

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
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)
NEW YORK FOOTBALL GIANTS, INC.)

Appearances:

For Appellant: John O'Dea
 Attorney at Law

For Respondent: Kendall Kinyon
 Counsel

OPINION ON REHEARING

On February 3, 1977, we modified in part the action of the Franchise Tax Board in denying the claim of the New York Football Giants, Inc., for refund of franchise tax in the amount of **\$1,117.41** for the income and taxable year 1968. Thereafter, timely petitions for rehearing were filed by both parties pursuant to Revenue and Taxation Code section 26077, and we granted the petitions on May 10, 1977.

Appeal of New York Football Giants, Inc.

This appeal involves three issues: (1) Whether the payment appellant received in 1968, pursuant to the terms of the merger between the AFL and NFL, as compensation for the **loss** of its exclusive territorial rights constituted business or nonbusiness income; (2) Whether respondent **properly** determined that the 40 percent of appellant's home game receipts paid to visiting teams should be excluded from the, denominator of the sales factor: and (3) Whether respondent correctly ruled that the numerator of the payroll factor should include a portion of the compensation paid to appellant's players, coaches, and trainers, based on the number of working days those employees spent in California. In our initial decision, we ruled in respondent's favor on the first **and third** issues, and in appellant's favor on the second. Rehearing was **granted** on all three. **issues**.

With respect to the business income and payroll factor issues, no new arguments or facts were presented on rehearing, and our reexamination of these issues has not led us to believe that **our original** determination of them was incorrect. Accordingly, we will reaffirm our previous **disposition** of these two questions.

On the sales factor issue, respondent has advanced a new argument in its attempt to show that the application of the standard UDITPA sales factor distorts the apportionment of appellant's income. Respondent points out **that, when** the NFL is considered as a whole, the standard sales factor causes **140** percent of actual gate receipts to be placed in the denominators of the combined sales factors of the **member** teams. This occurs because each team's denominator **includes** 100 percent of its home game gate receipts plus 40 percent of the total receipts from its away games. Respondent's position **is** that the NFL's 60-40 method of splitting the gate receipts between the home and visiting teams is really a revenue-sharing arrangement, and that each team's sales factor should therefore contain only the share of the gate receipts each team actually retains. To achieve that result, respondent argues **that** the 40 percent share of the gate paid to a visiting team should be excluded from the home team's sales factor.

In order to compare the different results reached by the normal sales factor and by respondent's approach, it will be helpful to consider a hypothetical situation which we have adapted from one submitted by respondent. Assume **a New York-based team** played one game in California **against** a California-based opponent, and that the gate receipts from that game and the other 13 regular season games played by each **team** were \$100,000 per game. Under **UDITPA's** normal rules,

Appeal of New York Football Giants, Inc.

the sales factor would assign only 4.08 percent (or \$28,560) of the New York team's total retained receipts to California, even though it actually received \$40,000 of gate receipts from the game played in California. For the California-based team, on the other hand, the usual statutory sales factor would assign to California 71.43 percent (or \$500,010) of this team's total retained receipts, even though it actually kept only \$420,000 in receipts from games played in California. (This computation assumes that the California team played all of its away games outside California.) Under respondent's approach, which excludes from the sales factor all receipts not actually retained by each team, the New York team's sales factor would be 5.71 percent ($\$40,000 \div \$700,000$) and the California team's sales factor would be 60 percent ($\$420,000 \div \$700,000$).

It is apparent, we think, that respondent's approach is logical and reasonable, and it may even be superior to **UDITPA's** standard sales factor. The problem is that UDITPA does not authorize deviations from its normal rules whenever someone can think of a better approach. As we said in our original opinion, Revenue and Taxation Code section 25137 permits a special apportionment method only when it is shown that the methods specified in UDITPA "do not fairly represent the extent of **the taxpayer's business activity in this state.**" In this case, we simply do not believe that **this** test has been satisfied. Although respondent has adopted a reasonable approach of its own, it has not established, as it is required to do, that the result UDITPA reaches in this case is unreasonable. The requisite proof is not provided by the fact that the combined standard sales factors of all the NFL teams together include 140 percent of the league's total gate receipts. Only one team, and not the whole NFL, is being taxed in this case, and it is not inherently unreasonable for that team's sales factor to include all of the gate receipts. the team actually receives and reports as income. Moreover, **even** if respondent's approach creates the "perfect" sales factor, the statutory factor yields a result that is only slightly **different** in this case (4.08 percent vs. **5.71 percent**).

Under these circumstances, we are **compelled** to conclude that respondent has still failed to show that **the use of UDITPA's** standard sales factor will not fairly reflect the extent of appellant's business activity in this state. Consequently, section 25137 does not permit the use of a special sales factor in this case.

Appeal of New York Football Giants, Inc.

ORDER ON REHEARING

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 our order dated February 3, 1977, modifying the action of the Franchise Tax Board in denying the claim of New York Football Giants, Inc., for refund of franchise tax in the amount of \$1,117.41 for the income and taxable year 1965, be and the same is hereby affirmed on rehearing.

Done at Sacramento, California, this 28th day of June, 1979, by the State Board of Equalization.

William W. Burns, Chairman
Philip H. Gray, Member
George P. Kelly, Member
_____, Member
_____, Member