BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DOROTHY C. THORPE GLASS MFG. CORP.)

Appearances:

For Appellant: Arthur D. Sweet
President

For Respondent: Richard A. Watson
Counsel

OPINION

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 Dorothy C. Thorpe Glass Mfg. Corp. against a proposed assessment of additional franchise tax in the amount of $1,677.62 for the income year ended July 31, 1963.

During the year in question appellant owned real property on Thompson Avenue in Glendale. Previously appellant had leased the property to an affiliated

corporation for the conduct of the affiliate's business. Both appellant and its affiliate have at all times operated as separate business entities, each keeping separate books and filing separate corporate tax returns. During the period in question appellant's only business activity was leasing the Thompson Avenue property to the affiliate.

In 1959 the affiliate needed additional space and leased the land and building adjoining the Thompson Avenue property. The adjoining property was owned by a third party unrelated to either appellant or the affiliate. The two adjoining buildings were used as a single integrated unit with conveyors, passages, and doorways connecting the two buildings. In order to provide additional storage space and as part of the consideration for the lease, the lessor constructed a mezzanine in the adjoining building. The mezzanine, as constructed, violated Glendale's Building and Safety Code. Notice of the defects was given to the affiliate and legal action was threatened if they were not remedied. Since correction of the violations was not economically feasible, it was determined to construct new facilities. To facilitate construction, appellant and its affiliate obtained a loan from the Small Business Administration (SBA). As a condition to the loan, appellant was required to and did sell the Thompson Avenue property and apply the proceeds to the outstanding balance of the SBA loan. The property was sold and the new plant occupied during the year ended July 31, 1963. The new plant was used in the same way as the old property.

On its federal income tax return for the year ended July 31, 1963, appellant did not report the gain on the sale but instead transferred the basis of the Thompson Avenue property to the new property. The Internal Revenue Service determined that appellant realized a long-term capital gain on the transaction. Appellant disagreed, contending that the gain on the property was nonrecognizable since the gain arose out of an involuntary conversion of its property. The matter was litigated in the United States Tax Court (Dorothy C. Thorpe Glass Mfg. Corp., 51 T.C. 303) and a determination adverse to appellant was rendered.

Appeal of Dorothy C. Thorpe Glass Mfg. Corp.

Based on the federal audit report respondent, issued a notice of proposed assessment on **April 18,** 1967. Appellant protested the proposed assessment but the protest was denied after the Tax Court's decision became final. It is from this action that appellant appeals. However, in accordance with the Tax Court's determination that the proposed gain on the sale of the Thompson Avenue property should be reduced by selling,;. costs in the amount of **$5,690.40,** respondent now concedes that the correct liability is **$1,364.65.**

The primary question for determination is whether appellant is entitled to nonrecognition of the gain realized on the sale of its property. The resolution of this question turns on whether there was an involuntary conversion of the property within the terms of section 24943 of the Revenue and Taxation Code. That section provides, in pertinent part:

> If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted--
>
> (a) Into property similar or related in service or use to the property so converted, no gain shall be recognized.

Since section 24943 of the Revenue and Taxation Code is substantially identical to section 1033(a) of the Internal Revenue Code of 1954, respondent followed the federal audit report and proposed a corresponding assessment of additional tax. Unless appellant can show that the federal determination was erroneous its accuracy must be conceded. (Rev. & Tax. Code, **§ 25432;** see also Appeal of **Vinemore** Co., Cal. St. Bd. of Equal., Dec. 12, 1972.) Appellant indicated its belief that the determination was erroneous by challenging it in the Tax Court. However, the court ruled against the taxpayer.

The determination of a federal court construing a federal statute is entitled to great weight in interpreting an identical state statute. (Meanley v. McColgan, 49 Cal. App. 2d 203, 209 [121 P.2d 45]; Appeal of Estate of Adam Holzwarth, Deceased, and Mary Holmarth, Cal. St. Ed. of Equal., Dec. 12, 1967.) Here the statutes are the same and the Tax Court decided the precise issue that is now before this board. In view of that fact, the disposition of the case at the federal level is highly persuasive of the result that should be reached here. (Appeal of Estate of Adam Holzwarth, Deceased, and Mary Holzwarth, supra.)

In reaching its decision the Tax Court found that appellant had no interest in the property threatened by the city. Only the lessor and the lessee, appellant's, affiliate, had any interest in the property; The affiliate's interest could not be attributed to appellant since both were separate, viable corporate entities. Since appellant had no interest in the building, it had no property covered by the statute. Furthermore, the Tax Court concluded that the evidence did not establish that the city caused an involuntary conversion of the property in question within the terms of the statute. The only action threatened by the city was a criminal action with a minimal penalty upon conviction. The city did not threaten the condemnation or taking of the building. While the threat of a criminal conviction is coercive, it does not constitute a threat of requisition or condemnation of property as contemplated by the statute. (See, e.g., American Natural Gas Co. v. United States, 279 F.2d 220, cert. den., 364 U.S. 900 [5 L. Ed. 2d 193].)

The Tax Court also found no merit in appellant's argument that there was a governmental requisition since the SBA loan was conditioned upon the sale of the Thompson Avenue property and application of the proceeds against the balance of the loan. No doubt the existence of this requirement resulted in the ultimate disposition of the property. However, appellant entered into the contract with the SBA of its own volition. Any compulsion was the result of business expedience, not the threat of eminent domain. Compulsion of this nature is not

contemplated by the statute. (See, e.g., C. G. Willis, Inc., 41 T.C. 468, aff'd per curiam, 342 F.2d 996: Dear Publication & Radio, Inc., 31 T.C., 1168.)

Appellant has offered this board no evidence that was not considered by the Tax Court. Rather it has made substantially the same arguments here that were made unsuccessfully before the federal court. We find the Tax Court's determination persuasive on this issue. (See Appeal of Estate of Adam Holzwarth, Deceased, and Mary Holzwarth, supra.)

As an additional argument appellant apparently contends that respondent's action was not timely and is now barred by the statute of limitations. Such argument is entirely unfounded. Appellant's return for the income year ended July 31, 1963, was filed on October 14, 1963. Respondent issued the notice of proposed assessment on April 18, 1967, well within the four-year statute of limitations provided in section 25663 of the Revenue and Taxation Code.

After a full consideration of the record, we find nothing that would justify reaching a conclusion different from that of the Tax Court. Accordingly, respondent's action, in this matter, as modified, must be sustained.

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,

Appeal of Dorothy C. Thorpe Glass Mfg. Corp.

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 Dorothy C. Thorpe Glass Mfg. Corp. against a proposed assessment of additional franchise tax in the amount of $1,677.62 for the income year ended July 31, 1963, be and the same is hereby modified in accordance with respondent's concession. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 17th day of September, 1973, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary