BEFORE THE STATE BOARD OF EQUALIZATION

OF **THE STATE OF CALIFORNIA**

In the Matter of the Appeal of)
)
WESTERN POWER PRODUCTS, INC.)

For Appellant: Lynn F. Beier
Treasurer

For Respondent: Jean Harrison Ogrod
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Western Power Products, Inc. for a refund of franchise tax, including penalty and interest, in the amount of **$3,071.29** for the year 1972.

The issue to be resolved is whether appellant Western Power Products, Inc. is entitled to a refund of corporation franchise tax paid on part of its 1972 income properly apportioned to California, where (1) such income was apparently previously misapportioned to Oregon; (2) tax was paid to Oregon on that income; and (3) appellant may not seek from Oregon a refund for excess tax paid because the misapportionment error was discovered after the expiration of Oregon's period for filing an amended return.

During 1972, appellant operated a unitary business which manufactured and sold electrical products to utility companies in Oregon and California. Appellant's principal headquarters were in Oregon. The certified public accounting firm that prepared appellant's return for the taxable year ended December 31, 1972, attributed all of appellant's business income for that year to Oregon. Consequently, appellant paid tax on its entire 1972 business income to the State of Oregon.

Subsequently, as a result of inquiries that respondent Franchise Tax Board made of appellant, respondent determined that part of appellant's income for the year on appeal was unitary business income from California which was subject to California's corporation franchise tax. 'Therefore, respondent issued a deficiency notice for that year setting forth a proposed apportionment of income to California and a delinquent filing penalty. Appellant protested. After reconsidering the proposed assessment, respondent denied appellant's protest. Appellant then made a payment of $3,071.29, of which $1,844.00 was for tax, $461.00 was for the penalty, and $866.29 was for interest; and brought this timely appeal.

Appellant concedes the accuracy of the proposed apportionment to California of part of its 1972 income. Appellant also agrees that the assessed tax and penalty were properly determined by respondent. Nonetheless, appellant contends that the deficiency paid by it should be refunded. According to appellant, if the refund is not granted, appellant will have been subjected to "double taxation" on a portion of its income. This contention is based on the fact that by the time appellant learned it had erroneously attributed **all** its business income to Oregon, Oregon's statutory period for filing an amended return had expired, apparently leaving appellant without means to seek a refund of any excess tax paid to that state.

Appellant's contention is without merit. A claim of double or multiple taxation will be considered if the taxpayer shows that a state's statutory formula of apportionment places a burden upon interstate commerce in a Constitutional sense. (Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 463 [3 L. Ed. 2d 421] (1959).) It must be shown by-the taxpayer that what a state exacts is not a constitutionally fair demand for that aspect of the interstate commerce to which the state bears a special relation. (Central Greyhound Lines v. Mealey, 334 U.S. 653, 661 [92 L. Ed. 1633] (1948); Northwestern States Portland Cement Co. v. Minnesota, supra.)

Appellant simply has not made the required showing. Furthermore, the allocation formula (Revenue and Taxation Code sections 25101 and 25128) employed by respondent to determine the net income attributable to California has frequently been upheld and its fairness has been declared settled. (Butler Bros. v. McColgan, 17 Cal. 2d 664 [111 P. 2d 334] (1941), affd., 315 U.S. 501 [86 L. Ed. 991] (1942); John Deere Plow Co. v. Franchise Tax Board, 38 Cal. 2d 214, 229 [238 P.2d 569] (1951), app. dism., 343 U.S. 939 [96 L. Ed. 13451 (1952); Appeal of The Lane Company, Inc., Cal. St. Bd. of Equal., Dec. 13, 1961 and June 18, 1963.)

We, therefore, conclude on the basis of the foregoing that appellant has failed to show that the State of California has subjected it to unlawful double taxation. Respondent Franchise Tax Board thus acted properly in denying appellant's claim for refund. The fact that appellant is not able to appeal its 1972 tax paid to the State of Oregon is immaterial to this proceeding (Appeal of The Lane Company, Inc., supra.).

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 26077, subdivision (a), of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Western Power Products, Inc., for refund of franchise tax, including penalty and interest, in the amount of $3,071.29 for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of February, 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member