79-SBE-093

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
MILWAUKEE PROFESSIONAL SPORTS)
AND SERVICES, INC.)

Appearances:

For Appellant: John B. Lowry
'Attorney at Law

For Respondent: Brian W. Toman
Counsel

O P I N I O N

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 Milwaukee Professional Sports and Services, Inc. against proposed assessments of franchise tax and penalties for failure to file timely tax returns in the total amounts of $2,529.80, $3,480.66, and $3,703.56, for the income years ended May 31, 1970, 1971, and 1972, respectively.

Appeal of Milwaukee Professional Sports and Services, Inc.

This appeal presents the threshold inquiry whether appellant is subject to either the California franchise tax or the corporate income tax. Thereafter,. we must consider the application to a professional basketball club of various provisions of the Wniform Division of Income for Tax Purposes Act (UDITPA). (Rev. & Tax. Code, §§ 25120 - 25139.)

Appellant, a Wisconsin corporation, owns and operates the Milwaukee Bucks, a professional basketball club, as a member of the National Basketball Association (NBA). Appellant's home arena is in Milwaukee. Two of the member clubs of the NBA during 1970 and 1972, the Los Angeles Lakers and the San Francisco Warriors, plus the San Diego Rockets during 1971 only, had home arenas in California. Accordingly, the Bucks came to California as a visiting club during those regular seasons and,, when required, during the post-season play-offs. During 1970, 1971 and 1972 the Bucks played 9 games out of 100, 12 games out of 104, and 10 games out of 96, respectively., in California. Although the total games set out above include the Bucks' preseason exhibition games, none of those games were played in California during the appeal years. Generally, under NBA rules, each team plays the same number of games with opposing teams away from home as it plays at home. On occasion, however, there is an odd number of games. In the event of an odd number of regular season games the home and away games are balanced, to the extent possible, in the schedule for subsequent seasons.

Under the rules of the MBA, a visiting team does not share in the gate receipts from a game away from home. The home team is entitled to all the gate receipts, and is not required to make even a minimum payment to the visiting team. Thus, appellant did not receive any of the receipts from games it played in California or other states when it was the visiting team. However, it received all of the receipts from games it played in its home arena against teams from other states, including those from California. There is one apparent exception to this policy involving play-off games. In the case of an odd number of play-off games, after the league receives its 45 percent share, the home team receives $1,250 plus 25 percent of the gross gate receipts. The remaining receipts are then shared equally between the home team, the visiting team and the league.

With respect to gate receipts, the rules of the NBA differ from those of some other professional sports where, by league rule, the visiting team and the home team share the gate receipts in some predetermined manner. For example, in professional football the visiting team receives either a flat fee-or 40 percent of the gate receipts while the'home team retains 60 percent.

Appellant is also compensated for the right to broadcast and televise its basketball games. Appellant is paid by local Wisconsin radio stations which broadcast both its home games and its away games. Appellant also receives **amounts** for the right to telecast its games to an audience in the Milwaukee area.

Appellant also shares in the proceeds from the **NBA's** national television contract with the major television networks which telecast selected games during the regular season and the championship play-offs. During any single season, the games selected may or may not include the Bucks and may or may not be played in California. Appellant would receive its share of national television revenue even if it did not appear in any nationally televised game. The contract treats all televised games alike as far as appellant is concerned. Appellant's income from the national television contract does not depend upon whether the televised games involve the Bucks, involve a California team, are played in California, are telecast from California, or are received by a California audience.

Wisconsin taxed 100 percent of appellant's income pursuant to a three-factor formula similar to the standard three-factor formula provided for under California law. Appellant paid the Wisconsin tax when due.

Respondent determined that, during the years in issue, appellant was subject to the franchise tax and directed appellant to file returns for those years. Appellant refused and respondent issued deficiency assessments **and penalties** for failure to file timely tax returns. In computing the deficiencies respondent determined that application of the standard UDITPA formula would apportion no income to California although appellant had engaged in substantial activities within this state. Accordingly, respondent devised a special apportionment formula under the authority of section 25137 of the Revenue and Taxation Code. The special formula, which utilized the average of the gross receipts (sales), payroll and property factors as a basis to calculate appellant's taxable income apportionable to California, is described in detail below.

