

The question presented by this appeal is whether appellant's sole proprietorship qualifies as a "new" small business and thus whether appellant is entitled to carry forward net operating losses incurred during the sole proprietorship's first two taxable years.

Appellant purchased an existing KOA Campground franchise, located in California, at the end of 1984. (Hereinafter the business will be referred to as the "campground.") The campground had been operated for approximately 10 years by the prior owner. During 1984 and 1985, appellant incurred losses operating the campground.

Appellant contends that the campground is a new small business as defined by sections 17276 and 17276.5, and filed an amended return for 1986 claiming as a deduction the net operating losses incurred in 1984 and 1985. Respondent treated the amended return as a refund claim and disallowed the refund. This appeal followed.

Section 17276 provides for a deduction as a carryforward of a net operating loss of a "qualified taxpayer." (Rev. & Tax. Code, § 17276, subd. (a).) "Qualified taxpayer" is defined in section 17276.5 as a taxpayer fitting one of three definitions. It is the definition provided in subdivision (a) of section 17276.5 that is at issue here. Subdivision (a) provides that a qualified taxpayer is a "taxpayer engaged in a new small business." (Rev. & Tax. Code, § 17276.5, subd. (a), emphasis added.) Respondent concedes that appellant fits all of the requirements of these sections except one. At issue in this appeal is the proper interpretation of the word "new."

Respondent contends that the appellant simply continued the operation of the existing campground and thus it is not a "new" business. Respondent contends that the word "new" implies that the business was not previously in existence. Based on two prior decisions of this board, we agree with respondent that the campground was not a new business.

In Appeal of Carmel Mortgage Corporation, 89-SBE-031, decided by this board on November 29, 1989, we held that the incorporation of a sole proprietorship mortgage brokerage business did not qualify for the special net operating loss carryforward provisions of sections 24416 and 24417 because there was no new business. (Sections 24416 and 24417 are essentially identical to sections 17276 and 17276.5.) Instead, the business simply carried on in a new form and otherwise was just a continuation of the old business. We therefore concluded it was not a "new" business.

In Appeal of Two's Company Interiors, 92-SBE-012, also decided by this board on this date, we stated:

In Appeal of Carmel Mortgage Corporation, supra, we discussed the purpose of section 24417. Citing the language of the predecessor statute to section 24417, we found that the purpose of this statute was to create a favorable environment for small businesses and to encourage the development of new businesses. We determined that this policy would be defeated if already existing businesses could take advantage

of this statute by 'merely changing their business form.' (Appeal of Carmel Mortgage Corporation, supra.)

We then concluded that the term "new" implies that the taxpayer is facing financial risks because he has no "track record" on which to rely. (Appeal of Two's Company Interiors, supra.)

Here, appellant had a track record on which he could rely.^{2/} He purchased an ongoing business which was part of an existing nationwide chain of campground business operations. He presumably had complete access to the financial records of the predecessor owner. He therefore could make a reasonable estimate of anticipated expenses and revenue. Presumably he believed that, based on his purchase price, he could earn a satisfactory return on his investment. We do not mean to imply that appellant did not take financial risks when he purchased the business. Revenue and expenses similar to those of prior years were not assured. However, the financial risks he faced were not the result of the lack of a "track record." Rather, the risks were more in the nature of general business risks.

Moreover, the simple fact is that the campground was in existence prior to appellant's purchase. Appellant continued the existing business, presumably operating it in essentially the same manner as the prior owner. There is certainly nothing in the record to indicate that appellant so changed the business that it was not a continuation of the old operation. The fact that appellant is new to the business is in this case not relevant. The statute requires that the business be new, not that the appellant be new to the business. Similar to Appeal of Carmel Mortgage Corporation, supra, the change in owner is analogous to a change in form. The old owner left and the new owner arrived; nothing else substantial took place. A change in form does not make the business "new." (Appeal of Carmel Mortgage Corporation, supra.)

We conclude that an existing business with an existing record of financial results is not a "new" business for purposes of sections 17276 and 17276.5, even though the business may be new to the taxpayer. Accordingly, respondent's denial of appellant's refund claim will be sustained.

^{2/} It may be possible that a taxpayer purchases an existing business where there is no track record on which he can rely. We do not address such a situation in this appeal.

ORDER

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 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Kenneth Grigg for refund of personal income tax in the amount of \$4,047 for the year 1986, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of May, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

Brad Sherman _____, Chairman

Ernest J. Dronenburg, Jr. _____, Member

Winnie Scott* _____, Member

_____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9