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OPINION	:	No. 79-816
of	:	October 18, 1970
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SUBJECT: HOLDING COMPANY PAYMENT OF REGISTRATION FEES—Financial Code section 11552 requires that an annual registration fee be paid by a holding company irrespective of its characterization as a "first-tier" or "second-tier" holding company. Unpaid fees for past years may be collected.

The Honorable Patrick J. Connolly, Commissioner of the Department of Savings and Loan requests an opinion on the following questions:

1. Does section 11552 of the Financial Code require that an annual registration fee be paid by second-tier holding companies that are companies?

2. If the answer to the first question is in the affirmative, may fees for all past years be collected where the department's records establish the requisite control by second-tier companies?

CONCLUSIONS

1. Section 11552 requires that an annual registration fee be paid by a holding company that is a company, irrespective of its characterization as a "first-tier" or "second-tier" holding company, if it has the requisite degree of ownership or control or otherwise meets the conditions of Financial Code sections 11500 and 11501 that define a "holding company and a "company." A company that controls a holding company, as defined by Financial Code section 11550, is a "holding company" that is subject to the fee specified in Financial Code section 11552 if it is a "company" as specified in Financial Code section 11501.

2. Unpaid fees for past years may be collected from entitles that were holding companies if the commissioner determines that they were subject to the applicable provisions of the Financial Code during such years, that he had issued a registration certificate to them as to each of such years and that the statutorily prescribed fees have not been paid.

ANALYSIS

The commissioner states in his request for our opinion that: "Soon after the 1964 enactment of part 4 of the Savings and Loan Association Law (commencing with Fin. Code, § 11500), the Department of Savings and Loan established a policy of collecting a single annual registration fee from (only one company of) multitiered holding companies, although reports were required of each company." The commissioner then presents an example of multi-tiered holding companies, which we shall describe in neutral terms thusly: "X" Savings and Loan Association is 100 percent owned by "X" Enterprises, Inc., which in turn is 100 percent owned by "X, Y and Co." The commissioner states further that while both "X" Enterprises, Inc. and "X, Y and Co." are registered as holding companies pursuant to Financial Code[1] section 11550, a registration fee was paid only by "first-tier" "X" Enterprises, Inc. and no such fee was paid by "second-tier" "X, Y and Co." The commissioner concludes that the department's policy of not also charging the second-tier holding company the annual registration fee is contrary to the statutory provisions of part 4 of the Savings and Loan Association Law. We agree.

Section 11550 requires each savings and loan holding company to register with the commissioner on forms prescribed by him. Section 11550 further provides that such forms "shall include information with respect to the financial condition, ownership, operations, management and intercompany relationships of the savings and loan holding company and its subsidiaries, and related matters, as the commissioner may deem necessary or

[1] All unidentified section references are to the Financial Code.

appropriate to carry out the purposes of this part of this division."

Section 11552 provides that:

"An annual registration fee shall be paid to the commissioner by each savings and loan holding company which is a company as follows:

"(a) Two hundred fifty dollars ($250) as to any savings and loan holding company which controls associations having total assets of up to fifty million dollars ($50,000,000).

"(b) Five hundred dollars ($500) as to any savings and loan holding company which controls associations having total assets of up to one hundred million dollars ($100,000,000).

"(c) Seven hundred fifty dollars ($750) as to any savings and loan holding company which controls associations having total assets of up to one hundred fifty million dollars ($150,000,000).

"(d) One thousand dollars ($1,000) as to any savings and loan holding company which controls associations having total assets of one hundred fifty million dollars ($150,000,000) or over.

Thus, the fee, as specified, shall be paid by each savings and loan holding company.

Section 11500 provides that:

"Savings and loan holding company' means (a) Any person or company which: (1) directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding guarantee stock of any domestic association, or 10 percent or more of the shares or proxies of shares of any domestic borrowers' mutual savings and loan association or federal savings and loan association located in California; (2) controls in any manner whether by the holding of proxies, or otherwise, the election of a majority of the directors of any domestic association, any borrowers' mutual savings and loan association or any federal savings association located in California; or (3) the commissioner determines, after reasonable notice and opportunity for hearing, directly or indirectly exercises, or has power to exercise, a controlling influence over the management and policies of any domestic association, any borrowers' mutual savings and loan association or any federal savings and loan association located in California; (b) Any company

which controls in any manner any company which is or becomes a savings and loan holding company by virtue of this chapter."

Section 11501 provides that:

> "'Company' means any domestic or foreign corporation, voting trust, business trust, limited partnership, partnership fund, joint stock company, association, syndicate, organized group of persons, or similar organization or group, whether incorporated or not."

Section 11502 provides that:

> "'Subsidiary,' with respect to a specified savings and loan holding company, means, (1) any company 10 percent or more of whose voting securities is directly or indirectly owned or controlled by such holding company, (2) any company the election of a majority of whose directors is controlled in any manner by such holding company, (3) any company 10 percent or more of whose voting securities are held by trustees or nominees for the benefit of the stockholders, shareholders or members of such holding company, or (4) any company 10 percent or more of the legal or beneficial ownership of which is directly or indirectly owned or controlled by such holding company."

