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AND MAY NOT BE CITED AS PRECEDENT

Appellant: B & G Properties Inc., 92R-0900-CS; Income Years
Ended: 06/30/89, 06/30/90; Claims For Refund: \$ 600, 600

[NO NUMBER IN ORIGINAL]

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

1993 Cal. Tax LEXIS 237

August 26, 1993

CORPORATION FRANCHISE TAX APPEAL

QUESTION: Whether appellant was "doing business" in California so as to subject it to the minimum franchise tax.

Findings and Determination

The appellant, a Canadian corporation, is owned 100 percent by George and Mary Miller, who are husband and wife (hereinafter referred to as the "shareholders"). Its only asset in the 1989 and 1990 income years was residential real property located in Palm Desert, California (hereinafter referred to as the "property"). The property was purchased in June of 1988 for use by the shareholders and eventual sale. The appellant had no other investments in California. During the income years ended June 30 of 1989 and 1990, there was only seasonal use of the property by the shareholders. The appellant never rented the property, nor advertised the property for rent. The property remained vacant when not in use by the shareholders. During the years at issue, the shareholders directly paid the expenses of maintaining the property, including repairs, association dues, utilities, property taxes and insurance.

Appellant's tax returns for the appeal years showed no income and no minimum franchise tax due. [*2] Because the shareholders paid appellant's maintenance expenses on the property, respondent determined that appellant was "doing business" in California. Appellant was assessed the minimum tax. After appellant paid the tax, it filed claims for refund. Respondent denied the claims, and the current appeal followed.

The only issue to be decided is whether appellant was "doing business" in California. Revenue and Taxation Code section 23101 defines "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." (Emphasis added.) In the present case, the facts demonstrate that the appellant was not, during the appeal years, actively involved in any activity relating to the property for the purpose of financial gain or profit. In *Golden State Theatre & Realty Corp. v. Johnson*, 21 Cal.2d 493, 496 (1943), the California Supreme Court said that "the word 'actively,' "as used in former section 5 of the California Bank and Corporation Tax Act (the predecessor section to Revenue and Taxation Code section 23101), must be interpreted "as the opposite of passively or inactively," and as used in the section "means active participation [*3] in any transaction for pecuniary gain or profit." Here, appellant was merely holding property in California during the income years at issue. To hold that such a passive activity was somehow an "active" event so as to come within the meaning of section 23101 would, in effect, erase the word

"actively" from the statute. This board has refused to do so in the past (see Appeal of The Blanc Corporation, Assumer for Sponberg's, Inc., Cal. St. Bd. of Equal., Feb. 18, 1964), and refuses to do so now.

Therefore, the action of the respondent in denying appellant's claims for refund is hereby reversed.

ATTEST: Burton W. Oliver, Executive Director