BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)	Nos. 84R-794, 84R-1183,
)	84R-795, 84R-1184, 84A-568,
ATLANTA HOCKEY, INC., ET AL.)	84A-569, 84A-570, 84R-796,
	84A-571, 84R-797, 84A-572,
	84R-1185, 84A-573, 84R-799,
	84R-1186, 84A-574, 84A-575,
	84R-800, 84R-798, 84R-801

Appearances:

For Appellants: Stafford Matthews
Attorney at Law

For Respondent: Vicki Musto McNair
Counsel

O P I N I O N

These appeals are made pursuant to section 26075, subdivision (a),[1] of the Revenue and Taxation Code from the actions of the Franchise Tax Board in denying the claims of Atlanta Hockey, Inc., et al., for refund of franchise tax in the amounts and for the years as follows and pursuant to section 25'666 of the Revenue and Taxation Code from the actions of the Franchise Tax Board on the protests of Chicago Blackhawk Hockey Team, Inc., et al., against proposed assessments of additional franchise tax and penalties in the amounts and for the years as follows:

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

Appeals of Atlanta Hockey, Inc., et al.

Appellants	Income Years	Claims for . . Refund
Atlanta Hockey, Inc.	1972-79	1,800.00
Boston Professional Hockey Assn., Inc.	1968, 1970-79	3,610.61
Colorado Rockies	1977-79	909.99
Detroit Hockey Club, Inc.	1981	200.00
Niagara Frontier Hockey Corp.	1970-79	3,689.40
Pittsburgh Penguins	1980	200.00
St. Louis Blues, Inc.	1968-77	2,884.17
Vancouver Hockey Club	1971-73, 1975-78	2,742.97

		Proposed Assessments of Tax and Penalty
Chicago Blackhawk Hockey Team, Inc.	1966-78	$2,900.00
Cleveland Barons	1976-78	800.00
Club de Hockey Canadien, Inc.	1966-79	2,600.00
Detroit Hockey Club, Inc.	1966-79	2,950.00
Madison Square Garden Center, Inc.	1966-72, 1974-77	2,183.22
Maple Leaf Gardens, Ltd.	1966-74, 1977-78	2,400.00
Northstar Financial Corp.	1966-72, 1974-75, 1977-79	2,350.00
The Philadelphia Hockey Club, Inc.	1966-75, 1977-79	2,600.00

The question in these appeals is whether appellants were subject to the minimum tax and the penalties imposed for the appeal years.

Appellants operate professional hockey clubs as members of the National Hockey League (NHL). In 1974, the Franchise Tax Board ("FTB" or "respondent") informed the out-of-state NHL teams that they were subject to the franchise tax and that they were required to apportion a part of their net income to California pursuant to California's Uniform Division of Income for Tax Purposes Act. (Rev. & Tax. Code, § 25120 et seq.) The hockey teams disagreed, and, after correspondence and discussion between the parties, a test case for the year 1969 involving the Boston Professional Hockey Association, Inc., (the Boston Bruins) was instituted.

An appeal was taken before this board and an opinion was rendered sustaining the action of the FTB. (appeal of Boston Professional Hockey Association, Inc., Cal. St. Bd. of Equal., June 28, 1979.) The Boston Bruins then brought a suit for refund in Los Angeles Superior Court. The Superior Court rendered a judgment noting that the parties had expressly waived findings of fact and conclusions of law and ordering the refund of all taxes which the Boston Bruins had paid. ('Boston Professional Hockey Association, Inc. v. Franchise Tax Board, (Super. Ct. L.A. Co., No. C317618)(1981).)

The FTB took an appeal to the Second District Court of Appeal where the judgment of the Superior Court was affirmed in an unpublished opinion. (Boston Professional Hockey Association, Inc. v. Franchise Tax Board, 2 Civ. No. 63444 (2d Dist. Ct.App. 1982).) The Court of Appeal denied the FTB's petition for rehearing and the California Supreme Court denied the FTB's subsequent petition for hearing.

The basic dispute between the parties here is the effect of the courts' decisions in the Boston Bruins' test case on the liability of the 15 appellants for payment of the minimum tax imposed under section.23151, The appellants. contend that the doctrine of collateral estoppel prevents the FTB from imposing the minimum tax against the appellants. Respondent argues that collateral estoppel does not bar it from imposing the minimum tax because the courts did not decide the minimum tax issue in the Boston Bruins litigation.

Collateral estoppel is the legal doctrine in which a judgment in an earlier action operates as a conclusive determination in a second action between the same parties (or those in privity with them) "as to such issues in the second action as were actually litigated and determined in the first action." (Todhunter v. Smith, 219 Cal. 690, 695 [28 P.2d 9161 (1934).) The fundamental inquiry in deciding whether this doctrine may be asserted. against respondent and preclude it from imposing the minimum tax against appellants is whether the minimum tax issue was "actually litigated and determined" in the Boston Bruins litigation.

Appellants contend that the minimum tax issue was decided by both the Superior Court and the Court of Appeal as evidenced by the judgments of those courts that all taxes paid by the Boston Bruins were to be refunded. They argue that 'these decisions necessarily included a determination that no tax, including the minimum franchise tax, could be imposed on Boston." (App. Reply Br. at 13.) However., regardless of the ultimate orders entered, we must ascertain whether, in fact, the issue was raised and determined in the Boston Bruins case. The record in that case, including the briefs of the parties, the oral opinion of the Superior Court, and the written opinion of the reviewing court, is a relevant source for ascertaining whether a particular issue was decided. (See 4 Witkin, California Procedure, Judgment, §§ 199-200 (2d Ed. 1971) and cases cited therein.)

The briefs of the parties before the appellate court show. that the parties themselves, although they discussed whether or not the appellants were doing business in California, never mentioned the minimum franchise tax. The fact that corporations not otherwise taxable are subject to a minimum tax under section 23153 is stated in the FTB's petition for rehearing in the appellate court and its petition for hearing in the Supreme Court. However, in both cases, there is merely a statement to that effect and no argument that the minimum tax should be imposed as an alternative to the tax which was imposed based on the Boston Bruins' net income. Nowhere is it argued that the minimum tax imposed under section 23151 was applicable.

Some of the Superior Court's comments from the bench were included in the opinion of the Court of Appeal. The Superior Court first stated that it declined to-extend "rough approximation income theories . . . and the unitary principle" (Resp. Ex. R-7 at 6) to the

factual situation before it. The Superior Court judge then said:

> As to whether this is interstate commerce or not I really don't think I have to reach that particular question. Ruling, as I am, that the Boston Hockey Club, . .. is entitled to recover the tax it has paid, together with the penalties, I don't think I need to reach the question of interstate commerce.

(Resp. Ex. R-7 at 7.)

Similarly, the Court of Appeal, in its opinion, stated:

> At first blush this case appeared to be quite complicated because the parties raised issues pertaining to intrastate commerce, interstate commerce, due process under the United States Constitution, and tax formula computations. After a careful review of the entire record, we are satisfied that the trial court correctly zeroed in on the basic issue, namely, whether the facts justify taxation by California of Massachusetts income under the unitary busines concept. The (Franchise Tax] Board admits that its right to tax, in this instance is governed by this concept.

(Resp. Ex. R-7 at 7-8.)

The court went on to discuss the "unitary business concept" in relation to the Boston Bruins' activities and income. At the end of this discussion, the court stated: "Our decision of affirmance for the reasons stated makes it unnecessary to respond to the parties' other contentions on appeal." (Resp. Ex. R-7 at 11.)

Viewing the proceedings of the Boston Bruins' 'litigation, as presented in the parties' exhibits, we see that there was a mere mention by the parties of the existence of a minimum tax and no mention by them of the minimum tax imposed by section 23151, no contention that the minimum tax should be imposed as an alternative to the tax based on net income, and no mention of minimum tax at all by either of the courts. Given these facts, we would be hesitant to conclude that the minimum tax issue had actually been litigated. Even if we could so conclude, we are convinced that the issue was not decided by the courts, even implicitly, as appellants contend.

Our conviction is based on what both courts said regarding the issues they decided and did not decide. The minimum tax under section 23151 is imposed on corporations doing business in California. The parties did, specifically and at great length, argue the question of "doing business" before the courts. Their arguments on this point revolved around the question of whether appellants were engaged solely in interstate commerce. This was the question which the Superior Court specifically refrained from deciding and one of the "other issues" which the appellate court refrained from deciding, Since the interstate commerce question was the basis for resolution of the doing business question, and doing business was a prerequisite to imposition of the minimum tax under section 23151, it appears to us that, since the courts expressly refrained from deciding the interstate commerce issue, they also implicitly refrained from deciding the minimum tax issue.

Appellants argue that, because the courts ordered that all taxes paid by the Boston Bruins were to be refunded, they must have determined that the Boston Bruins were not doing business in California and, therefore,, were not subject to any franchise tax, including the minimum tax. However, the posture of the case, as characterized by the Court of Appeal, belies this argument. Apparently, the court considered that the Boston Bruins could be subject to tax in California only "under the unitary businass concept." This is clear to us from the court's statement that "The [Franchise Tax] Board admits that its right to tax, in this instance is governed by [the unitary business] concept." (Resp. Ex. R-7 at 8, emphasis added.) The court apparently felt that the FTB had conceded that the Boston Bruins were subject to taxation if the unitary business concept was applicable or not subject to taxation at all, Given this characterization of the case, it is obvious why the court felt that it did not need to decide any of the other issues raised by the parties once it had disposed of the unitary business concept issue unfavorably to the FTB. We must conclude that the issue of the applicability of the minimum tax to the Boston Bruins was not "actually litigated and determined" in either the Superior Court or Court of Appeal actions.

Appellants argue, however, that the FTB made an admission which "conclusively determines, the issue of whether the minimum tax issue had been decided in the Boston Bruins case." (App. Reply Br. at 10.) The admission to which appellants refer is found in the FTB's

petition for hearing to the California Supreme Court where the FTB notes the appellate court's failure to discuss the "doing business" issue: "[B]y failing to discuss the issue, the Court of Appeal has in effect held that Boston is not doing business in California due to the minimum tax requirements under the California Franchise Tax. Section 25153." (App. Ex. M at 9, original emphasis.)

Appellants contend that an assertion or concession in a brief is deemed "an admission of a legal or factual point, controlling in the disposition of the issue," (App. Reply Br. at 10) citing a number of cases in support of that proposition. We find the cases cited by appellants distinguishable both factually and. legally. More importantly, we are persuaded by the reasoning in Morse v. E. A. Robey & Co., 214 Cal.App.2d 464, 470-471 [29 Cal.Rptr. 734] (1963) where the court concluded that it was not bound by a "concession" of one of the parties. The court quoted with approval the following language from Bradley v. Clark, 133 Cal. 196, 209-210 [65 P. 395] (1901):

> Finally, it is urged that it is conceded by appellant that the defendant's answers would tend to criminate him, and that our inquiry need go no further than this concession: or in other words, that we are bound to accept as matter of law, and as a rule of evidence, a concession as to the law made by appellant's attorney, no matter how faulty that concession may be. . .. [W]e are not bound by such concession, our duty being to declare the law as it is, and not as either appellant or respondent may assume it to be; . . .

Similarly, having concluded that the minimum tax issue was not "actually litigated and determined" in the Boston Bruins litigation, we are not bound by a different and, we believe, erroneous conclusion by either of the parties here as to what was or was not decided.

Appellants' further argument, that the minimum tax may not be imposed because the parties agreed that the Boston Bruins' litigation would be a "test case," must also be rejected, Although it appears to us from the evidence presented that such an agreement did, in fact, exist, we cannot therefore say that the FTB is bound by an issue not decided in that test case. Because the issue of the minimum tax was not decided, the FTB was

not precluded by their agreement from imposing the minimum tax.

Because the FTB was not precluded from imposing the minimum tax by collateral estoppel or by agreement of the parties, we must next determine whether that tax may be properly imposed under section 23151. This raises the question of whether the appellants were doing business in California. The appellants, who bear the burden of showing that respondent's determination is incorrect, have presented absolutely no evidence or arguments on this question. We find that apellants were doing business in California and subject to the minimum tax not only because of appellants' burden-of-proof failure, but also. on the basis of our decisions in the Appeal of Boston Professional Hockey Association, Inc., supra, and the Appeal of Milwaukee Professional Sports and Service, Inc., decided by this board on June 28, 1979. The specific question of doing business was raised and decided adversely to the taxpayers in those appeals, and we have no grounds for reaching a different decision in these present appeals. The penalties imposed must also be sustained, again on the basis of both appellants' failure of proof and the Boston and Milwaukee appeals just cited.

For the reasons stated above, we must sustain respondent's actions in these appeals.

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 of the Revenue and Taxation Code, that the actions of the Franchise Tax Board in denying the claims of Atlanta Hockey, Inc., et al., for refund of franchise tax in the amounts and for the years as previously set forth in this opinion and pursuant to section 25667 of the Revenue and Taxation Code from the actions of the Franchise Tax Board on the protests of Chicago Blackhawk Hockey Team, Inc., et al., against proposed assessments of additional franchise tax and penalties in the amounts and for the years an previously set forth in this opinion, be and the same are hereby sustained.

Done at Sacramento, California, this 10th day of September, 1985, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

Ernest J. Dronenbura. Jr., Chairman

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9