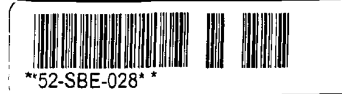

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CALMAR STEAMSHIP CORPORATION)

Appearances:

For Appellant: Cravath, Swaine & Moore and Brobeck, Phleger & Harrison, Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel; Hebard P. Smith, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 25667 of the Revenue and Taxation Code (formerly Section 19 of the Corporation Income Tax Act) from the action of the Franchise Tax Board on the protests of Calmar Steamship Corporation to proposed assessments of additional tax in the amounts of $12,659.34, $11,832.33 and $1,555.90 for the years 1940, 1941 and 1942, respectively.

The Appellant, a Delaware corporation with its principal office and place of business in New York City, operates ships in interstate and foreign commerce. During 1940 and until the summer of 1941 it was engaged exclusively in operations in intercoastal trade through the Panama Canal between ports on the Atlantic Coast and ports in California, Oregon and Washington. In the summer and fall of 1941 its vessels made several voyages to the Red Sea carrying war supplies. On January 21, 1942, Appellant was ordered to transfer all its ships to the United States Maritime Commission and upon completion of a voyage of one of its vessels on February 19, 1942, all its ships thereafter operated in interstate and foreign commerce under time charter to that Commission.

Calmar did not engage in any activities in California other than those incident to its business of transporting freight exclusively in interstate and

foreign commerce. Its vessels stayed in ports of this State for a few days for the purpose of discharging cargo and taking on bunker fuel and such ship's supplies as are of an emergency nature. Prior to May 1, 1940, operating details in California, such as the emergency purchase of supplies, arranging for pilotage and towing; handling of cargo and solicitation of freight, were carried out for it by an independent contractor. From May 1, 1940, to March 31, 1942, these operating details were handled here by employees of Calmar. Until March 31, 1942, Appellant maintained an office in San Francisco for its Pacific Coast manager whose duties were to consult with and advise the independent contractor acting for Appellant prior to May 1, 1940, and masters of Calmar vessels while in Pacific Coast ports. He also spent considerable time in Oregon and Washington in connection with Appellant's affairs. All the general business activities of Calmar were conducted, however, from the East Coast.

Appellant filed returns for 1940, 1941 and 1942 employing the three factor formula of property, payroll and sales to apportion its income to sources within and without the State. As respects the property factor, it did not assign to California any portion of the value of its ships. In the case of the payroll factor, it attributed to this State all or an appropriate portion of the salaries of its employees located here and such portion of the wages of the crews of its ships as in its opinion was allocable to services performed while the ships were in California ports. The allocation of the wages of the crews was apparently made on the basis of a fraction of which California port days was the numerator and total voyage days of all vessels was the denominator.

The Franchise Tax Board did not agree with this assignment of Appellant's property and payroll to within and without the State. That Board's redetermination of the portion of the income from California sources made use of the same allocation factors, but the California property and payroll were considered as including that percentage of the value of each vessel and that percentage of the vessel's operating personnel, respectively, which the total days of the vessel in California ports bore to total days in all ports. The proposed deficiency assessments here in question resulted from these adjustments in the property and payroll factors of the allocation formula.

Waivers had been obtained by the Respondent from **Calmar,** pursuant to Section 19 of the Corporation Income Tax Act, extending until March 15, 1948, the time within which to mail notices proposing assessments of additional tax for the years 1941 and 1942. On January 7, 1948, the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) requested certain supplementary information from Appellant-and also asked that he be informed of the "date as extended for proposing and assessing additional taxes for Federal purposes." Under date of January 28, 1948, Calmar replied to this letter and stated that the date had been extended to June 30 1949, with respect to the calendar years 1941 and 1942. The&after, contrary to his usual practice when a Federal waiver had been executed, the Commissioner on February 13, '1948, requested a waiver extending the limitation period for the State tax to March 15, 1949, for those years. While the waiver form referred merely to the consent and agreement of Calmar that the period for proposing to assess additional taxes be extendedto March 15, 1949, the letter of February 13, 1948, requesting it stated:

> "This waiver will not only extend the period for proposing additional assessments, but also will extend the period within which a refund may be made, whichever is disclosed upon completion of the audit."

The Appellant's executed State waivers for the years 1941 and 1942 were received by the Commissioner on March 5, 1948. The Commissioner's notices of proposed assessments of additional tax for the years 1941 and 1942 were mailed to Appellant on May 12, 1949, and April 19, 1949, respectively.

