BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal)
of)
CORO, INC.)

Appearances:

For Appellant: H. M. Powell, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel; Crawford H. Thomas, 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 Coro, Inc. to proposed assessments of additional franchise tax in the amounts of $2,014.58 and $648.03 for the taxable years 1945 and 1946, respectively, the tax for both years being measured by income of the year 1945.

Appellant is a New York corporation which commenced doing business in California in 1945. It is a wholesaler of novelty jewelry and maintains several regional offices, including one in Los Angeles which serves an area covering eight western states.

The Appellant has objected to the Respondent's action in (1) disallowing a deduction for New York franchise taxes, (2) including certain interest income in allocable net income, (3) limiting the amount of interest which is deductible, and (4) increasing the percentage of net income allocable to California.

Section 8(c) of the Bank and Corporation Franchise Tax Act, for the years in question (now Section 24121c of the Revenue and Taxation Code), provides for the deduction of taxes paid or accrued during the income year except, among others, taxes "... on or according to or measured by income or profits paid or accrued within the income year imposed by the authority of ... any state ..." Acting under that provision of the law, Respondent disallowed the deduction for the income year 1945 of the New York state franchise tax in the amount of $22,256.58. The New York franchise tax is not in all instances measured by income and

for that reason Appellant contends that the exception from deduction in Section 8(c) does not preclude the deductian of the New York tax.

The New York statute provides for the imposition of the franchise tax on every corporation "upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided..." (New York Tax Law, Art. 9-A, Section 209). The tax is computed upon the entire net income, or upon business or investment capital, or upon a part of the net income plus salaries and other compensation paid to officers and certain major shareholdess, or a stated minimum amount, whichever results in the greatest tax, (Sec. 210,) Insofar as pertinent to this appeal, the New York law was the same in 1945 as now. The taxpayer does not have the choice of the method of computation to be followed. It is undisputed that the New York taxes paid by Appellant were actually measured by income,, In applying the plain wording of the California law in Section 8(c) the conclusion is inescapable that the New York tax is not deductible in this case,

Appellant makes a further argument that the New York tax on corporate franchises accrues on the first day of the year and that at that time it is unknown whether the tax will be based on income, Inasmuch as the California franchise tax is measured by the income of the year preceding the filing of the tax return and allows deductions paid or accrued in that year, we are unable to find merit in this contention. At the 'close of the income year in question and prior to filing its California return, the Appellant knew, or could have ascertained, which alternative measure would be used for the computation of its New York tax.

The Respondent has included in Appellant's income subject to allocation interest income amounting to $326.81. Although Appellant has not denied that this item represents interest from unitary assets, it has not presented any authority in support of its position that the interest is not includible in allocable income. Section 10 of the Bank and Corporation Franchise Tax Act (now Section 24301) provides that business income derived from or attributable to sources both within and without this State is to be allocated. It follows that we must sustain the action of the Respondent on this point as it is incumbent upon the taxpayer to do something more than merely assert the incorrectness of the tax determination. Todd v. McColgan, 89 Cal. App. 2d 509.

A third issue relates to the Respondent's disallowance of the deduction of interest expense in excess of an amount equal to the interest income included in allocable net income. The Respondent has allowed the interest deduction to the limit permitted by Section 8(b) of the Act (now Section 24121b). Here, again, Respondent's determination is in accordance with the statutory requirements and Appellant has advanced no argument to the contrary.

Appellant contends, however, that to the extent the adjustments made by Respondent with respect to the New York tax, the unitary interest, and the interest deduction are authorized by the Bank and Corporation Franchise Tax Act, the statute is invalid under the Constitutions of the United States and of California, As we have often stated, this Board refrains from passing on questions concerning the asserted unconstitutionality of the statute in order to make it possible for such issues to. receive judicial consideration, Appeal of Tide Water Associated Oil Company June 3, 1948. In that appeal, as here, the taxpayer contended that Section 8(b) was invalid..

The final issue in this appeal relates to the sales factor of the allocation formula as adjusted by the Respondent. Appellant's return apportioned 1.4950% of its sales to California. Respondent increased the percentage of sales attributable to California to 4.25446. Appellant contends that sales made in New York City, Chicago and other places where industry style shows are customarily held outside of California were allocated by Respondent to California if the customer's place of business was located in this State, and that many of these sales were made by salesmen attached to a regional office other than the one *in* Los Angeles,

An audit by the Franchise Tax Board revealed that the Appellant had reported as California sales only those sales filled from California inventories, The Respondent redetermined the amount of California sales from Appellant's records of commissions paid to salesmen working out of its Los Angeles office. Appellant furnished information that sales negotiated by one B. Goodman; were not solicited in California, but no similar information was given with respect to activities of other California salesmen. Respondent eliminated all sales of Mr. Goodman from those allocated to California. There is nothing to indicate that sales made by salesmen from offices outside this State were apportioned to the California sales factor. Inasmuch as the method followed by Respondent is fair and reasonable and the figures used were those supplied by Appellant, the sales factor so computed 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 protests of Coro, Inc. to proposed assessments of additional franchise tax in the amounts of $2,014.58 and $648.03 for the taxable years 1945 and 1946, respectively, income year 1945, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of March, 1955, by the State Board of Equalization,

J. H. Quinn, Chairman

Geo. R. Reilly, Member

Paul R. Leake, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary