BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MISSION VALLEY EAST)

For Appellant: Murry Luftig
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

Paul J. Petrozzi
Counsel_.

OPINION

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim' of Mission Valley East for refund of franchise tax in the amount of $200.00 for the income and taxable year 1973.

Appellant Mission Valley East was organized and its articles of incorporation filed with the California Secretary of State on March 8, 1973. Its principal office was located in San Diego.

The corporation was formed for the sole purpose of holding title to real property. The corporate number assigned to appellant was 700307. As a part of the process of incorporation appellant prepaid the minimum franchise tax of $200.00 as required by law.

Soon after its incorporation, but before commencing business, appellant discovered that another California corporation known as Mission Valley East, Inc., corporate number 537974, was already in existence on March 8, 1973. The prior corporation, which also had its principal office in San Diego, was no longer in good standing. It had not paid its minimum franchise tax for some years, was heavily in debt, and was subject to the recordation of one or more abstracts of judgment against it.

Upon inquiry, appellant was informed by counsel for the title insurance companies involved that the title to any real property placed in its name would be clouded by any liens, encumbrances, or judgments against the prior corporation. Appellant was further advised that a change of its corporate name at that time would not solve the problem because of the mechanics of the title insurance system. Therefore, appellant decided that it could never use its corporate franchise and filed a claim for refund of the $200.00 minimum franchise tax it had paid. Respondent denied the claim, and this appeal followed.

In support of its position, appellant points out that the Secretary of State shall not file articles of incorporation when the proposed name of the filing organization is the same as that of an existing corporation, or so closely resembles the name of an existing corporation as to deceive the public, (Corp. Code, § 310.) Since such a corporation did exist, appellant maintains that the Secretary of. State's impropriety in filing the articles rendered it impossible to exercise its corporate franchise.. Appellant concludes that since the error of a state official effectively denied it the use of the franchise for which it paid, the claim for refund should be allowed.

Respondent, on the other hand, maintains that there is no legal basis for the refund of the minimum franchise tax paid by a corporation which has attained co t-porate status. We agree with respondent.

While we can sympathize with appellant, we cannot agree with its position as a matter of law. Basically, appellant seeks to recover a tax, otherwise validly imposed, based on events extrinsic to the franchise tax law. This it cannot do. Should appellant desire to seek relief from the Secretary of State's action it must utilize an appropriate form of action directed 'to the proper forum. (See, e. g., Rixford v. Jordan,, 214 Cal. 547 [6 P. 2d 959]; Cranford v. Jordan, 7 Cal. 2d 465 [61 P. 2d 45].)

Section 23221 of the Revenue and Taxation Code requires the prepayment of the minimum franchise tax as a condition precedent to the legal formation of a corporation. Furthermore, payment of the minimum franchise tax provided for in section 23153 of the Revenue and Taxation Code is not contingent upon the corporation doing business or engaging in any profitable activities. Rather, it is a tax imposed for the privilege of exercising the corporate franchise within California. (Appeal of Inland. Development Corp.:., Cal. St. Bd, of Equal. , May 29, 1952.) This privilege arises on the date on which the state sanctions the corporation's existence, the date the articles of incorporation are filed with the Secretary of State and the corporation's existence begins. (Appeal of Edward M. Ornitz & Co. , Cal. St. Bd. of Equal. , May 17, 1950.) Upon filing the corporate articles on March 8, 1973, appellant was authorized to exercise its corporate franchise in California. In effect, appellant obtained the right to which it was entitled by payment of the minimum franchise tax. The fact that appellant chose not to pursue its declared business purpose, for whatever reason, cannot entitle it to a refund of the minimum franchise tax.'

Section 26071 of the Revenue and Taxation Code provides that a refund may he made if it is found that there has been an overpayment of tax, penalty, or interest. The statute provides no other grounds for a refund. Under the existing circumstances there has been no overpayment. Thus, there can be no refund.

In accordance with the views set out above it is our conclusion that respondent properly denied appellant's claim for refund. Accordingly, respondent's action in this matter must be sustained.

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 the claim of Mission Valley East for refund of franchise tax in the amount of $200.00 for the income and taxable year 1973, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of October, 1974, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member'

ATTEST: _____, Secretary