BEFORD THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
SNAP-ON TOOLS CORPORATION

Appearances:

For Appellant: George G. Witter, Attorney at Law

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

OPINION

These appeals are made by Snap-On Tools Corporation pursuant to Section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) in denying its claims for refund of franchise taxes in the amounts of $1,426.65, $1,469.59 and $950.45 for the income years 1945, 1946 and 1947, respectively, and pursuant to Section 25667 of the Code from the action of the Franchise Tax Board on its protests to proposed assessments of additional franchise taxes in the amounts of $3,459.48, $4,263.46 and $3,232.86, respectively, for the same years,

Appellant, a Delaware corporation with its principal place of business at Kenosha, Wisconsin, is engaged in the manufacture and sale of hand tools featuring a "snap-on" device from which the company name and trade-mark is derived, Originally the distribution of its products was entirely through marketing outlets which were independently owned and operated, Gradually, however, Appellant purchased the assets of many of these distributorships until, during the years in question, it owned and operated the majority of them as company branches. Eleven distributorships had not been so acquired, two of these being in California, These two distributorships, located in Los Angeles and San Francisco, were operated by Anthony Oberholtz, Jr, All of Appellant's products sold in California were handled through these two outlets,

The name "Snap-On Tools Corporation" or "Snap-On Tools" was prominently featured at the Los Angeles and San Francisco premises. Telephones at each location were listed under such names. Letterheads, bill-heads, invoices and other forms used by the distributorships also bore such names and designated Los Angeles and San Francisco as branch offices. Sales tax permits and local bank accounts were in the company name.

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In the corporation's annual report all the sales outlets, including the eleven which had not been acquired by Appellant, were listed together as branch offices, Various forms of insurance were purchased by Appellant on a nation-wide basis and were charged to its non-company owned distributorships on a pro-rata basis, Appellant maintained central payroll records and filed withholding statements for the employees of each such distributorship, for which it charged the distributor twenty-five cents per employee per month,

Mr. Oberholtz purchased the Los Angeles distributorship in 1932 directly from the previous owner. Appellant acquired the San Francisco outlet from the widow of the previous owner on April 1, 1939, and on the same day by written agreement sold it to Oberholtz, The capital required to purchase each business was furnished by Mr, Oberholtz. By these separate transactions Oberholta acquired, and during all of the period in controversy owned, the furniture, fixtures, equipment, supplies, and accounts receivable of each of the two California distributorships. He built, and through a corporation organized by him owned, the building in which the Los Angeles business was located,

Appellant consigned merchandise to the Los Angeles and San Francisco distributorships, It was sold by route salesmen covering the area in trucks from which deliveries were made. Approximately 110 persons were employed in the two locations, When merchandise was removed from the consigned stock and put into a truck it was charged to Mr. Oberholtz at a marked up price. The prices at which the products were subsequently sold were determined by Mr. Oberholtz. His gross profit consisted of the difference between the amounts charged to him by Appellant and the amounts for which the products were subsequently sold. He assumed liability for all the expenses of operation and upon him fell the risk of credit sales and losses from all other sources. Approximately 15 percent of the business of the Los Angeles and San Francisco distributorships consisted of sales of merchandise purchased by Mr. Oberholtz from other manufacturers,

Although the local bank accounts were in the name of Appellant, they had been opened by Mr. Oberholtz for his own use. He was the only person authorized to make withdrawals on the Los Angeles account. At the insistence of the bank, however, an officer of Appellant designated by Mr. Oberholtz was also authorized to make withdrawals from the San Francisco account. Appellant has never made any withdrawals from either account and has- at no time made any claim to the funds therein. Mr. Oberholtz used these accounts for his own purposes and from funds deposited therein he paid all the expenses of operation, including the salaries and wages of employees, He hired, directed and, when necessary, discharged employees of the two offices. Appellant owned no property in California other than the stock of merchandise consigned to Oberholtz. The accounts receivable and the bank accounts, together with all tangible property, except the inventory of consigned merchandise owned by Appellant, were at all times assessed to Mr. Oberholtz for tax purposes and he paid all the taxes levied thereon.

Appellant's books showed only the amounts charged to Mr. Oberholtz for merchandise and did not reflect either the names of customers or the sales of the Los Angeles and San Francisco offices. Neither its financial statement nor its annual report included the revenues or expenses of the operations at those locations. In both its Federal and California tax returns it reported as gross receipts from sales the amounts charged to Oberholte for merchandise withdrawn by him.

The Franchise Tax Board contends that the outlets in Los Angeles and San Francisco constituted branch sales offices of Appellant and that all the California operations were a part of its unitary business. Appellant, on the other hand, contends that Mr. Oberholtz was an independent contractor doing business on his own behalf, Both rely on Bank and Corporation Tax Regulation 15000 (now Section 23040(b) of the California Administrative Code), the relevant parts of which provide as follows:

* * *

"(c) Foreign corporations do not become subject to the tax imposod by the Bank and Corporation Franchise Tax Act simply because they send goods to California dealers or brokers on consignment or because they maintain stocks of goods hero from which deliveries are made pursuant to orders taken by independent dealers or brokers. Such corporations, however, are subject to the tax imposed by the California Corporation Income Tax Act, since a portion of their income is attributable to the investment represented by the property located in this State.

"(d) Foreign corporations which make deliveries from stocks of goods located in this State 'pursuant to orders taken by agents in this State are engaged in intrastate business in this State and are taxable under the Bank and Corporation Franchise Tax Act, even though they have no office or regular place of business in this State, Since all the income of such corporations from sources in this State will be included in the measure of the franchise tax, such corporations are not subject to the Corporation Income Tax Act,

"(e) Whether or not orders are taken or sales are made by an agent or by an independent dealer or broker must depend upon the facts of each particular case. In general, if a person acts only for one company, and takes orders or makes sales in the name of that company, or otherwise purports to represent that company, he is acting as an agent, and his acts are the acts of the company. Conversely, if a person or corporation takes orders or makes sales for a number of companies, or purports to be doing

> business on his or its own account, and not as a representative of some other party, the person or corporation is generally acting as an independent dealer or broker. These rules are, however, subject to exceptions."

The Franchise Tax Board relies on subdivisions (d) and (e) of the regulation, Appellant takes the position that subdivision (c) is applicable, Both are agreed that Appellant engaged in no other activities in California and that if it did not operate the distributorships at Los Angeles and San Francisco, it was not subject to taxation under the Bank and Corporation Franchise Tax Act, See Irvine Co, v. McColgan, 26 Cal, 2d 160, and El Dorado Oil Works v. McColgan, 34 Cal, 2d 731.

The narrow issue for our decision is whether Oberholtz was conducting the California operations as an employee or agent of Appellant or as his own business. In construing the business relationship between Appellant and Oberholtz it is the total situation that controls, Bartels v. Birmingham, 332 U. S. 126, The Franchise Tax Board does not allege, nor does it appear, that the arrangement between Appellant and Oberholtz was a sham, or that it was entered into for the purpose of tax avoidance, To the contrary, while contending that Oberholtz is only an employee or agent of Appellant, the Franchise Tax Board makes the statement that "In effect Mr. Oberholtz has undertaken to guarantee financially the operations of the San Francisco and Los Angeles offices..."

The investment by Mr. Oberholtz of his own capital in the purchase of the Los Angeles and San Francisco distributorships, his authority to determine the price at which merchandise was to be sold, his control over the hiring, direction and compensation paid to employees, his retention of accounts receivable, his liability for all operating expenses and losses, and last, but not least, his opportunity for greater profit from sound management, all point to a great deal more than a financial guarantee. They are the mark of an independent contractor operating a business on his own behalf and for his own benefit. United States v. Silk, 331 U. S. 704; Skelton v. Fekete, 120 Cal, App. 2d 401, Mountain Meadow Creameries v. Industrial Commission of California, 25 Cal. App, 2d 123. We conclude, accordingly, that under subdivision (c) of Bank and Corporation Franchise Tax Regulation 15000 Appellant was subject to a tax under the California Corporation Income Tax Act, rather than the Bark and Corporation Franchise Tax Act, measured only by income attributable to its investment in property located in this State,

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 (1) pursuant to Section 26077 of the Revenue and Taxation Code that the action of the Franchise

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Tax Commissioner (now succeeded by the Franchise Tax Board) in denying the claims of Snap-On Tools Corporation for refund of franchise taxes in the amounts of $1,426.65, $1,469.59 and $950.45 for the income years 1945, 1946 and 1947, respectively, be and the same is hereby reversed; and (2) pursuant to Section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Snap-On Tools Corporation to proposed assessments of additional franchise taxes in the amounts of $3,459.48, $4,263.46 and $3,232.86 for the income years 1945, 1944, and 1947 be and the same is hereby reversed.

Done at San Francisco, California, this 29th day of December, 1958, by the State Board of Equalization,

George R. Reilly, Chairman

Robert E. McDavid, Member

Paul R. Leake, Member

J. H. Quinn, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary