BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
IMPERIAL 400 NATIONAL, INC.)

For Appellant: Douglas Collins
Controller

For Respondent: Karl F. Munz
Counsel

OPINION

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Imperial 400 National, Inc., against proposed assessments of additional franchise tax in the amounts of $4,219 and $19,107.47 for the income years 1975 and 1977, respectively.

The main issue to be resolved is whether respondent's reclassification of certain items of appellant's income from "nonbusiness" to "business," within the meaning of Revenue and Taxation Code section 25120, was proper. A second issue involving the proper allocation of the interest expense attributable to California has been conceded by appellant and will not be discussed further.

During the years at issue, appellant was engaged in the business of owning, operating, managing and franchising motels. As of December 31, 1980, appellant was involved with 81 motels, and was conducting business in 30 states. In the course of such operations, appellant earned income and incurred losses from rental property and realized gain from the sale of motels. In the early 1970's, appellant had reported its rental income or loss as business income within the meaning of Revenue and Taxation Code section 25120. However, such income or loss was reported as nonbusiness income for the years at issue and for 1978. Moreover, since incorporation in 1951, appellant concluded that all gains from the sale of motels were nonbusiness income and specifically allocated such gains to the state of the property's situs.

In late 1979, appellant was advised that its rental income and gain from the sale of motels constituted business income rather than nonbusiness income as it had previously reported. Thereupon, appellant filed an amended return seeking a refund for 1978 with respondent properly reflecting this fact. However, appellant apparently did not attempt to amend its returns for 1975 and 1977, the years at issue here. Upon the receipt of appellant's 1978 amended return and allowance of the claimed refund, respondent reclassified appellant's 1975 and 1977 rental income and gain from the sale of motels as business income to conform with the 1978 adjustments. Accordingly, respondent issued deficiency notices for 1975 and 1977. Appellant protested. Respondent's denial of that protest led to this timely appeal.

It is well settled that a presumption of correctness attaches to the action of respondent, and it is incumbent upon the taxpayer to prove otherwise. (Appeal of Thomas A. Beckett Investment Co., Cal. St. Bd. of Equal., July 22, 1952.) Appellant has made no attempt here to disprove the correctness of respondent's determination. In fact, the record indicates that after, its 1978 amendment, appellant properly treated the items at issue for 1979 and 1980 as business income. We must, therefore, infer that appellant agrees with the legal

theory underlying respondent's action in this matter. Nonetheless, appellant argues that, at this point, it would be costly and perhaps impossible, due to various state statutes of limitations, to recoup the additional assessments made by California from the other states. Appellant's contention has been rejected in a similar appeal. (See Appeal of Western Power Products, Inc., Cal. St. Bd. of Equal., Feb. 6, 1980.) We see no reason to deviate from that decision in this appeal and appellant has offered none.

Appellant appears to suggest that respondent's assessments here amount to double taxation that is unconstitutional. We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III precludes our determining that the statutory provisions involved here are unconstitutional or unenforceable. Moreover, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Ruben B. Salas, Cal. St. Bd. of Equal., Sept. 27, 1978; Appeal of Iris E. Clark, Cal. St. Bd. of Equal., March 8, 1976.) However, we have had occasion to consider a similar constitutional question in an appeal involving a claim for refund. (Appeal of Western Power Products, Inc., supra.) In that appeal, we stated that a claim of multiple taxation will be considered only if the taxpayer shows that a state's method of taxation places an undue 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).) Accordingly, if we could entertain such a challenge in this appeal, appellant would have to show that what California exacts here is not a constitutionally fair demand with respect to its share of interstate commerce. (Central Greyhound Lines v. Mealey, 334 U.S. 653, 661 [92 L.Ed. 1633] (1948).) Appellant has made no such showing. Moreover, the method of apportionment utiliied by respondent here has frequently been upheld and its fairness is well settled. (Appeal of The O.K. Earl Corporation, Cal. St. Bd. of Equal., April 6, 1977; Appeal of Kroehler Manufacturing Company, Cal. St. Bd. of Equal., April 6, 1977.)

For the reasons set forth above, we conclude that respondent's action must be sustained.

Appear of Imperial 400 National, Inc.

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 protest of Imperial 400 National, Inc., against proposed assessments of additional franchise tax in the amounts of $4,219 and $19,107.47 for the income years 1975 and 1977, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 26th day of October, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9