

WILLIAM C. STALEY
Nonprofit Business Planning

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**SUSPENDED AND FORFEITED CORPORATIONS –
REVIVOR, RESTORATION AND RELIEF FROM CONTRACT VOIDABILITY**

A corporation can be suspended for various reasons. Reviving a California corporation that was suspended only for failing to file a Statement of Information with the Secretary of State is simple. In contrast, reviving a corporation that was suspended for failing to file California tax returns or to pay California taxes is more complex.

Special concerns apply for a corporation that was organized under the laws of another state and does business in California.

For a nonprofit corporation that fails to file with the California Attorney General, there is a risk that while suspended or forfeited it will become liable for the corporate minimum tax, even if it is revived and is otherwise exempt from corporate income tax.

This bulletin examines the consequences of suspension for for-profit and nonprofit corporations and the mechanics of reviving a suspended corporation.

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1. The Basic Concepts

1.1. Corporate Powers, Rights and Privileges

A corporation is a “creature of statute.” It exists because there are laws that allow it to exist. It has only the rights, powers and privileges granted to it by a government. At one time, each corporation was created by a separate decree of a monarch or action by parliament. They were allowed to exist for a limited period of time. In the U.S. today state statutes allow corporations to be created. Those statutes give to corporations created under them specific rights, powers and privileges.¹ Generally, a corporation organized under these statutes exists until it dissolves.

However, the state that grants those rights, powers and privileges can also take them away or suspend them. We deal with so many corporations every day that we have operating assumptions about what they can do. But for a suspended corporation, many of those assumptions are false.

A corporation organized under California law (called a “**domestic corporation**” in this bulletin and in the California Corporations Code) must file an annual **Statement of Information** with the California Secretary of State.²

Generally, a corporation doing business in California is subject to a corporate minimum tax, to a tax on its business income sourced in California and, if the corporation is based in California, to a tax on its non-business (that is, investment) income.

¹ For example, Section 207 of the California Corporations Code gives specific powers to corporations organized under California law. Such a corporation’s existence begins when it files its articles of incorporation. Cal. Corp. Code § 200(c). Generally, it ends when the corporation files a certificate of dissolution with the Secretary of State. Cal. Corp. Code § 1905(b) (at which time “its powers, rights and privileges shall cease”). For a California nonprofit public benefit corporation, the corresponding provisions are Sections 5140, 5120(c) and 6615(c).

² Cal. Corp. Code §§ 1502 (for-profit corporation), 6210 (nonprofit public benefit corporation).

1.2. “Foreign Corporations” Doing Business in California

A corporation organized under the laws of another state, province or country is a “**foreign**” **corporation** for purposes of this bulletin and the California Corporations Code.³ For these purposes, a corporation organized under the laws of Nevada, Alberta or Germany would be a “foreign corporation.” A foreign corporation gets its powers, rights and privileges from the laws of its home state, province or country, not from California law. Consequently, California cannot suspend the powers, rights and privileges of a foreign corporation. But California does have some leverage with a non-compliant foreign corporation.

California does not allow foreign corporations to “**transact intrastate business**” (generally, that means to have employees active in California doing something besides just selling) *unless* the foreign corporation “registers to do business” in California.⁴ To do so the foreign corporation identifies itself to the California Secretary of State and consents to be sued in California. This is accomplished by filing with the California Secretary of State a “**Statement and Designation by Foreign Corporation.**” In response, the Secretary of State issues a “**Certificate of Qualification.**”⁵ This is the foreign corporation’s authorization to do business in California, even though it was not organized under California law.

³ Cal. Corp. Code §§ 171 (for-profit corporations), 5053 (nonprofit corporations).

⁴ “Just selling” is interstate commerce that is protected under the U.S. Constitution. California has a very detailed statute defining “transacting intrastate business” and the detail comes largely from the many appellate cases on the subject. Cal. Corp. Code § 191. This is a very superficial summary of a complex area of corporate law. To add to the complexity, these rules are not the same as the “nexus” test to determine whether a foreign corporation must file a tax return in California. Cal. Rev. & Tax. Code § 23101; Cal. Admin. Code title 18 Reg. 23101. There is still another, similar test to determine whether a court has sufficient contacts with a person to subject the person the court’s orders.

⁵ Cal. Corp. Code §§ 2105 (filing by the foreign corporation), 2106 (certificate of qualification). The foreign corporation might also be required to obtain a license or permit to operate its business in California.