Sales Factor

1. Numerator.

(a) Gate receipts--Forty percent of the gross gate receipts (less sales tax and less a 45 percent deduction paid to the NBA in the case of play-off games) **generated from** regular season, play-off and exhibition games when the Bucks played the California teams in its home arena as a measure of the portion of appellant's revenue-generating business activity attributable to California.

(b) Radio and television receipts--A portion of the income appellant derived from such broadcasts based on the ratio of the number of regular season, play-off and exhibition games appellant's club played in California to the total number of regular season, play-off and exhibition games it.played multiplied by its total receipts from radio and television broadcasts,

2. Denominator.

(a) Gate receipts--Sixty percent of the regular season and exhibition games' gross gate receipts and 60 percent of the play-off games' gate receipts (less the aforementioned league payment) generated from all of the Bucks' home games; plus, 40 percent of the gross gate receipts from regular season and exhibition games and 40 percent of the play-off games' gate receipts (less the aforementioned league payment) generated from all of the Bucks' home games as a measure of the portion of appellant's revenue-generating business activity attributable to states other than Wisconsin.

(b) Radio and television receipts--All radio and television broadcast receipts.

Respondent originally included in the numerator of the sales factor 40 percent of the gross gate receipts, as adjusted, when the Bucks played the California teams in California, and.included in the denominator 40 percent of the gross gate receipts, as adjusted, generated from games the Bucks played in states other than Wisconsin. In order'to avoid alleged administrative and confidentiality problems pertaining to the acquisition of such information, however, respondent's formula has been modified asset forth above. Respondent has conceded that, if it prevails on this aspect of the appeal, the proposed assessments will be increased or decreased, as the case :may be, to reflect the corrected position, unless, ifits position is sustained in its entirety, such assessments are increased above the amounts now stated. In that case, the proposed assessments will not be increased.

Payroll Factor

Respondent computed the numerator by multiplying a ratio of the working days appellant's players, trainers and coaches spent in California to total working days spent everywhere times the total wages they were paid. The denominator was total wages paid the players, trainers, coaches and all other employees.

Property Factor

Since appellant did not own or rent any real or tangible personal property in California, the parties are in agreement that the property factor was zero.

The initial issue with which we are presented is whether appellant is subject to the franchise tax.

Section 23151 of the Revenue and Taxation Code provides that every corporation doing business in California, with exceptions not here material, shall annually pay to the state, for,the privilege of exercising its corporate franchise within this state, a tax according to or measured by its net income at the prescribed rate upon the income for the **preceeding** year. "Doing business" is defined as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." (Rev. & Tax. Code, § 23101.) If all the corporation's business is done in California, the tax shall be computed on its entire net income; if not, the tax shall be computed on that portion of the corporation's net income derived from or attributable to sources within this state. (Rev. & Tax. Code, § 25101.) In any event, each such **corporation** annually shall pay the minimum tax for the privilege of exercising its corporate franchise within California, (Rev. & Tax. Code, § 23151.)

If appellant's California activities constitute local intrastate activities, the franchise tax applies tc those activities. (Matson Navigation Co. v. State Board of Equalization, 3 Cal. 2d 1 **[43 P.2d 805] (1935)**, affd., 297 U.S. 441 **[80** L. Ed. 7911 **(1936).)** In determining whether appellant's local activities constitute intrastate commerce, it is sufficient if only some, as opposed to all, activity within California' constitutes intrastate commerce. (Matson Navigation Co. v. State Board of Equalization, supra; see also Bass, **Ratcliff &** Gretton v. State Tax Commission, 266 U.S. 271 [69-L. Ed. 2821 **(1924).)**

In asserting that the franchise tax is applicable, respondent contends that appellant is engaging in intrastate commerce by entering California for the specific **purpose** of engaging in professional basketball games. In support of its position, respondent relies on an opinion of the California Attorney **General,** and the cases cited therein, which concluded that professional baseball corporations entering **California** for the specific **purpose of** engaging in **baseball games** were transacting intrastate business within the meaning of section 6403 of the Corporations Code. (45 ops. Cal. Atty. Gen. 11 **(1964).)** Although the Attorney General's opinion involved the qualification requirements of a foreign corporation as set out in the Corporations Code, rather than the applicability of the franchise tax, the test for intrastate activity is the same: the existence of local business activities separate and apart from interstate commerce. (American President Lines, Ltd. v. Franchise Tax Board, 3 Cal. App. 3d 587, 597 [83 Cal. Rptr. 702] (1970).)

Appellant, on the other hand, argues that the franchise tax does not apply since its business is solely an interstate business. In support of this proposition appellant relies on Washington Professional Basketball Corp. v. National Basketball Association, 147 F. Supp. 154 (S.D.N.Y. 1956) State v. Milwaukee Braves, 31 Wis. 2d 699 [144 N.W.2d 11 (1966), two cases holding that professional athletic teams were engaged in interstate commerce within the meaning of certain antitrust statutes. Appellant also attempts to distinguish the Attorney General's opinion and the cases cited therein. Appellant's position in this regard may be summarized as follows: Although concluding that visiting professional baseball teams were not engaged exclusively in interstate commerce but were also transacting intrastate business in California, the opinion specifically stated that the baseball clubs "derived substantial revenues" from participating in California games. This finding reflects the fact that visiting professional major league baseball clubs shared the gate receipts in a predetermined manner with the home teams. By contrast, in this appeal, when appellant is a visiting team, it does not share in the gate receipts from any games in California or elsewhere: therefore, appellant concludes that it did not derive any revenue within California and that the franchise tax is inapplicable.

It is well settled that the business of professional sports, as well as other professional entertainment activities, constitutes interstate commerce within the meaning of the Sherman Act. (15 U.S.C.A. § 1 et seq.) (See, e.g., Radovich v. National Football League, 352 U.S. 445 [1 L. Ed. 2d 456] (1957); United States v. International Boxing Club, 348 U.S. 236 [99 L. Ed. 290] (1955); Washington Professional Basketball Corp. . National Basketball Association, supra; see also United States v. Shubert, 348 U.S. 222 [99 L. Ed. 279] (1955); Interstate Amusement Co. v. Albert, 239 U.S. 560 [60 L. Ed. 439] (1916); Carrol v. Associated Musicians, 183 F. Supp. 636 (S.D.N.Y. 1960); State v. Milwaukee-Braves, supra; but see Toolson v. New York Yankees, 346 U.S. 356 [98 L. Ed. 64] (1953); Federal Baseball Club v. National League, 259 U.S. 200 [66 L. Ed. 898] (1922).) But it is equally clear that the actual performance of these activities is a purely local affair. (45 Ops. Cal. Atty. Gen. 11 (1964) relying on United States v. International Boxing Club,' supra; United States v. Shubert, supra; Interstate Amusement Co. v. Albert, supra; Carrol v. Associated Musicians, supra.) For example, in Shubert, supra, 348 U.S. at 227, the Court stated:

> [T]he allegations of the Government's complaint bring the defendants within the scope of the Sherman Act, even though the actual performance of a legitimate stage attraction "is of course a local affair."

Similarly, while holding that professional boxing constituted interstate commerce within the Sherman Act the court stated, in International Boxing Club, supra, 348 U.S. at 241:

> A boxing match - like the showing of a. motion picture (United States v. Crescent Amusement Co. 323 US 173, 183, 89 L ed 160, 168, 65 S Ct 254) or the performance of a vaudeville act (Hart v. B. F. Keith Vaudeville Exchange, 262 US 271, 67 L ed 977, 43 S Ct 540) or the performance of a legitimate stage attraction (United States v. Shubert, 348 US 222, 99 L ed 279, 75 S Ct 277) "is of course a local affair."

Again, while noting that, for the purposes of the antitrust statutes, the entertainment and sports industries are part of interstate commerce, the court in-Associated Musicians; supra, 183 F. Supp. at 639, stated:

> Nevertheless, it seems clear that the actual performance of the engagement would be a purely local affair ....

Appellant would have us dismiss these cases as mere dicta on the issue before us. However, we view them as more persuasive. Even if appellant is correct, upon analysis we conclude that the "dictum" in these cases is sound. Appellant has offered no contrary authority,

In a somewhat parallel vein appellant would distinguish these cases, as well as the Attorney General's opinion, on the basis that in each one the professional involved received compensation at the situs of the performance. Although appellant admits that it engages in activities in several states, including California, it maintains that income is earned only in Wisconsin. Since it does not share in the gate receipts when a visiting team, retaining instead 100 percent of the gate receipts when it is home team, appellant argues that income is earned only in a single state - Wisconsin.

