources in this state which are qualified to do an intrastate business but not actually engaging in such business. Furthermore, we are also unaware of any constitutional objection, inasmuch as appellant is not being taxed for the privilege of doing an interstate business, nor taxed for engaging in an intrastate business when not actually in such a business. It is merely being taxed for the right to transact an intrastate business and not the exercise of that right.

The liability of a qualifying corporation for the payment of the minimum tax was recognized in Appeal of Johnson Foundry & Machine Co., Cal. St. Bd. of Equal., Nov. 17, 1948 when the following statement was made in that opinion with regard to the predecessor statute to section 23153:

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 the liability for the minimum tax imposed by Section4(5)....

Appellant cites Appeal of No-San Spring Co., Cal. 'St. Bd. of Equal., Jan. 7, 1964, as supporting its position that it should not be subject to the minimum tax

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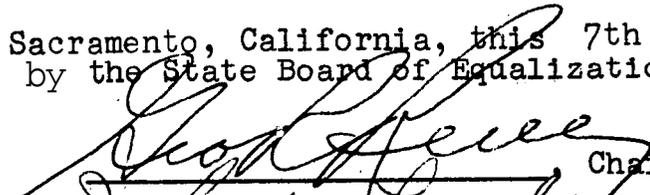
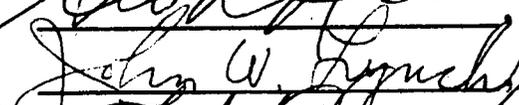
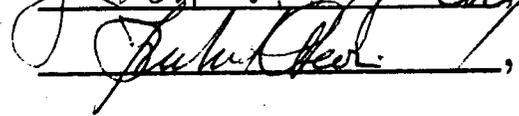
because it did not conduct an intrastate business. This authority, however, only referred to the franchise tax imposed under section 23151 for doing business in this state, and not the minimum tax imposed under section 23153. Appellant also refers to the provisions of section 23224, subdivision (A) of the Revenue and Taxation Code in maintaining that in any event the minimum tax should not be due for the year 1967. However, the change-over provisions set forth in section 23224 do not apply to the situation where a corporation acquires the right to engage in an intrastate business but only apply where such business is actually commenced.

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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying to the extent of \$200 the claim of Tip Top Delights, Inc., for refund of tax paid in the amount of \$1,100 for the year 1967 be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of December, 1970, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member
_____, Member
_____, Member

ATTEST:  Secretary