Generally, the laws of the home state, province or country govern the internal affairs of the foreign corporation. But there are several exceptions.⁶ One is that the corporation must file an annual **Statement of Information** just like a domestic corporation (but using a slightly different form).⁷

A foreign corporation doing business in California is subject to the California corporate minimum tax, to a California tax on its business income from California sources and, if it's base of operations is California, on its non-business (investment) income.

When the foreign corporation stops doing business in California (called "**withdrawing from business in California**"), it files with California Secretary of State a "**Certificate of Surrender of Right to Transact Intrastate Business.**"⁸

1.3. Suspension, Restoration and Revivor

A California corporation is **suspended** when it fails to make a required filing or payment, after receiving a notice threatening suspension. What are actually suspended are "the corporate powers, rights and privileges of the corporation."⁹ A suspension initiated by the Franchise Tax Board is effective after the FTB both gives the notice to the corporation and gives the

⁶ Cal. Corp. Code §§ 2115-17.1, 2252-60. Section 2115 applies the "quasi-California corporation" rules, but these do not apply to foreign nonprofit corporations. Cal. Corp. Code § 6910.

⁷ Cal. Corp. Code § 2117.

⁸ Cal. Corp. Code §§ 2112, 2113.

⁹ Cal. Corp. Code §§ 2205(c) (domestic corporation, failure of a for-profit corporation to file a Statement of Information); Cal. Rev. & Tax. Code §§ 23301 (failure to pay a corporate tax or penalty), 23301.5 (failure to file a tax return), 23775 (failure to file a return or statement by a tax-exempt organization, to pay late filings penalties, or to pay corporate minimum tax that is due as a result of failure to file a Form RRF-1 with the Attorney General). The corporation is entitled to notice before the suspension becomes effective. Cal. Rev. & Tax. Code § 23302(a), (b).

name of the suspended corporation to the Secretary of State.¹⁰ A suspension initiated by the Secretary of State is effective after the Secretary of State both gives the notice to the corporation and gives the name of the suspended corporation to the Franchise Tax Board.¹¹

What California calls “suspension” is known as “**administrative dissolution**” under the laws of some other states.¹² Calling something “dissolution” when it is not leads to all kinds of confusion.

A corporation can be suspended either by the Secretary of State or by the FTB. It is common for a corporation to fail to file Statements of Information with the Secretary of State and also to fail to pay taxes or to fail to file tax returns with the FTB. The corporation might first be suspended by the Secretary of State. However, when the corporation fails to pay taxes or file returns file after notice from the FTB, additional consequences apply (as discussed below).

When a corporation has been suspended, it can become compliant again. When each of the government agencies that suspended the corporation agrees that suspended the corporation is again compliant, they “**revive**” the corporation.¹³ At that point, the FTB issues a “**Certificate of Revivor.**”¹⁴

¹⁰ Cal. Rev. & Tax. Code § 23302(c); *see* *Mediterranean Exports v. Superior Court*, 119 Cal. App. 3d 605, 615 (1981) (“The suspension or forfeiture contemplated by Revenue and Taxation Code section 23302 is mandatory because the word ‘shall’ is used, but the statute is not self-executing. The suspension or forfeiture takes effect only when the Franchise Tax Board transmits the name of the tax-delinquent corporation to the Secretary of State.”). This can be important, because a suspension by the FTB can have drastic consequences, as discussed below.

¹¹ Cal. Corp. Code § 2205(c).

¹² For examples, see:
<http://www.sos.ga.gov/Corporations/Administrative%20Dissolutions%20FAQ.pdf>,
<http://apps.leg.wa.gov/rcw/default.aspx?cite=24.03.302>,
<http://www.moga.mo.gov/statutes/C300-399/3510000484.HTM>,
<https://www.oregonlaws.org/ors/65.651>.

¹³ Cal. Corp. Code § 2205(c); Cal. Rev. & Tax. Code § 23305.

The mechanics of reviving a corporation vary somewhat depending on the cause of the suspension, as discussed in detail below.

If the corporation sends in its required filing or payment too late, the corporation might be suspended even though it was actually compliant at the time. In that case, the government agency corrects its mistake and **restores** the corporation to good standing.¹⁵

1.4. Forfeiture

California does not have the power to suspend the powers, rights and privileges of a non-compliant foreign corporation. Instead, a non-compliant foreign corporation **forfeits** the exercise of its corporate powers, rights and privileges in California.¹⁶ A forfeiture initiated by the Franchise Tax Board is effective after the FTB both gives the notice to the corporation and gives the name of the forfeited corporation to the Secretary of State.¹⁷ A forfeiture initiated by the Secretary of State is effective after the Secretary of State both gives the notice to the corporation and gives the name of the suspended corporation to the Franchise Tax Board.¹⁸

(footnote continued from preceding page)

¹⁴ Cal. Rev. & Tax. Code § 23305.

¹⁵ Cal. Corp. Code § 204(e). The Franchise Tax Board must “abate” (or cease efforts to impose) any penalty resulting from the failure to file on time. Note that a corporation is “restored” if the suspension was erroneously imposed by the government agency. Cal. Rev. & Tax. Code § 23305c(c), (d). A corporation is “revived” if the suspension was properly imposed, and the problem causing the suspension was then corrected by the corporation.

¹⁶ Cal. Corp. Code § 2206(a); Cal. Rev. & Tax. Code §§ 23301 (failure to pay a corporate tax or penalty), 23301.5 (failure to file a tax return), 23775 (failure to file a return or statement by a tax-exempt organization, to pay late filings penalties, or to pay corporate minimum tax due as a result of failure to file a Form RRF-1 with the Attorney General).

¹⁷ See footnote 10 above.

¹⁸ Cal. Corp. Code § 2206(a).

After the forfeiture, the foreign corporation can still engage in constitutionally-protected “just selling” in California.¹⁹

The effects of the forfeiture and the mechanics of reviving the corporation vary depending on whether the Secretary of State or the FTB initiated the forfeiture, as discussed below.

1.5. Good Standing

A corporation that was incorporated under California law and is not suspended is said to be in “**good standing.**” A foreign corporation that has registered in California and has not forfeited is also said to be in “**good standing.**” If a corporation is in good standing, the status of either corporation on the Secretary of State’s Business Search website will be “**Active**” (as opposed to “Suspended” or “Forfeited”).²⁰ Such a corporation can obtain a “**Certificate of Good Standing**” from the Secretary of State. A corporation cannot obtain this certificate while it is suspended or forfeited.

A foreign corporation cannot register to do business in California unless it provides to the California Secretary of State a certificate of good standing from the corporation’s home state.²¹

2. Effects of Suspension of Forfeiture

2.1. Tax Returns

A corporation that is subject to suspension or forfeiture but continues to do business or to receive income is required to file a California tax return.²²

¹⁹ Cal. Corp. Code § 2206(c). The U.S. Constitution and federal law prohibit a state from restricting this activity.

²⁰ <http://kepler.sos.ca.gov/>.

²¹ Cal. Corp. Code § 2105(b).

²² Cal. Rev. & Tax. Code § 23303.

2.2. Corporate Name

While the corporation is suspended for any reason, the Secretary of State will not protect its name. Another corporation can use the exact name of the suspended corporation, or a name confusingly similar to it. In that case, before the suspended corporation can be revived, it must change its name to one that is not the same or confusingly similar to the name of the corporation that took its name.²³ Generally, a suspended corporation cannot file an amendment to its articles of incorporation or a certificate of dissolution. However, an exception is made for name changes for a corporation that has lost the right to its name while it was suspended.²⁴

2.3. Delayed Participation in Litigation

While the corporation is suspended, it is “disabled from participating in litigation activities.”²⁵ It can’t file or answer a complaint, or enter a

²³ Boyer v. Jones, 88 Cal. App. 4th 220 (2001). The Secretary of State’s website includes the following Q&A: “Q: What do I do if my business entity is suspended/forfeited and another party has reserved the name or another entity is using the name? A: The suspended/forfeited business entity must change its name, obtain a release of name reservation from the party who has reserved the name, [or] in certain circumstances, obtain written consent to use the name or convince the other entity to change its name.” <http://www.sos.ca.gov/business/be/faqs.htm#suspension>

²⁴ Cal. Corp. Code § 2205(c) (specific right to amend the articles of incorporation in this situation).

²⁵ Palm Valley Homeowners v. Design MTC, 85 Cal. App. 4th 553, 559 (2000) (upholding sanctions against lawyers who knew their corporate client was suspended, but answered cross-complaints, engaged in discovery and asked the court for summary judgment). This case was heard before the status of a corporation was posted on the Secretary of State’s website. At that time, it was necessary to ask the Secretary of State’s office for a Certificate of Good Standing to determine the status of a corporation. The website does not eliminate the need to get a Certificate, but it gives a quick and early indication that there is a problem if it shows the status as “Suspended” or “Forfeited.” See footnote 20 for the web address. The website is generally updated weekly, so the status will show “Suspended” for a few days after the corporation is really “Active,” and vice versa.

