



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal)

of

CALTEX SPORTSWEAR CO. OF
CALIFORNIA, INC.

Appearances:

For Appellant: Marcus, Rabwin, Nash & Naiditch,
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 from the action of the Franchise Tax Board on the protests of Caltex Sportswear Co. of California, Inc. to proposed assessments of additional franchise taxes for the income years 1945 and 1946 in the amounts of \$2,474.56 and \$249.31, respectively,

Appellant is a Delaware corporation engaged in the manufacture and sale of ladies sportswear and beach apparel. All of its manufacturing is done at Los Angeles, California. Its products are sold to customers throughout the United States,

For some years prior to 1944, Mr. Bernard R. Hoelscher was employed as general manager of Appellant's predecessor, a partnership. In that year he terminated his employment and organized a sales agency under the firm name of Bernard R. Hoelscher and Associates. By an agreement entered into between Appellant and Bernard R. Hoelscher and Associates, Appellant granted to that firm an exclusive right to sell Appellant's products for the period from January 1, 1945, to January 1, 1946. For its services the agency was to receive a commission of ten percent of the net amount of all orders accepted by Appellant and paid for by the purchasers.

By the terms of the contract the sales agency agreed to solicit sales from approved prospects at least every six months, but it retained the right to sell non-competing lines of other manufacturers. All orders were subject to

acceptance by Appellant, the merchandise was delivered by Appellant to the purchaser, and payment therefor was made directly to Appellant. Bernard R. Hoelscher and Associates paid its own operating expenses, hired its own personnel, and appears to have functioned as a **completely** independent firm. For the period of the agreement Appellant did not maintain offices or employees in any state other than California.

Upon termination of the foregoing agreement on January 1, 1946, Appellant employed Mr. Hoelscher as its general manager and resumed the distribution of its own products. During the income year 1946 Appellant maintained showrooms in Los Angeles and New York for the purpose of soliciting sales of its products. In smaller cities sales of its products were solicited by sales representatives under commission agreements said to be substantially similar, except for the territory covered, to the previous contract between Appellant and Bernard R. Hoelscher and Associates,

In its franchise tax return for each of the years in question, Appellant, acting under Section 10 of the Bank and Corporation Franchise Tax Act (now Section 24301 of the Revenue and Taxation Code), allocated its income to sources within and without California by the three-factor formula of property, payroll, and sales. In applying the formula it treated sales made without the State by Bernard R. Hoelscher and Associates and other similar sales representatives, as out-of-state sales. The Franchise Tax Board determined that such sales did not result from out-of-state activities of Appellant, and included them in the sales factor as California sales. Although the Franchise Tax Board also made some adjustments to the payroll factor for the income year 1946, those adjustments are not in issue in this appeal.

Although Appellant has asserted that the out-of-state activities of Bernard R. Hoelscher and Associates should be deemed the activities of Appellant, its principal argument is directed to the proposition that income from sales made out-of-state through Bernard R. Hoelscher and Associates is derived from or attributable to sources outside the State, without regard to the status of that firm as an employee, agent or independent contractor. It bases the latter contention upon an analysis of the **statutory history** of Section 10, supra. with particular reference to the amendment of that section in 1939 (Stats. 1939, p. 2944). Similar arguments presented in prior appeals involving sales made out-of-state through independent sales representatives have been rejected by this Board. See Appeals of Great Western Cordage, Inc., decided April 22, 1948, Farmers Underwriters Association, decided February 18, 1953, and The Times-Mirror Company, decided October 27, 1953.

In Irvine Co. v. McColgan, 26 Cal. 2d 160, and El Dorado Oil Works v. McColgan, 34 Cal. 2d 731, it was held that sales outside California through independent contractors, brokers, and agents were not out-of-state activities of the producing corporation in California and did not constitute doing business outside this State by the corporation, within the meaning of Section 10 as it read prior to 1939. Although Section 10 was amended in that year to provide that the tax shall be measured by net income derived from or attributable to sources within this State, whereas previously the tax had been measured by that portion of net income derived from business done in this State, we believe the reasoning of those decisions to be applicable to the present controversy. As we have stated in prior opinions, supra, from the standpoint of the source of income, as well as of doing business, the activity of Appellant outside California is to be distinguished from activity outside California on its behalf by independent firms. Since all of the sales in question were made through independent firms, rather than by employees, they were not sales made by Appellant outside this State, and the action of the Franchise Tax Board must be sustained.

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 protests of Caltex Sportswear Co. of California, Inc. to proposed assessments of additional tax in the amounts of \$2,474.56 and \$249.31 for the income years 1945 and 1946, respectively, be and the same is hereby sustained.

Dated at Sacramento, California, this 20th day of January, 1954, by the State Board of Equalization.

Geo. R. Reilly , Chairman
J. H. Quinn , Member.
Paul R. Leake , Member
Wm. G. Bonelli , Member
_____ , Member

ATTEST: Dixwell L. Pierce , Secretary