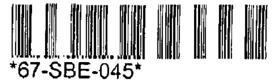

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ANCHOR HOCKING GLASS CORPORATION)

Appearances:

For Appellant: Francis G. Stapleton
Attorney at Law

For Respondent: A. Ben Jacobson
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 Anchor Hocking Glass Corporation against proposed assessments of additional franchise tax in the amounts of $19,427.43 and $37,792.06 for the income years 1959 and 1960, respectively.

In regard to these assessments appellant concedes that it is conducting a unitary business and that it is liable for the proposed assessments to the extent of $18,647.43 and $32,922.06 for the income years 1959 and 1960, respectively. The amounts remaining in dispute result from respondent's inclusion in appellant's unitary operations of two subsidiaries which appellant considers to be separate businesses.

Anchor Hocking Glass Corporation (hereafter "appellant") is a leading manufacturer of glass tableware and glass containers. Approximately 10 percent of its business consists of the manufacture and sale of caps and closures for various types of jars and bottles. Appellant's principal place of business is in Lancaster, Ohio. The majority of its customers are food processors and beverage companies.

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Appellant's operations are conducted by a series of divisions and subsidiaries. Through the years it has acquired ownership of several existing and prosperous corporations. Among the companies so acquired by appellant is a Canadian corporation, Anchor Cap and Closure Corporation of Canada, Ltd. (hereafter referred to as "the Canadian company" or "Canadian Co."), which has been wholly owned by appellant since 1937. In 1944 appellant acquired 97.5 percent of the stock of Carr-Lowrey Glass Company (hereafter "Carr-Lowrey"), an established domestic corporation.

It was respondent's inclusion of these two subsidiaries in appellant's unitary business group which gave rise to the protested portion of the proposed assessments. Thus, the primary issue in this appeal is whether either or both the Canadian company and Carr-Lowrey were engaged in a unitary business with appellant during the years 1959 and 1960.

The Canadian company manufactures and sells caps and closures for bottles and jars, similar to those caps and closures produced by appellant. It operates exclusively in Canada. Its manufacturing plant is located in Toronto, and it has salesmen and sales offices in a number of cities throughout Canada.

During the appeal years Canadian Co. was managed by its own executive staff located in Canada, with only minimum control being exerted by appellant. However, three of the Canadian company's seven directors and three of its eight officers held similar positions with appellant. Included in this count is the chairman of Canadian Co.'s board of directors who simultaneously served as vice-president in charge of appellant's Closure Division.

The Canadian company maintained its own sales force independent of that of its parent, the appellant. The Canadian company's sales were made under its own terms of sale, which were distinct from those prescribed by appellant, Some of Canadian Co.'s sales were made to Canadian subsidiaries of customers of appellant in the United States, .

Although most of the caps and closures sold by the Canadian company were products which it had manufactured, about 1.7 percent of its total sales, or about $75,000 worth, were sales of products manufactured by appellant, The Canadian company and appellant made use of a common trademark,, and approximately 20 percent of the products manufactured and sold by Canadian Co. incorporated features which were protected by patents owned by appellant,

The Canadian company maintained its own purchasing department and did not participate in any centralized purchasing activities conducted by appellant.' Although Canadian Co. operated its own limited research and development department it appears that it also had access to appellant's main research facilities.

Appellant's books reflect intercompany charges 'against the Canadian company totaling $163,015.50 for 1959 and $176,902.22 for 1960. These amounts include an annual charge of $25,000 for use of appellant's patents by the Canadian company. The remaining charges were for various administrative services rendered by appellant to its subsidiary, the Canadian company, such as research and development costs, charges for machinery and machinery parts, arid advertising costs, i.e., a portion of the cost to appellant of mats and printing techniques for use of their common trademark.

After an audit, the Internal Revenue Service increased appellant 's total intercompany charges against the Canadian company by approximately $40,000 in each of the years here on appeal. Those additional charges were for administrative salaries, officers* salaries, and airplane expenses attributable to the Canadian company.

Carr-Lowrey is primarily engaged in the manufacture and sale of glass containers for cosmetics, perfumes, drugs and chemicals. Its manufacturing plant is in Baltimore, Maryland, and it has sales offices in New York and Chicago. In these two latter locations Carr-Lowrey shares sales office space with appellant.

As in the case of the Canadian company, Carr-Lowrey had its own executive staff and it operated with only minimum parental control during 1959 and 1960, However, three of its six directors and two of its officers held similar positions with appellant. The chairman of Carr-Lowrey's board of directors was also chairman of appellant's board of directors.

Carr-Lowrey maintained its own manufacturing, warehousing and distribution facilities, It had its own staff of salesmen independent of appellant's sales force. Neither Carr-Lowrey nor appellant sold any product manufactured by the other.

Carr-Lowrey did most of its own purchasing, although it did buy its soda ash from an independent supplier under a master contract negotiated and established by appellant. These purchases of soda ash constituted about 5 percent of Carr-Lowrey's total purchases of materials. Carr-Lowrey had its own research and development department, although it appears that it also had access to the main research and development facilities maintained by appellant.

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Appellant's books show intercompany charges against Carr-Lowrey totaling $344,541.80 in 1959 and $322,069.58 in 1960. From 80 to 90 percent of these totals represented Carr-Lowrey's share of a centralized group insurance plan negotiated by appellant and maintained for all employees of appellant and its domestic subsidiaries. The remaining intercompany charges were for Carr-Lowrey's share of the cost of the joint sales offices in New York and Chicago, its share of the cost of a centralized employees' retirement program, and various other administrative services rendered by appellant.

There was no interchange of operating personnel between Carr-Lowrey and appellant. They negotiated their union contracts separately, and each had its own legal counsel. Appellant maintained no centralized accounting system.

Appellant states that it has always been its corporate policy to allow established, successful businesses which it acquired to continue to operate substantially as they had before appellant acquired them, free of any real parental control. In accordance with this policy, appellant contends that the operations of the Canadian company and of Carr-Lowrey were locally controlled by their own executive personnel. Appellant discounts the relevance of the fact that there was some'interlocking of directorates and some' overlapping of officers between itself and each subsidiary, contending that these positions were merely nominal and none of the individuals holding them were a part of either subsidiary's functional, operating executive force. Appellant further argues that those intercompany charges made by it against Canadian Co. and Carr-Lowrey represent less than one-half of 1 percent of appellant's net sales and 'are, therefore, insignificant.

Appellant also contends that the markets served by the Canadian company and Carr-Lowrey were quite distinct from appellant's, making it impractical to attempt coordination of their activities. In the case of the Canadian company, appellant argues this distinction arose because of the different products handled and different packaging techniques and customs prevailing in Canada and, in the case of Carr-Lowrey, because of the specialized glass containers which it made primarily for sale to manufacturers of cosmetics, perfumes, and toiletries, rather than to the food and beverage industries which were appellant's principal customers.

Appellant concedes the existence of some unitary features in the overall factual picture. It contends, however, that neither in the case of its relationship with the Canadian company, nor in its relationship with

Carr-Lowrey, was there that degree of contribution and dependency requiring unitary treatment.

In its decisions in Superior Oil Co. v. Franchise Tax Board, 60 Cal. 2d 406 [34 Cal. Rptr. 545, 386 P.2d 333 and Honolulu Oil Corp. v. Franchise Tax Board, 60 Cal. 2d 417 [34 Cal. Rptr. 552, 386 P.2d 40], the California Supreme Court reaffirmed and gave broad application to the two tests which it has promulgated for determining the existence of a unitary business. The first of those tests, originally set forth in the case of Butler Bros. v. McColgan, 17 Cal. 2d 664 [111 P.2d 334], aff'd, 315 U.S. 501 [86 L. Ed. 991] provides that a unitary business exists when there is unity of ownership, unity of operation as evidenced by central purchasing, advertising, accounting and management, and unity of use in a centralized executive force and the general system of operation. Under the second test, as expressed in Edison California Stores, Inc. v. McColgan, 30 Cal. 2d 472 [183 P.2d 16], a business is unitary when the operation of the portion of the business done within the state is dependent upon or contributes to the operation of the business without the state.

Application of these tests to the facts presented by the instant appeal leads us to conclude that during 1959 and 1960 both the Canadian company and Carr-Lowrey were engaged in a unitary business with appellant.

The Canadian company was engaged in a business identical to one phase of the business conducted by its parent. Although appellant minimizes the importance of the fact that appellant and the Canadian-company were linked together by interlocking directorates and officers common to both corporations, it seems inevitable that this situation would lead to a mutually beneficial exchange of information and know-how between two companies engaged in manufacturing the same product.

The fact that appellant and Canadian Co. utilized a common trademark, that some 20 percent of the Canadian company's products incorporated features protected by patents belonging to appellant, and that a small percentage of Canadian Co.'s sales were of products manufactured by appellant, all lend weight to the conclusion that there was a substantial interdependence between the two companies during the years in question. It seems virtually certain that the affiliation of appellant and Canadian Co. had a beneficial effect upon the Canadian company's sales.

Finally, although the intercompany charges made by appellant against the Canadian company may have been

small amounts in relation to appellant's net sales figures, they were nevertheless large amounts of money and they did indicate that the services rendered by appellant on behalf of the Canadian company had considerable value.

During 1959 and 1960 appellant owned substantially all (97.5 percent) of the stock of Carr-Lowrey. Appellant contends that because Carr-Lowrey manufactured and sold a special type of glass containers, primarily for sale to a different market than that of its parent, it was engaged in a separate business. The fact remains, however, that Carr-Lowrey was engaged in the manufacture of glass containers, which is appellant's principal business. Notwithstanding the distinction in form, appearance and function of the containers produced by each company, the raw materials used, the manufacturing processes, and the technical skills required to make the glass containers in each case must of necessity have been substantially the same.

Although appellant would minimize the importance of the interlocking directorates and overlapping of officers between itself and Carr-Lowrey, as it did in the case of the Canadian company, it seems inevitable again that there would be a mutually beneficial exchange of information and know-how among these experienced executives, especially in view of the similarities in the businesses of the two corporations.

In addition Carr-Lowrey shared sales space and expenses with appellant in New York and Chicago, it purchased its soda ash under a master contract negotiated by appellant, and the employees of Carr-Lowrey were covered under centralized group insurance and retirement programs established and maintained by appellant.

Finally, the intercompany charges made against Carr-Lowrey by appellant are a further indication of the substantial interdependence which existed between parent and subsidiary.

With regard to the statements made by appellant in its initial brief concerning the constitutionality of respondent's proposed additional assessments, it appears that those allegations are unfounded. Appellant makes no arguments to support them, and we are unable to find any support for them either in the record or in the relevant case law.

Nor can appellant obtain any relief under the provisions of Public Law 86-272 (15 U.S.C.A. § 381 et seq.). Appellant has not demonstrated that that section is applicable in this case and, from the facts before us, it does not appear that it is.

For the above stated reasons, we must sustain respondent in its action in this matter.

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 Anchor Hocking Glass Corporation against proposed assessments of additional franchise tax in the amounts of $19,427.43 and $37,792.06 for the income years 1959 and 1960, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 7th day of August, 1967, by the State Board of Equalization.

Paul R. Leake, Chairman

John W. Lynch, Member

[illegible], Member

[illegible], Member

_______________, Member

ATTEST: [illegible], Secretary