BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 85R-109
POLEMIC PRESS	)	
PUBLICATIONS, INC.	)	

For Appellant: Harry R. Illman

For Respondent: Karen D. Smith
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a),[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Polemic Press Publications, Inc., for refund of franchise tax in the amount of $200 for the income year 1983.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the income year in issue.

The question presented by this appeal is whether respondent properly denied appellant's claim for refund of the $200 minimum tax.

Appellant filed its articles of incorporation, apparently as a nonprofit corporation, with the California Secretary of State on October 19, 1983, and paid the $200 minimum tax at that time. It then applied for exemption from tax as an educational corporation. In December 1983, respondent notified appellant that processing of the exemption application would be held in abeyance pending a final federal determination of exempt status.

Respondent received no information from appellant regarding the federal exemption application and, on August 8, 1984, sent a letter to appellant requesting such information. This letter also notified appellant that if a reply was not received within 30 days, there would be a technical denial (as opposed to one on the merits) of the state application. This letter was returned to respondent as undeliverable. Appellant dissolved on August 28, 1984. Appellant requested a refund of the $200 minimum tax, which respondent denied.

Section 23153 provides that domestic corporation are subject to a $200 minimum tax "from the date of incorporation until the effective date of dissolution . . . ." Section 23221 provides:

> A corporation which incorporates under the laws of this state . . . shall thereupon prepay the minimum tax provided in Section 23153, . . . The prepayment shall be made to the Secretary of State with the filing of the articles of incorporation . . . . The Secretary of State shall transmit the amount of the prepayment to the Franchise Tax Board. The Franchise Tax Board shall certify to the Secretary of State on an individual or class basis those domestic or foreign corporations which are exempt from prepayment or for which prepayment to the Secretary of State is waived.

Specified organizations are exempt from taxation if, and only if, they file the proper application form, pay the required filing fee, <u>and</u> "The Franchise Tax Board issues a determination exempting the organization from tax." (Rev. & Tax. Code, § 23701.)

Appellant characterizes its $200 prepayment of the minimum tax as a deposit "to be held in escrow pending receipt of a federal exemption." (App. Reply Br. at 1.) It contends that since it dissolved without ever conducting any business, never obtained an exemption, never had any capital, and never issued any shares of stock, it never came into existence, and the $200 should be refunded.

The $200 paid upon incorporation pursuant to section 23221 is a prepayment of tax, not a deposit or an amount held in escrow. If the Franchise Tax Board has not certified that a corporation is exempt from taxation, the corporation is liable for and required to pay this tax at the time of incorporation, regardless of whether it ever does business. (Rev. & Tax. Code, §§ 23153 and 23221; Appeal of Mission Valley East, Cal. St. Bd. of Equal., Oct. 7, 1974.) A corporation is not exempt from taxation until the Franchise Tax Board has issued a determination that it is exempt. (Rev. & Tax. Code, § 23701.) Appellant never received such a determination from either the Franchise Tax Board or the Internal Revenue Service; therefore, it was not exempted from prepayment of the minimum tax.

Appellant raises constitutional objections to the denial of its claim for refund, but we are precluded by section 3.5 of article III of the California Constitution from determining that statutory provisions are unconstitutional or unenforceable. Therefore, we decline to address appellant's objections. Appellant also makes allegations of faulty information received from respondent. However, these allegations are both vague and unsupported and, even if true, would not provide a basis for refunding the $200 prepayment which was clearly due from appellant.

For the reasons stated, we must sustain respondent's action.

Appeal of Polemic Press Publications, Inc.

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 Polemic Press Publications, Inc., for refund of franchise tax in the amount of $200 for the income year 1983, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of October , 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

William M. Bennett, Member

Richard Nevins, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9