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BEFORE TBE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
) Nos. 80R-93 and
BALDAR INDUSTRIES, INC.,) 82A-1005-MW
TAXPAYER, AND BRUCE F. BALENT,)
ASSUMER AND/OR TRANSFEREE)

For Appellants: Bruce F. Balent

For Respondent: Elleene R. Tessier
Counsel

OPINION

These appeals re 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 BalDar Industries, Inc., for refund of franchise tax in the amount of $200 for the taxable year ended July 31, 1979, and pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of BalDar Industries, Inc., Taxpayer, and Bruce F. Balent, Assumer and/or Transferee, against a proposed assessment of additional minimum franchise tax and penalty in the total amount of $222 for the taxable year ended July 31, 1979. Since appellant paid the proposed assessment of tax and penalty after the filing of this appeal, it will be treated as an appeal from the denial of a claim for refund pursuant to section 26078.

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

The questions presented by these appeals are: 1) whether appellant was entitled to a refund of the $200 minimum tax it prepaid for its first taxable year; and 2) whether appellant was liable for the $200 minimum franchise tax for the period August 1, 1979, through October 2, 1979. "Appellant" herein shall refer to the corporate appellant, BalDar Industries, Inc.

Appellant was incorporated as a California corporation on July 19, 1977, and selected August 1 through July 31 as its fiscal year. Upon incorporation, appellant prepaid the $200 minimum franchise tax for its first taxable year (August 1, 1977-July 31, 1978) as required by section 23221. On December 1, 1977, appellant made a $200 estimated tax payment for its second taxable year (August 1, 1978-July 31, 1975). Appellant made no estimated tax payments thereafter in any year.

Appellant filed a tax return for its fiscal year ended July 31, 1978, showing a loss. Since the business was proving unprofitable, appellant decided to dissolve. Appellant advised the Franchise Tax Board on December 13, 1978, of its decision to dissolve and, on January 12, 1979, the Franchise Tax Board informed appellant of the tax return requirements for obtaining a tax clearance certificate necessary for dissolution.

Appellant filed its final tax return on August 6, 1979, reporting a loss for the fiscal year ended July 31, 1979, and showing no tax due. On its return, appellant also requested, as a dissolving corporation, a refund of the $200 minimum tax it had prepaid upon incorporation. On August 9, 1979, the Franchise Tax Board provided appellant with a tax clearance certificate and appellant then filed both its certificate of election to wind-up and dissolve and its certificate of winding up and dissolution (hereinafter 'certificate of dissolution") with the Secretary of State. However, the certificate of dissolution was subsequently returned to appellant, unfiled, because appellant had failed to remit the $15 filing fee. The certificate of dissolution was resubmitted with the filing fee and filed with the Secretary of State on October 2, 1979.

The Franchise Tax Board denied appellant's claim for refund of its $200 minimum tax prepayment and issued a proposed assessment of the $200 minimum tax for the taxable period beginning August 1, 1979, and ending

on the date appellant's certificate of dissolution was filed, October 2, 1979.

Appellant contends that it had no tax liability for the taxable year ended July 31, 1979, because it was not "doing business," only winding up and dissolving during that year, and that it is entitled to a refund of its $200 prepayment because it paid a total of $400 in its first taxable year. Appellant also argues that it is not liable for any tax for the period August 1, 1979, through October 2, 1979, because It was effectively dissolved on the date it original-y nailed its certificate of dissolution to the Secretary of State. In any case, appellant asserts, any delay in its dissolution was directly attributable to the advice and information of employees of the Franchise Tax Board, and the Franchise Tax Board should be estopped fros asserting any deficiency for the period after July 31, 1979.

A California corporation which is not doing business within the limits of this state is not subject to the general franchise tax. (See Rev. & Tax. Code, §§ 23101, 23151.) Section 23153, however, imposes an annual $200 minimum tax on every California corporation not otherwise subject to the general franchise tax. The statute also provides that "[e]very such domestic corporation taxable under this section shall be subject to the said tax from the date of incorporation until the effective date of dissolution as provided in Section 23331." Section 23331 provides that, "For the purposes of this article, the effective date of dissolution of a corporation is .. . the date on which the certificate of winding up and dissolution is filed in the office of the Secretary of State." "Every domestic corporation is subject to the annual minimum tax from the date of incorporation until the certificate of dissolution is filed with the Secretary of State, ever. though the corporation may cease doing business prior thereto." (Emphasis added.) (Cal. Admin. Code, tit. 18, req. 23151.)

As can be seen from thr foregoing statutes and regulation, it is very clear that appellant was liable for the minimum tax for its year ended July 31, 1979. No contention is, or could be, made that appellant was dissolved prior to that fiscal year end. It makes no difference at all that appellant had ceased doing business. In addition to the general law stated above, there is a statute which specifically provides for payment of no less than the minimum tax for the year in which a

corporation ceases to do business. (Rev. & Tax. Code, § 23151.1, subds. (d), (e).)

It is equally clear that appellant is not entitled to any refund of its $200 prepayment on incorporation. That prepayment, contrary to appellant's belief, was not a refundable deposit, but was a prepayment of its minimum tax liability for its first taxable year, which ended July 31, 1978. (Rev. & Tax. Code, § 23151.1, subd. (a); §§ 23153, 23221.) Credits for tax paid for a first taxable year are: 1) only available to those corporations which computed their first-year tax under sections 23222 to 23224 and 2) only allowed in the amount of the excess of the tax paid over the minimum tax for the first full 12-month taxable year of doing business. (Rev. & Tax. Code, § 23201, subd. (a).) Appellant meets neither of these requirements. Sections 23222 to 23224 are only applicable to those corporations which commenced doing business in this state before January 1, 1972. Appellant commenced doing business after that date and its. first year's tax was computed under section 23151. In addition, appellant did not pay any excess over the minimum tax for its first taxable year - the estimated tax payment which it made on December 1, 1977, was for its second taxable year, ended July 31, 1979, even though it was made during appellant's first income (and taxable) year which ended July 31, 1978.

With respect to appellant's second contention, that it owes no tax for any period after its fiscal year ended July 31, 1979, the law is also clear. As we stated before, a corporation is liable for the minimum tax until it is dissolved, and it is not dissolved until it files its certificate of dissolution with the Secretary of State's office. Appellant's certificate of dissolution was not filed in the office of the Secretary of State until October 2, 1979, more than two months after the end of its fiscal year. Therefore, it was not dissolved until October 2, 1979, and it is clearly liable for the minimum tax for the taxable year which began on August 1, 1979..

Appellant argues that the certificate of dissolution is considered filed as of the date when it was first mailed to the Secretary of State. However, in the Appeal of United Linens, Inc., decided by this board on February 3, 1977, we found that a certificate of dissolution was not filed until after the December 15 fiscal year end of that appellant, where the certificate was

originally mailed to the Secretary of State on December 11, but returned to the appellant for correction of wording on December 17 and resubmitted and accepted by the Secretary of State on December 20. Appellant has cited no authority in support of its contention or in contradiction to the United Linens decision.

We conclude that the original mailing date was not the filing date of the certificate of dissolution and that the filing date, and effective date of appellant's dissolution, was October 2, 1979. Therefore, the dissolution was not effective until after a new taxable year had begun and appellant was liable for the minimum tax as assessed by the Franchise Tax Board.

Appellant also argues that the Francnise Tax Board should be estopped from asserting liability against it for the period after its taxable year ended July 31, 1979, because, it alleges, it received verbal instructions from one of respondent's employees to wait until the end of its taxable year to file its return, and this prevented it from timely filing its certificate of dissolution.

As a general rule, estoppel will not be invoked against the government or its agencies unless grave injustice would otherwise result; this rule is especially true in tax cases. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal.2d 865, 869 [3 Cal Rptr. 675] (1960); U.S. Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal.2d 384, 389 [303 P.2d 1034] (1956).) Estoppel is an affirmative defense and the burden is on the party asserting it to establish the facts necessary to support it. (Hull v. Commissioner, 87 F.2d 260, 262 (4th Cir. 1937); Joyce v. Gentsch, 141 F.2d 891, 896-897 (6th Cir. 1944).) Moreover, the doctrine of estoppel does not erase the duty of-due care and, therefore, is not available for the protection of one who has suffered loss because of his own failure to act. (Hampton v. Paramount Pictures Corporation, 279 F.2d 100, 104 (9th Cir.), cert. den., 364 U.S. 882 [5 L.Ed.2d 1031 (1960).)

Appellant has failed to provide any evidence to show that it received advice from respondent's employees to wait until the end of the taxable year to file its return. In addition, the written instructions dated January 12, '1979, which appellant received from respondent contain no statement or implication that it was

necessary to wait to the end of the taxable year to file a return; rather, the import of the instructions is that the return could and should be filed expeditiously. Appellant's contention that its reliance on alleged erroneous information was the true and direct cause of its late filing, besides being unsubstantiated, lacks credence in view of appellant's failure to properly submit its certificate of dissolution to the Secretary of State. We are unable to conclude that respondent should be estopped from asserting minimum tax liability for the period August 1, 1979, through October 2, 1979.

Based on the foregoing, the action of the Franchise Tax Board must be sustained.

Appeals of BalDar Industries, Inc., Taxpayer, and Bruce F. Balent, Assumer and/or Transferee

ORDER

Pursuant to the views expressed in the opinion of the board on file in these proceedings, 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 BalDar Industries, Inc., for refund of franchise tax in the amount of $200 for the taxable year ended July 31, 1979, and in denying the claim of BalDar Industries, Inc., Taxpayer, and Bruce F. Balent, Assumer and/or Transferee, for refund of franchise tax and penalty in the total amount of $222 for the taxable year ended July 3'1, 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 3rd day of March, 1987 by the State Board of Equalization, with Board Members Mr. Collis, Mr. Bennett, Mr. Carpenter and Ms. Baker present.

Conway H. Collis, Chairman

William M. Bennett, Member

Paul Carpenter, Member

Anne Baker *, Member

_____, Member

*For Gray Davis, per Government Code section 7.9