BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SMITH, KLINE & FRENCH LABORATORIES)

Appearances:

For Appellant: Bruce M. Casey, Jr., Attorney at Law

For Respondent: F. Edward Caine, 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 protest of Smith, Kline & French Laboratories to proposed assessments of corporation income tax in the amounts of $1,783.72, $2,583.20, $2,964.78, $3,027.73 and $3,185.95 for the years 1947, 1948, 1949, 1950 and 1951, respectively. Subsequent to filing the appeal, Appellant paid the tax, and pursuant to Section 26078 the appeal will be treated as an appeal from the denial of claims for refund.

Appellant is a Pennsylvania corporation with its principal place of business in Philadelphia. Appellant is not qualified to do business in California and it maintains no place of business nor stock of merchandise here. During the years in question, Appellant regularly sold pharmaceutical products to California wholesalers. The merchandise was shipped from Philadelphia by carrier directly to the California customer. The sales were made pursuant to purchase orders sent by. California wholesalers directly-to Appellant's Philadelphia office, The volume of the California sales increased from approximately $1,000,000 in 1947 to approximately $2,000,000 in 1951.

One of Appellant's divisions, with headquarters in Philadelphia, was known as the Medical Promotion Division. This division advertised Appellant's products to doctors, distributors, and other interested parties. Advertisements were placed in magazines, and samples, cards and letters were mailed. The division also employed "professional service representatives" who called on doctors in California to acquaint these doctors with the new products produced by the Appellant, together with new uses for its old products. The salaries paid to these representatives increased from

approximately $14,000 in 1947 to approximately $46,000 in 1951.

Acting upon advise of counsel that the California corporation income tax was unconstitutional as applied to it, Appellant filed no returns, for the years in question. However, in 1956, at the demand of Respondent for returns, it furnished all relevant information to the Respondent. Notices of corporation income tax proposed to be assessed were mailed to Appellant on May 2, 1957. On May 31, 1957, Appellant filed a written protest to the proposed assessments. On August 9, 1957, Respondent issued notices of action affirming its proposed assessments and Appellant thereafter filed its appeal with this Board..

At the outset, Appellant claims that Respondent is without statutory authority to assess the tax. Its contention is that, although there was authority in the former Corporation Income Tax Act to make an assessment where no return was filed, this authority was not carried forward when the Act was codified in 1951. Appellant points out that from the year 1951 and until May 30, 1957, Section 25732 of the Revenue and Taxation Code gave authority to make an assessment of franchise tax where no return was filed but did not expressly apply to the income tax.

It is our opinion that, despite this apparent oversight of the Legislature, there was authority to make the assessments in question,

The tax here involved, if it applies to Appellant at all, which we shall determine in a later portion of this opinion, was imposed under Section 23501 of the Revenue and Taxation Code and former Section 3 of the Corporation Income Tax Act. (See Rathjen Bros., Inc. v. Collins, 50 Cal. App. 2d 774.) Section 25732 provided a procedure or remedy to enforce the obligation to pay the tax and the 1957 amendment of that section made the procedure applicable to enforce the existing obligation, (San Bernardino County v. Industrial Acc. Comm., 217 Cal. 618; Lincoln v. Superior Court, 2 Cal. 2d 127; Maguire v. Cunningham, 64 Cal. App. 536; California Emp. Stab. Comm. v. Smileage Co., Ltd., 68 Cal. App. 2d 249.) It should be noted that there is no statute of limitations which bars an income tax assessment where no return is filed. None may be found in the Revenue and Taxation Code and the limitation statutes in the Code of Civil Procedure do not apply. (See Bold v. Board of Medical Examiners, 133 Cal. App. 23.) The notices of action affirming the proposed assessments here in question were issued after the amendment of Section 25732 became effective. Since that section does not prescribe any particular form of assessment, we see no persuasive reason why the notices of action should not be regarded as valid assessments.

Moreover, Section 25932 of the Revenue and Taxation Code, which has been in effect since 1951, allows the Franchise Tax Board to levy either an income or a franchise tax against a taxpayer who, upon notice and demand, fails to file a return "unless it is shown that such failure is due to reasonable cause and not due to wilful neglect." The mere belief of the taxpayer that he is not subject to the tax, even if the belief is based upon the opinion of an attorney, would not, in our view, constitute reasonable cause for failing to file a return after a demand has been made. To give effect to an opposite view would be entirely inconsistent with and would emasculate the power to demand a return, contrary to the cardinal rule that effect should be given to the statute as a whole. (Neuwald v. Brock, 12 Cal. 2d 662.) A different view would also espouse the anomaly that the cooperative person who filed a return in response to a demand would be taxable and one who refused to do so would not be taxable. Where a statute is susceptible of more than one construction, the one that leads to the more reasonable result should be followed. (Metropolitan Water District v. Adams, 32 Cal. 2d 620.) We conclude that if a taxpayer has the necessary information to complete a return, and is not otherwise prevented from filing it, his failure to file after a demand subjects him to an assessment based on any available information. He may, of course, file a return without reporting that a tax is due.

With regard to the merits of the matter, Appellant contends that the application of the tax violates the commerce and due process clauses of the United States Constitution. This contention must be rejected for the reasons set forth in our opinion in Appeal of Dr. Posner Shoe Co., Inc., this day decided. Although Appellant emphasizes that its employees did not solicit orders in California, the activities which they engaged in, promoting Appellant's products among the doctors who prescribed drugs for their patients, went to the heart of the matter of selling drugs in this State. The active promotion of sales by employees physically present within a state is readily distinguishable from the advertising and occasional deliveries involved in the case relied upon by the Appellant, Miller Bros. Co. v. Maryland, 347 U.S. 340. (Cf. Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So. 2d 70, App. dism. and cert. den., 359 U.S. 28.)

In the determination of this matter, we have taken into consideration Public Law 86-272, a Federal act which places certain limitations upon the power of a state to tax income derived from interstate commerce. By its terms, the act does not apply to taxes "assessed" prior to its effective date, September 14, 1959. For the reasons stated by us in Appeal of American Snuff Co., this day decided, we conclude that the tax in question was "assessed," within the meaning of the act, before the effective date of the act.

Appeal of Smith, Kline & French Laboratories

ORDER

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 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Smith, Kline & French Laboratories for refund of corporation income tax in the amounts of $1,783.72, $2,583.20, $2,964.78, $3,027.73 and $3,185.95 for the years 1947, 1948, 1949, 1950 and 1951, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 20th day of April, 1960, by the State Board of Equalization,

John W. Lynch, Chairman

Richard Nevins, Member

George R. Reilly, Member

_____, Member

_____, Member

ATTEST: Dixwell L, Pierce, Secretary