judgment from another state.²⁶ Typically, when the suspension is discovered, the attorney for the suspended corporation asks the court for a continuation so the corporation can be revived. When it is revived, there is no particular penalty in the litigation after the Certificate of Revivor is obtained.²⁷ However, a statute of limitations continues to run while the corporation is trying to be revived (which is not an instantaneous process).²⁸

2.4. No real property transfers

While a corporation's powers are suspended or forfeited by the FTB or the Attorney General, the corporation "shall not be entitled to sell, transfer, or exchange real property in California during the period of forfeiture or suspension."²⁹

2.5. Contract voidability and relief from contract voidability

If the suspension or forfeiture was initiated by the FTB, the contracts made in California by the corporation while it was subject to the suspension or forfeiture are voidable by any party to the contract other than the suspended or forfeited corporation.³⁰

²⁶ In contrast, a foreign corporation that has never registered with the Secretary of State can defend an action and can file, but not maintain, an action, in California. See footnote 61 below.

²⁷ *Peacock Hill Ass'n v. Peacock Lagoon Construction Co.*, 8 Cal. 3d 369 (1972); *Cahill v. San Diego Gas & Electric*, 194 Cal. App. 4th 939, 958-59 (2011).

²⁸ *United Medical Mgmt. v. Gatto*, 49 Cal. App. 4th 1732, 1740 (1996), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997) (statute of limitations continues to run).

²⁹ Cal. Rev. & Tax. Code § 23302(d). Note that if the suspension or forfeiture is solely for failure to file a Statement of Information with the Secretary of State, this restriction does not apply.

³⁰ Cal. Rev. & Tax. Code § 23304.1(a), (d).

The only way for the other party to take advantage of this is to invoke the right to void the contract in a lawsuit. The other party cannot just send an email message or letter saying “We revoke that contract.”³¹ The court must allow the suspended or forfeited corporation a reasonable period of time in which to cure the problem.³²

If the problem is not cured within the time allowed by the court, the court will declare that the contract is rescinded. The suspended or forfeited corporation must receive full restitution of the benefits that it conferred on the other party or parties to the contract.³³

2.6. Summary of what a suspended/forfeited corporation can and cannot do:

2.6(a) Can:

- Apply for revivor
- Apply for relief from contract voidability
- Pay taxes, penalties and interest
- File delinquent tax returns necessary to revive
- Amend the articles of incorporation as required to revive or to obtain tax-exempt status
- Amend statement of designation as required to revive.

³¹ Cal. Rev. & Tax. Code § 23304.5.

³² *Id.* See text at footnote 44 regarding relief from contract voidability.

³³ *Id.*

2.6(b) Cannot:

- Do business
- Enforce contracts
- File a complaint, seek a restraining order, evict a tenant or initiate other legal action
- Defend an action in court
- Defend the corporation's name
- File a claim for refund or an amended return
- File or maintain an appeal before the State Board of Equalization
- Protest an assessment
- Sell, transfer or exchange real property in California³⁴
- Prevent another party to a contract from voiding it in court (except by reviving the corporation and paying for relief from contract voidability).³⁵

* * *

The next part of this bulletin discusses specific situations, the consequences and how to revive the corporation.

³⁴ Applies only if the suspension was by the FTB, whether or not the corporation was also suspended by the Secretary of State.

³⁵ Applies only if the suspension was by the FTB, whether or not the corporation was also suspended by the Secretary of State.

3. California for-profit corporations that:

3.1. Did not file a Statement of Information with the Secretary of State

The corporation's name is not protected and it cannot file a certificate of dissolution or amend its articles of incorporation except as required to revive. If the corporation is not also suspended by the FTB, its contracts are *not* voidable and it *can* transfer real property. It cannot use the courts without reviving.

If the corporation is compliant with the FTB, it can be revived simply by filing a Statement of Information with the Secretary of State, and paying any penalty required by the FTB. If it is also suspended by the FTB, it must also comply with the FTB's rules for revivor.

3.2. Did not file a return with or pay the Franchise Tax Board

An additional tax penalty can apply to those doing business in the name of a suspended corporation.³⁶

A corporation suspended by the FTB can be revived by filing an Application for Revivor, FTB Form 3557. The best practice is to call the FTB Revivor Unit at 886-635-0494 and to ask if the corporation has been suspended by the FTB and, if so, what exactly is required to revive the corporation.³⁷

³⁶ Cal. Rev. & Tax. Code § 19719(a) provides, in pertinent part: (“Any person who attempts or purports to exercise the powers, rights, and privileges of a corporation that has been suspended [by the FTB] or who transacts or attempts to transact intrastate business in this state on behalf of a foreign corporation, the rights and privileges of which have been forfeited pursuant to the section, is punishable by a fine of not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000), or by imprisonment not exceeding one year, or both fine and imprisonment.”)

³⁷ See *Suspension and Revivor 101*, Parts 1 through 4, in *Tax News* (a publication of the FTB) August, September, October, and November, 2010. The FTB will know if the corporation needs to file a Statement of Information.

The application for revivor would typically be submitted by an officer of the corporation. It can also be submitted by any shareholder or creditor, by a majority of the directors, or by any other person who has interest in the relief from the suspension.³⁸ However, only an officer can sign any tax returns that need to be filed to obtain the certificate of revivor, so the ability of others to file the application is not very helpful.

When the FTB is satisfied that the corporation is again compliant, it will issue a Certificate of Revivor.³⁹ Before it does so, it must check with the Secretary of State to determine that the name is still available.⁴⁰ If the name is no longer available, the corporation will be required to amend its articles of incorporation to change its name. The Revivor Unit processes the application in approximately six weeks, but the process can be expedited over 10 to 14 days. A one-day “walk-through” process is also available in some compelling circumstances.⁴¹

When the FTB issues the Certificate of Revivor, the corporation is “reinstated” and the Secretary of State will, if requested, issue a Certificate of Good Standing.⁴² On its own initiative, the Secretary of State will note on its

³⁸ Cal. Rev. & Tax. Code § 23305.

³⁹ Cal. Rev. & Tax. Code § 23305a. The FTB is authorized to accept an assumption of liability from another person or entity, a bond, a deposit, or other security for the amount due. Cal. Rev. & Tax. Code § 23305.2.

⁴⁰ *Id.*

⁴¹ *See Suspension and Revivor 101*, Part 2, in Tax News (a publication of the FTB) September, 2010.

⁴² The FTB can revive the corporation without full payment of all taxes, interest and penalties if the FTB determines that the revivor will improve the prospects for collecting the full amount due. Cal. Rev. & Tax. Code § 23305b. This type of revivor can be limited as to time or can allow the corporation to perform only certain functions. The FTB can unilaterally suspend the corporation again if the FTB determines that the prospects for collection were not really improved. *Id.*

The FTB tells the Secretary of State about the revivor. Cal. Rev. & Tax. Code § 23305c(a).

website that the corporation's status is "Active," although this might take a few days.

The "reinstatement" is "without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture."⁴³ This means that a contract that was voided remains voided after the corporation is revived. Generally, a contract that became voidable but was not voided during the suspension *can* be voided *after* the revivor. The suspended corporation can *cure* the voidability, but it requires more than just reviving the corporation.

To obtain Relief from Contract Voidability ("**RCV**"), anyone who could have filed the Form 3557 files a Form 2518 with the Revivor Unit. The corporation must be revived before it can obtain RCV, but the forms can (and should) be filed at the same time. RCV is granted for a period of time, which must *end* on the date that RCV is granted by the FTB. The period of time must *begin* on the first day of a tax year of the corporation.⁴⁴

To obtain RCV for the requested period, the corporation must also pay a "penalty." The penalty is \$100 per day (\$36,500 for each full year) or the amount of tax due for the year, whichever is less. For this purpose the "tax" does not include interest and penalties.⁴⁵ The FTB issues a Certificate of RCV, indicating the period of time for which the RCV is granted.⁴⁶ The issuance of the certificate is a matter of public record.⁴⁷

⁴³ *Id.*

⁴⁴ Cal. Rev. & Tax. Code § 23305.1(a)(2), (b). If the request for RCV is filed *after* the corporation is revived, the period must be the *entire time* that the corporation was suspended. Cal. Rev. & Tax. Code § 23305.1(b)(1)(A).

⁴⁵ Cal. Rev. & Tax. Code § 23305.1(b)(1)(B), (2)(B).

⁴⁶ Cal. Rev. & Tax. Code § 23305.1(c)(2).

⁴⁷ Cal. Rev. & Tax. Code § 23305.1(d).

The RCV, when granted, applies to any contracts that have not already been rescinded. If the corporation sold any California real estate while it was suspended (which it had no power to do), the sale is validated, as if the corporation was not suspended when it transferred the property.⁴⁸

4. California nonprofit corporations that:

4.1. Did not file a Statement of Information with the Secretary of State

The corporation's name is not protected and it cannot file a certificate of dissolution or amend its articles of incorporation except as required to revive or to obtain a tax exemption. If the corporation is not also suspended by the FTB, its contracts are *not* voidable and it *can* transfer real property. It cannot use the courts without reviving.