In the example provided by the commissioner, "X" Enterprises, Inc. "owns" "X" Savings and Loan Association. We assume that "X" Savings and Loan Association is a "domestic association" or a "domestic borrowers' mutual savings and loan association" or a "federal savings and loan association" located in California within the meaning of section 11500. Thus, "X" Enterprises, Inc. is a "savings and loan holding company" within the meaning of section 11500. We assume that "X" Enterprises is also either a domestic or foreign corporation which makes it a 'company" within the meaning of section 11501. Thus, under these assumptions, it must pay the appropriate fee as specified by section 11552.

"X, Y and Co." is stated to "own" "X" Enterprises, Inc. Section 11500 provides in subdivision (b) that "any company which controls in any manner any company which is or becomes a savings and loan holding company by virtue of this chapter" is itself a "savings and loan holding company." We assume that "X, Y and Co." is also either a domestic or foreign corporation which makes it a company within the meaning of section 11501. Thus, under these assumptions, it also must pay the appropriate fee as specified by section 11552.

The next issue is whether such fees as were not paid in prior years are due and payable upon the realization that such companies have been during such prior years "holding companies" that were subject to the annual fee specified in section 11552.

It is a well established principle of law that statutorily created public entitles have only those powers conferred upon them by statute or those powers necessarily implied in order to effectively implement those duties imposed by law. (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal. 2d 287, 302–303; *City and County of San Francisco v. Padilla* (1972) 23 Cal. App. 3d 388, 400.) The Department of Savings and Loan is such a public entity. It has been established that regulations of such a public entity must be consistent with related statutes of the state or they are invalid. (*Cooper v. Swoop* (1974) 11 Cal. 3d 856, 864; *Morris v. Williams* (1967) 67 Cal. 2d 733, 737; *Rosas v. Montgomery* (1970) 10 Cal. App. 3d 77, 87–88.) Similarly, "policies" or "practices" of such a public entity, even though long-acquiesced in, if inconsistent with statutory authority, are invalid. (*County of Mann v. Martin* (1974) 43 Cal. App. 3d 1, 10.) We also observe that the original interpretation of the meaning of the relevant statutes was a contemporaneous administrative construction which is normally to be given great weight in determining the legislative intent. (See generally, *Rivera v. City of Fresno* (1971) 6 Cal. 3d 132, 140; *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal. 2d 172, 176.) However, the rule giving weight to contemporaneous administrative construction is not applicable when the administrative construction is incorrect. (*Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal. 2d 585, 599; *King v. St. Bd. of Equal*. (1972) 22 Cal. App. 3d 1006, 1012.)

Thus, the fact that prior commissioners of the Department of Savings and Loan may have established such an erroneous interpretation of the law does not prevent the present commissioner from correctly interpreting the law and implementing it as intended by the Legislature. More pointedly, it is his duty to do so. "When a regulation or other statutory interpretation of an administrative agency appears to be erroneous, it becomes the agency's duty to conform to the correct interpretation. Otherwise, by persistence in such error, the agency would be permitted to function in a manner wholly unintended by law." (*Pacific Motor Transport Co. v. State Bd. of Equalization* (1972) 28 Cal. App. 3d 230, 242.)

The question then arises: if a holding company received a certificate of registration as a holding company during any of such prior years but did not pay the statutorily prescribed registration fee, are fees for any prior years presently due and payable, assuming that the commissioner has a basis for determining that a company was a holding company during those prior years?

Section 11575 provides that "when a savings and loan holding company has satisfied the requirements of article 1 of this chapter, the commissioner shall issue such holding company a certificate of registration."

One of the requirements of the "chapter" is that a registration fee, as specified by section 11552, shall be paid by a holding company as a condition precedent to the receipt of the certificate of registration. It is now apparent that the certificates of registration were improvidently issued commencing in 1964 to "second-tier" holding companies because at least one of the requirements of article 1 of chapter 1 of part 4 of the Financial Code was never satisfied, i.e., payment of the statutorily prescribed fee. Does the improvident issuance of a certificate of registration discharge the statutorily created obligation to pay the prescribed fee? We conclude that it does not do so.

We find no appellate case on point. We are aware that the fee is an annual fee and that such "second-tier" holding companies were never requested to pay the annual fee. We note further that section 11577 specifies certain activities that are forbidden to a domestic subsidiary of a holding company that does not have a certificate of registration. It is clear that the commissioner, by issuing the certificate of registration, is estopped from filing a civil action pursuant to section 11650 for the purpose of obtaining the penalty prescribed by that section for a willful violation of any provision applicable to such companies. (See *Market St. Ry. Co. v. Cal. St. Bd. of Equal*. (1955) 137 Cal. App. 2d 87, 106.)

The more difficult question is whether any obligation to pay the fee for prior years is now due and owing to the state and, if so, whether the commissioner is estopped from asserting the state's right to receive payment of such fees. The problem arises in the first instance because the fee was an annual "registration" fee and, in fact, such holding companies were duly registered and received the appropriate certificate of registration as a result of official action of the commissioner. Has such official action, in effect, mooted the issue of the payment of the fee for such periods of time as the holding companies were in fact registered as required by law? We do not believe so. The affected holding companies received the benefit of their being registered, i.e., their subsidiary companies were not prohibited from doing the acts otherwise proscribed by section 11577 if the holding company lacked the required certificate of registration. The quid pro quo for that benefit is the payment of the statutorily prescribed fee. The holding companies obtained the benefit but have not paid the fee. It remains due and payable unless the commissioner is estopped to assert the state's claim.