Calmar attacks the Respondent's use of the so-called port-day formula for arriving at the amount of its California property and payroll for allocation purposes on both statutory and constitutional grounds, as did the taxpayer in the Appeal of American President Lines, Inc,, this day decided. As we pointed out in our decision in that matter, however, the Attorney General in his Opinion NS 4344 of June 5, 1942, to the Franchise Tax Commissioner upheld the validity of the port-day formula as a proper and constitutional construction of the Corporation Income Tax Act. Here, too, in view of the considerations set forth in the Opinion of the

Attorney General, the action of the Respondent on the question of allocation is sustained.

Section 19 of the Act, relating to the assessment of an additional tax, provided in part as follows:

> "(f) Except in the case of a fradulent return, every notice of additional tax proposed to be assessed hereunder shall be mailed to the taxpayer within four years after the return was filed and no deficiency shall be assessed or collected with respect to the year for which such return was filed unless such notice is mailed within such period; provided, that in the case of any taxpayer which shall agree with the United States Commissioner of Internal Revenue for an extention (or renewals thereof) of the period. for proposing and assessing deficiencies in Federal income tax for any year, the period for mailing notices of proposed deficiency tax pursuant to this section shall (unless otherwise agreed between the commissioner and the taxpayer) be four years after the return was filed or six months after the date of the expiration of the agreed period for assessing deficiencies in Federal income tax, whichever period expires the later. For the purposes of this paragraph a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.
>
> "(g) Where before the expiration of the time prescribed in this section for the assessment of the tax, the taxpayer has consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon, The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

The Appellant contends that the Commissioner lacked authority to assess a deficiency against it for the years 1941 and 1942 after March 15, 1949, that being the end of the limitation period as extended in its waivers received by him on March 5, 1948. The Respondent argues, however, that the limitation period did not expire as respects those years until June 30, 1949, the date to which Appellant had extended the time for Federal tax purposes.

The position of the Appellant, in our opinion, must be sustained. Subdivision (f) of Section 13 did not in all cases automatically extend the limitation period for State deficiencies whenever the taxpayer and the United States Commissioner of Internal Revenue agreed to an extension for Federal deficiencies. Subdivision (g) clearly contemplated the consent by the taxpayer to an extension of time for assessment by the State and Subdivision (f), recognizing such an extension for State purposes, qualified the rule of State extension by virtue of Federal extension with the phrase "unless otherwise agreed between the [State] commissioner and the taxpayer," At the time of the agreement for the extension of the Federal period to June 30, 1949, there was in effect a consent or agreement of the Appellant for an extension under the State law. Subsequent to the extension for Federal purposes and within the period of the prior State extension the Appellant again filed its consent or agreement under the State law. The Respondent has not explained, nor do we understand, why these consents or agreements do not bring into operation the "unless otherwise agreed" phrase of subdivision (f).

It should be observed, furthermore, that under the State statute a waiver does not operate solely to tho benefit of the tax administrator, Section 20 provided that the period within which refunds may be allowed for a given year shall be the period within which the administrator may make an assessment for that year under Section 19. The situation, then, is that of a two-way rather than a one-way street inasmuch as an agreement between the taxpayer and the State tax administrator for a limitation period to terminate either before or after the period as extended for Federal tax purposes may operate to the benefit of the taxpayer as well as the benefit of the State or, on the other hand, to the detriment of the former as well as to that of the latter.

We conclude, accordingly, that the Franchise Tax Commissioner in requesting from the Appellant and accepting from it the series of State waivers had "otherwise agreed" with the Appellant as to the period within which a proposed assessment of additional tax might be issued for the years 1941 and 1942. As the notices of the proposed assessments for those years were not mailed within that period the Appellant's position based on the limitation provisions of Section 19 of the Act must be upheld.

O R D E R

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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Calmar Steamship Corporation to a proposed assessment of additional tax in the amount of $12,659.34 for the year 1940 be and the same is hereby sustained, and that the action of said Board on the protests of said Corporation to proposed assessments of additional tax in the amounts of $11,832.33 and $1,555.90 for the years 1941 and 1942, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 18th day of December, 1952, by the State Board of Equalization.

Wm. G. Bonelli, Chairman

J. H. Quinn, Member

Geo. R. Reilly, Member

________________, Member

________________, Member

ATTEST: F. S. Wahrhaftig, Acting Secretary