If the corporation is not also suspended by the FTB, the corporation can be revived simply by filing a Statement of Information with the Secretary of State. If it is also suspended by the FTB, it must also comply with the FTB's rules for revivor.

4.2. Did not file a Form RRF-1 with the California Attorney General

A nonprofit corporation active in California or holding property in California is generally required to register once with the California Attorney General and to file Form RRF-1 each year with the California Attorney General.⁴⁹ If the corporation fails to do either, its California tax exemptions can be

⁴⁸ Cal. Rev. & Tax. Code § 23305.1(c)(1)(B).

⁴⁹ Cal. Gov. Code §§ 12582.1 (defining charitable corporations subject to these rules), 12583 (registration and filing exceptions for religious organizations, educational institutions, hospitals and a few others), 12585 (initial registration), 12586 (filing reports as required by the Attorney General); Cal. Code Reg. title 11, §§ 301, 305 (requirement to file RRF-1), 311 (annual filing fee based on gross revenue).

disallowed.⁵⁰ These are the exemptions from the corporate income tax (currently 8.84% of taxable income) and the corporate minimum tax (currently \$800 annually).⁵¹ The Attorney General must give notice to the corporation before the Attorney General gives the corporation's name to the FTB to disallow the tax exemption.⁵²

If the Attorney General gives the notice to the corporation and the info to the FTB, and the FTB disallows the exemption, the corporation has an opportunity at any time to have its exemption from the corporate *income* tax reinstated, presumably back to the date it was disallowed.⁵³

However, the exemption from the corporate *minimum* tax is *not* reinstated retroactively.⁵⁴ The corporation should be prepared to pay the minimum tax for each year, plus accrued penalties and interest before the FTB will issue a certificate of revivor.

4.3. Did not file a return with or pay the Franchise Tax Board

California nonprofit corporations are subject to California corporate tax on their unrelated business taxable income.⁵⁵ The tax that is imposed on this income is the corporate income tax or at least the corporate minimum

⁵⁰ The California tax exemptions are available only if the organization qualifies for the exemption, applies for it, pays the \$25 filing fee and obtains a favorable determination letter from the FTB. Cal. Rev. & Tax. Code § 23701. The exemption can be retroactive. For a corporation that was eligible for the tax exemption but was active in California before applying for it, "disallowed" in this sense probably means that the exemption would not be applied retroactively when the organization applied for its exemption.

⁵¹ Cal. Rev. & Tax. Code § 23703(a).

⁵² Cal. Rev. & Tax. Code § 23703(b).

⁵³ Cal. Rev. & Tax. Code § 23703(c).

⁵⁴ *Id.*

⁵⁵ Cal. Rev. & Tax. Code § 23731(a).

tax.⁵⁶ Failure to pay these taxes could trigger suspension by the FTB just as for a for-profit corporation.⁵⁷

5. Non-California for-profit corporations that did business in California but:

5.1. Did not register with the Secretary of State to do business in California

The foreign corporation can be sued in California.⁵⁸

The California Attorney General or a local district attorney can impose misdemeanor criminal penalties on the corporation and the humans involved – a \$1,000 fine on the corporation and a \$600 fine on each human, plus a \$20 per day penalty.⁵⁹

Also, the corporation may not “maintain” in any California court any legal action about its business in California, until it registers with the Secretary of State, pays an extra \$250 penalty, and proves that it has paid all California taxes on its business or property in California that should have been paid for the period during which it did business in California.⁶⁰ Without becoming

⁵⁶ *Id.*, Cal. Rev. & Tax. Code § 23151(f)(2) (income tax at 8.84%), 23153(d)(1) (\$800 annual minimum tax), 23501(c) (reference to Section 23151).

⁵⁷ Cal. Rev. & Tax. Code § 23301(a), (b). See text at footnotes 36 through 48.

⁵⁸ Cal. Corp. Code §§ 2203(a)

⁵⁹ Cal. Corp. Code §§ 2203(a), 2258.

⁶⁰ Cal. Corp. Code §§ 2203(c). This does not apply to actions under federal law in federal court. *Harms v. Tops Music Enterprises*, 160 F. Supp 77 (S.D. Cal 1958). Also, a foreign corporation that does business in California, then registers with the Secretary of State, can maintain an action, even if the foreign corporation has not satisfied all of its California tax obligations before it files the law suit. *United Medical Mgmt. v. Gatto*, 49 Cal. App. 4th 1732, 1740-41 (1996) (“[This statute] simply forbids the exercise of a small part of the corporate powers, except on the specified conditions.”), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997).

compliant, the foreign corporation can defend an action and can file a complaint. But if it files a complaint, the defendant can ask the court to determine if the foreign corporation is required to become compliant before the case continues. If the court determines that the foreign corporation was doing business in California and/or subject to California taxes, the court will give the foreign corporation a limited amount of time to become compliant before the court will dismiss the action.⁶¹

The foreign corporation's contracts made in California can be voided by any other party to the contract.⁶² This applies to contracts made from the first day that the corporation was doing business in California and ends on the day that the foreign corporation registers with the Secretary of State.⁶³

The corporation can "purchase" receive from contract voidability and validate its real estate transfers.⁶⁴

(footnote continued from preceding page)

the exercise of a small part of the corporate powers, except on the specified conditions."), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997).

⁶¹ United Medical Mgmt. v. Gatto, 49 Cal. App. 4th 1732, 1740 (1996), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997). If the court dismisses the action on these grounds, the foreign corporation can file the complaint again, but the statute of limitations continues to run. In the United Medical Mgmt. case, the plaintiff foreign corporation had not registered in California, and the court dismissed its initial case. When it finally registered in California, it was allowed to file the case again because the statute of limitations had not run and the corporation was compliant with the Secretary of State and the FTB.

⁶² Cal. Rev. & Tax. Code § 23304.1(b).

⁶³ Cal. Rev. & Tax. Code § 23304.1(c), (d).

⁶⁴ See text at footnotes 44 through 48 above.

5.2. After registering, did not file a Statement of Information with the Secretary of State

The corporation's name is not protected. It cannot file a Certificate of Surrender of Right to Transact Intrastate Business. It cannot use the courts without reviving. If the corporation is *not* also suspended by the FTB, (a) its contracts are *not* voidable, (b) it *can* transfer real property and (c) the corporation can be revived simply by filing a Statement of Information with the Secretary of State.

5.3. Did not file a return with or pay the Franchise Tax Board

An additional tax penalty can apply to those doing business in the name of a forfeited corporation.⁶⁵

A foreign corporation subject to forfeiture by the FTB can be revived by filing an Application for Revivor, FTB Form 3557. The best practice is to call the FTB Revivor Unit at 886-635-0494 and to ask if the corporation has been suspended by the FTB and, if so, what exactly is required to revive the corporation.⁶⁶

The application would typically be submitted by an officer of the corporation. It can also be submitted by any shareholder, creditor, by a majority of the directors, or by any other person who has interest in the relief from the forfeiture.⁶⁷ However, only an officer can sign any tax returns that must be filed to obtain the certificate of revivor, so the ability of others to file the application is not very helpful.

⁶⁵ Cal. Rev. & Tax. Code § 19719(a).

⁶⁶ See *Suspension and Revivor 101*, Parts 1 through 4, in Tax News (a publication of the FTB) August, September, October, and November, 2010. The Revivor Unit will know if the corporation needs to file a Statement of Information.

⁶⁷ Cal. Rev. & Tax. Code § 23305.

When the FTB is satisfied that the corporation is again compliant, it will issue a Certificate of Revivor.⁶⁸ Before it does so, it must check with the Secretary of State to determine that the name is still available.⁶⁹ If the name is no longer available, the corporation will be required either to amend its articles of incorporation (in its home state) to change its name or to use an assumed name in California. The Revivor Unit processes the application in approximately six weeks, but the process can be expedited over 10 to 14 days. A one-day “walk-through” process is also available in some compelling circumstances.⁷⁰

When the FTB issues the Certificate of Revivor, the corporation is “reinstated” and the Secretary of State will, if requested, issue a Certificate of Good Standing.⁷¹ On its own initiative, the Secretary of State will note on its website that the corporation’s status is “Active,” although this might take a few days.

The “reinstatement” is “without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.”⁷² This means that a contract that was voided remains voided after the

⁶⁸ Cal. Rev. & Tax. Code § 23305a. The FTB is authorized to accept a assumption of liability from another person or entity, a bond, a deposit, or other security for the amount due. Cal. Rev. & Tax. Code § 23305.2.

⁶⁹ *Id.*

⁷⁰ *See Suspension and Revivor 101*, Part 2, in Tax News (a publication of the FTB) September, 2010.

⁷¹ The FTB can revive the corporation without full payment of all taxes, interest and penalties if the FTB determines that the revivor will improve the prospects for collecting the full amount due. Cal. Rev. & Tax. Code § 23305b. This type of revivor can be limited as to time or can allow the corporation to perform only certain function. The FTB can unilaterally suspend the corporation again if the FTB determines that the prospect for collection were not really improved. *Id.*

The FTB tells the Secretary of State about the revivor. Cal. Rev. & Tax. Code § 23305c(a).

⁷² *Id.*

corporation is revived. Generally, a contract that became voidable but was not voided during the forfeiture can be voided after the revivor. The foreign corporation can cure the voidability and validate its transfers of California real estate, but it takes more than just reviving the corporation. The process is the same as for a domestic for-profit corporation.⁷³

6. Non-California nonprofit corporations active in California but:

6.1. Did not register with the Secretary of State

The foreign corporation can be sued in California.⁷⁴

The California Attorney General or a local district attorney can impose misdemeanor criminal penalties on the corporation and the humans involved – a \$1,000 fine on the corporation and a \$600 fine on each human, plus a \$20 per day penalty.⁷⁵

Also, the corporation may not “maintain” in any California court any legal action about its business in California, until it registers with the Secretary of State, pays an extra \$250 penalty, and proves that it has paid all California taxes and on its business or property in California that should have been paid for the period during which it did business in California.⁷⁶ Without registering with the Secretary of State, the foreign corporation can defend an action and can file a complaint. But if it files a complaint, the defendant can ask the

⁷³ See text at footnotes 44 through 48.

⁷⁴ Cal. Corp. Code §§ 2203(a)

⁷⁵ Cal. Corp. Code §§ 2203(a), 2258.

⁷⁶ Cal. Corp. Code §§ 2203(c). This does not apply to actions under federal law in federal court. *Harms v. Tops Music Enterprises*, 160 F. Supp 77 (S.D. Cal 1958). Also, a foreign corporation that does business in California, then registers with the Secretary of State, can maintain an action, even if the foreign corporation has not satisfied all of its California tax obligations before it files the law suit. *United Medical Mgmt. v. Gatto*, 49 Cal. App. 4th 1732, 1740-41 (1996) (“[This statute] simply forbids the exercise of a small part of the corporate powers, except on the specified conditions.”), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997).

court to determine if the foreign corp is required to register with the Secretary of State before the case continues. If the court determines that the foreign corporation was active in California, the court will give the foreign corporation a limited amount of time to become compliant before the court will dismiss the action.⁷⁷

The foreign corporation's contracts made in California can be voided by any other party to the contract.⁷⁸ This applies to contracts made from the first day that the corporation was doing business in California and ends on the day that the foreign corporation registers with the Secretary of State.⁷⁹

6.2. After registering, did not file a Statement of Information with the Secretary of State

The corporation's name is not protected. It cannot file a certificate of surrender. It cannot use the courts without reviving. If the corporation is not also suspended by the FTB, (a) its contracts are *not* voidable, (b) it *can* transfer real property and (c) it can be revived simply by filing a Statement of Information with the Secretary of State.

6.3. Did not file a Form RRF-1 with the California Attorney General

The effects for a foreign nonprofit corporation active in California are the same as for a domestic nonprofit corporation.⁸⁰

⁷⁷ United Medical Mgmt. v. Gatto, 49 Cal. App. 4th 1732 (1996), rehearing denied by California Supreme Court, 1997 LEXIS 561 (1997) (a for-profit corporation). If the court dismisses the action on these grounds, the foreign corporation can file the complaint again, but the statute of limitations continues to run. *Id.* at 1740. This is what happened in the United Medical Mgmt. case.

⁷⁸ Cal. Rev. & Tax. Code § 23304.1(b).

⁷⁹ Cal. Rev. & Tax. Code § 23304.1(c), (d).

⁸⁰ See text at footnotes 49 through 54.

6.4. Did not file a return with or pay the Franchise Tax Board

Foreign nonprofit corporations are subject to California corporate tax on their unrelated business taxable income sourced in California.⁸¹ The tax that is imposed on this income is the greater of the corporate income tax or the corporate minimum tax.⁸² Failure to pay these taxes could trigger suspension by the FTB just as for a foreign for-profit corporation.⁸³

* * * *

I would be pleased to discuss with you the possible revivor of a corporation.

-- William C. Staley
(818) 936-3490
www.staleylaw.com

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⁸¹ Cal. Rev. & Tax. Code § 23731(a).

⁸² *Id.*, Cal. Rev. & Tax. Code § 23151(f)(2) (income tax at 8.84%), 23153(d)(1) (\$800 annual minimum tax), 23501(c) (reference to Section 23151).

⁸³ Cal. Rev. & Tax. Code § 23301(a)(b).