As a general proposition, an estoppel will not be enforced against the government because to do so would give effect to the unauthorized acts of public officials at the expense of the legislatively established public policy that they have been directed to implement. Thus, as a matter of public policy "the authority of a public officer cannot be expanded by estoppel." (*Boren v. State Personnel Board* (1951) 37 Cal. 2d 634, 643; see also *Whitcomb Hotel, Inc. v. Calif. Emp. Comm*. (1944) 24 Cal. 2d 753.)

Estoppel will not be applied against a governmental body "where it would operate to defeat the effective operation of a policy adopted to protect the public." (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal. 2d 817, 826; see *City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462, 492; *Strong v. County of Santa Cruz* (1975) 15 Cal. 3d 720, 725.)

Further, public policy will not allow an estoppel to operate so as to defeat the government's collection of its revenues by which it serves the public purpose. (See *Market St. Ry. Co. v. Calif. St. Bd. of Equal., supra,* 137 Cal. App. 2d 87; *La Societe Francaise v. Calif. Emp. Comm*. (1943)56 Cal. App. 2d 534.) This principle is directly applicable if the loss of revenues has occurred because of an erroneous ruling of an administrative official as to the meaning of a tax law. (*Market St. Ry. Co. v. Calif. St. Bd. of Equal., supra; La Societe Francaise v. Calif. Emp. Comm., supra,* at pp. 55 3–594.) Thus, "the taxpayer [should] pay from its own funds as much as it would have paid originally but for the erroneous administrative ruling, but it [should] not pay more." (*La Societe Francaise v. Calif. Emp. Comm., supra*, at p. 555.)

However, the rule that the government may not be estopped by the conduct of its officers and employees is not an absolute one. The principle has been stated thusly: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell*, *supra*, 3 Cal. 3d at pp. 496–497; *Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 17–18.) An equitable estoppel "in fact will run against the government where justice and right require it." (*Baird v. City of Fresno* (1950) 97 Cal. App. 2d 336, 342; *Farrell v. County of Placer* (1944) 23 Cal. 2d 624, 627–629.) In *Cruise v. City & County of San Francisco* (1951) 101 Cal. App. 2d 558, 565, it was stated that "the government should not be permitted to avoid *liability* by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one. (Emphasis added.)

A registration "fee" has many of the characteristics of a "tax" in that it is imposed to finance the regulatory activities of the public entity issuing the registration certificate. Thus, the government's ability to serve the specific public purpose of regulating savings and loan associations could be defeated or diminished by the failure of the responsible public officials to collect the necessary revenue as directed by the Legislature. Neither "justice" nor "right" is served by denying to the government the collection of such registration fees when it has conferred a benefit upon an entity statutorily obligated to pay a fee to be entitled to receive that benefit. (See generally *Market St. Ry. Co. v. Cal. St. Bd. of Equal., supra,* 137 Cal. App. 2d 87.) Thus, we conclude that there is no estoppel as a

matter of sound public policy.

Assuming, nevertheless, that an estoppel could operate in such a situation it is apparent that the state is not in fact estopped to assert its claim to the unpaid registration fees. As was stated in *Safeway Steel Products, Inc. v. Lefever* (1953) 117 Cal. App. 2d 489, 491:

> "In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury." (See *City of Long Beach v. Mansell, supra,* 3 Cal. 3d at pp. 488–489; *Killian v. City and County of San Francisco, supra,* 77 Cal. App. 3d 1.)

We believe that a holding company that received the certificate of registration, but which paid no fee, has suffered no detriment or injury.[2] As we have previously determined, the fee was due and payable in the year in which the certificate was issued. As such, it was an expense of doing business in the State of California. It suffers no injury or detriment because the expense is thus required to be allocated to a different year of doing business, assuming that it is still doing business in the State of California. Thus, we further conclude that unpaid registration fees for prior years are still due and owing and that the commissioner is not in fact estopped to assert the state's right to these fees under the circumstances made known to us.

There remain two collateral matters that should be considered. First, while such holding companies remain liable for the fee for each year that it was not paid, they have available to them a defense to the collection of such fees of the applicable three-year statute of limitations, Code of Civil Procedure section 338, subdivision 1, which must be affirmatively raised or else it is waived. (*King v. State Bd. of Equal., supra*, 22 Cal. App. 3d at p. 1015.) Secondly, the Department of Savings and Loan will remain responsible for all uncollected fees unless it is discharged from accountability pursuant to Government Code section 13940 *et seq*.

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[2] There may be other factual issues, which we do not consider, that would operate to defeat a claim of estoppel, assuming that the state could be estopped. (See, e.g*., State Air Resources Bd. v. Superior Ct.* (1979) 93 Cal. App. 3d 803, 810–812.)