We do not agree with appellant's position. Appellant is a professional basketball team. The word "professional" pertains to an occupation, vocation or business pursued for a financial return. (Webster's Third New Internat. Dict. (1971) p. 1811.) If the word "professional" has any meaning when applied to the performance of appellant's basketbali games, it must mean that appellant engages in these activities, wherever performed, for a financial return. It is the performance of those activities in California and other states where appellant is a visiting team which is essential and integral to appellant's earning of income. Without 'appellant's performance as a visiting team in California and elsewhere it would not be able to perform in Wisconsin where it retains 100 percent of the receipts from its home games. This conclusion is emphasized by the fact that, generally, the NBA rules require each team to play the same number of gameswith opposing teams away from home as the team plays at home. In those occasions where there is an odd number of games, the home and away games are balanced in the schedule for subsequent seasons. Further emphasis is provided by the policy where &here is an odd number of play-off games. Since this situation cannot be rectified by adjusting the schedule in subsequent seasons, the visiting team shares in the gate receipts.

We conclude that appellant 'engaged in professional basketball games in California and other states, where it received no part of the gate receipts, in order to host an equal number of games in Wisconsin, where it was authorized to retain 100 percent of the gate receipts. Thus, the right to retain all of the gate receipts when it hosted California teams in Wisconsin was based on activity that took place in California. It follows that at least some of appellant's business activities in California constituted intrastate commerce; therefore, the franchise tax, properly apportioned, is applicable.

Next, in determining whether the franchise tax was properly apportioned, we must consider the application of various provisions of UDITPA to a professional athletic club.

Initially, appellant attacks respondent's departure from the standard formula because, under'the circumstances presented by this appeal, the development of any special formula can be neither "reasonable" nor "equitable" as required by section 25137. More specifically, appellant argues that since 109 percent of its income was apportioned to Wisconsin pursuant to that state's thre'e-factor formula, which-is similar to California's, respondent's adoption of a special formula results in double taxation and violates the uniformity goal of UDITPA. Appellant concludes, therefore, that under these circumstances any special formula is unreasonable on its face.

The first prong of appellant's attack is that respondent's application of a special formula results in double taxation which violates the Fourteenth Amendment to the United States Constitution. We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California Constitution, precludes our determining that respondent's adoption of a special formula was unconstitutional. In any event, this board has a well-established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (See, e.g., Appeal of Barton Industries, Inc., Cal. St. Bd. of Equal., July 31, 1972.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this issue.

Next, appellant argues that any special formula that results in double taxation is inherently unreasonable and inequitable. As we have concluded previously, at least some of appellant's business activities constitute intrastate commerce which California is empowered to tax. Since California is authorized to tax these activities, we cannot conclude that, on the basis of appellant's double taxation argument, the adoption of a special formula to apportion some of appellant's income to California is unreasonable on its face. Even accepting some overlap, we cannot conclude that California, rather than Wisconsin, was necessarily at fault. (Cf. Moorman Manufacturing Co. v. Bair, - U.S. - [57 L. Ed. 2d 1971 (1978).) It is true that iflifornia had used Wisconsin's standard formula, the risk of duplicative taxation by the two states could have been avoided. But the risk might also have been reduced had Wisconsin adopted a formula reflecting the fact that a substantial part of appellant's business activity took place outside that state.

Finally, appellant contends that the use of a special formula violates the uniformity goal of UDITPA. The lack of uniformity is, of course, undesirable and should be avoided if at all possible, especially where the standard allocation and apportionment provisions fairly represent the extent of the taxpayer's business activity in the taxing state. However, the mere existence of the discretionary authority contained in section 25137 suggests that absolute uniformity may be unattainable in the administration of UDITPA throughout the various jurisdictions which have adopted it. In certain unusual situations one administrator may conclude that the standard formula applies to the business activity of a particular taxpayer while another, for equally valid reasons, may determine that a special formula is necessary to fairly represent the extent of a taxpayer's business activity in that state. While it would be presumptuous for us to speculate on Wisconsin's action, we note that the uniform UDITPA regulations promulgated by the Multistate Tax Commission, of which Wisconsin is not a member, and adopted for the most part by California, specifically mention that the business activities of professional sports teams merit a special formula. (Cal. Admin. Code, tit. 18, reg. 25137, subd. (a) (art. 2.5) (applicable to income years beginning after December 31, 1972).) In view of this specific language in the regulations, it is apparent that UDITPA, as interpreted by the uniform regulations, recognized that the business activities of professional athletic teams were unique and required the development of a special formula to properly reflect such activity in the various states.

For these reasons we must reject appellant's argument that any special formula is unreasonable on its face.

The next questions are whether a special' formula is necessary in this case, and if so, whether respondent's special formula is reasonable and proper under section 25137.

A number of recent decisions have established that the special allocation and apportionment methods authorized by section 25137 may not be employed unless the party invoking that section first proves that UDITPA's standard provisions do not fairly represent the extent of the taxpayer's business activity in California. (Appeals of Pacific Telephone and Telegraph Co., Cal. St. Bd. of Equal., May 4, 1978; Appeal of Revere Copper and Brass, Inc., Cal. St. Rd. of Equal., July 26, 1977; Appeal of Danny Thomas Productions, Cal. St. Bd. of Equal., Feb. 3, 1977; Appeal of Donald M. Drake Co., Cal. St. Bd. of Equal., Feb. 3, 1977.) Respondent's position, in substance, is that the impropriety of the standard'formula in this case is clearly established by its failure to apportion any income to California despite appellant's substantial business activities in this state. We agree with that position, for reasons expressed'below in our discussion of the sales and payroll factors. That discussion will also consider whether the special formula devised by respondent is "reasonable", as required of all special apportionment methods authorized by section 25137.

SALES FACTOR

The standard UDITPA sales factor is a fraction whose numerator is 'the taxpayer's total sales in California during the income year, and whose denominator is the taxpayer's total sales everywhere during that year. (Rev. & Tax. Code, § 25134.)

The term "sales" includes all of the taxpayer's gross receipts which constitute business income. (Rev. & Tax. Code, § 25120, subd. (e).) Assuming for the moment that appellant's receipts from ticket sales and radio and television contracts are business income, they would all be includible in the denominator of the standard sales factor. As for the contents of the numerator, section 25136 provides that sales other than sales of tangible personal property are in this state if:

> (a) The income-producing activity is performed in this state: or
>
> (b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

Under these two tests, none of the receipts in question qualify as sales in this state. Consequently, the numerator of the standard sales factor is zero, and of course the factor itself is then zero. Stated another way, the normal rules attribute all of appellant's sales to Wisconsin.

The substance of respondent's objection to this result is that appellant receives income from playing all of its games, not just from those played in Wisconsin. In respondent's view, the standard factor is unreasonable because it fails to reflect that one-half of appellant's games are played outside of Wisconsin, and that the playing of those games is essential to appellant's right to receive any income. Appellant contends, on the other hand, that the standard sales factor accurately attributes all of its sales to Wisconsin since all of its receipts come from the games played in Milwaukee. Appellant also argues that respondent's special sales factor is not reasonable and thus is not authorized by section 25137. In order to resolve these questions , we will examine each class of appellant's receipts separately.

Gate Receipts

We agree with respondent that appellant's home game gate receipts should not be considered as arising solely and exclusively from the playing of games in Milwaukee. To do so would ignore the reality that those games constitute only half of the total games played by the Bucks during the season, and that the playing of the away games is a condition to appellant's right to retain all of the gate receipts from its home games. As we said earlier, appellant is a professional basketball team whose activities, wherever performed, are engaged in for profit. Under the basic structure of the NBA, appellant always receives a specific quid pro quo for playing an away game in California or elsewhere. Basically, the quid pro quo is the right to play a matching game against that particular opponent in Milwaukee. But when matching home and away games are not possible, as in the post-season play-off setting, the gate receipts from an "odd" game are split between the home and away teams. Gate-sharing in this situation reinforces our conclusion that each home game is not an isolated transaction but rather is part of a matched pair of games, each of which is as essential to the production of income as the other.

This analysis leads us to conclude that respondent was correct in determining that some portion of appellant's gate receipts is properly attributable to the games the Bucks played in California. This is not to say, however, that we agree with the method of allocation respondent has selected. On the contrary, we believe that respondent's method is arbitrary and unreasonable, and therefore is not authorized by section 25137. It will be recalled that respondent's approach was to include in the sales factor numerator 40 percent of the gate receipts from appellant's home games against California opponents as a measure of appellant's revenue-generating business activity in California. The denominator included 60 percent of appellant's total gate receipts from all its home games, plus 40 percent of total home game gate receipts as a measure of appellant's revenue-generating business activity in states other than Wisconsin. Respondent apparently adopted this approach because professional football (and one professional baseball league) has a gate-sharing arrangement calling for the visiting team to receive 40 percent of the gate receipts, and respondent believed that this percentage was therefore fairly reflective of the receipts attributable to appellant's California activities and would also effect uniform treatment among all professional sports.

We find respondent's reasoning unpersuasive. To allocate appellant's gate receipts in this manner solely because it is the method adopted by the National Football League strikes us as completely arbitrary and unsustainable. Neither are we impressed with the necessity to treat all professional sports exactly alike in this respect, especially when it appears that there may well be materially different economic consequences flowing from each sport's distinctive treatment of its gate receipts. For example, an NBA team that is consistently able to generate higher gate receipts at home than its opponents is not required to share the fruits of its efforts with its less successful rivals. One result of this policy may be that the success of an expansion team is more problematical than in football, where the gate-sharing arrangement causes the higher drawing teams to subsidize the franchises with smaller stadiums or less local fan interest. It should also be noted that professional football does not follow the MBA practice of uniformly scheduling matched pairs of home and away games between each two opponents. The number of "odd" games in football would seem naturally to call for some sort of regular gate-sharing arrangement, while basketball's method of scheduling would require it only on rare occasions.

Although we have found respondent's basic position on this issue unacceptable, respondent has suggested two alternative approaches either of which would appear to be reasonable. One would allocate the gate receipts according to the number of "duty days"' the Bucks spent in California, as compared to duty days everywhere. The other would allocate the receipts according to "game days" in California, as compared to game days everywhere. Our inclination would be to use "game days" since we are concerned here with game receipts, and since the "duty days" approach will find a more logical application in the payroll factor; as discussed below.

We recognize that due to appellant's economic situation, our rejection of respondent's approach to the sales factor may result in an increased prospective California franchise tax liability. However, due to respondent's concession, the proposed assessments for the appeal years will not be increased.

Radio and Television Receipts

For sales factor purposes, respondent included in the numerator a portion of these receipts based on the ratio of the number of games the Bucks played in California to the total number of games played, multiplied by total broadcast receipts. The denominator was composed of all broadcast revenues. Appellant objects to this approach on two alternative grounds. First, it contends that these receipts constitute nonbusiness income specifically allocable to Wisconsin. If that is correct, these revenues would not appear in the sales factor at all. Second, if the broadcast receipts are business income, then appellant argues that none of them are Properly includible in the numerator under section 25136, since all of them should be attributed to Wisconsin, where the greatest Proportion of the income-producing activity took place.

Revenue and Taxation Code section 25120, subdivision (a), defines "business income" as:

> income **arising** from transactions and activity in the regular course of ths taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Subdivision **(d)** of the same section defines "nonbusiness income" as "all income other than business income". It is a matter of common knowledge that the success of modern professional sports is due in substantial part to the public exposure they receive in the broadcast media, especially television. Indeed, the close and **long-established** relationship between the- sports and broadcasting industries leaves no doubt that broadcasting revenues constitute income arising in the regular course of a professional sports team's trade or business. Accordingly, we conclude that such receipts are business rather than non-business income.

As business income, all of these receipts would normally appear in the sales factor's denominator, and section 25136 would determine whether any would appear in the numerator. Respondent seems to agree with appellant that section 25136 would exclude all of these receipts from the numerator, but it finds that result unacceptable because appellant was paid for the right to broadcast the games it played in California. In respondent's view, that is a sufficient connection with California to justify allocating a portion of these receipts to California on a games-played basis. We agree. Since appellant was compensated for the right to broadcast **all of** its games, half of which were played in states other than Wisconsin, we believe it is entirely reasonable to attribute some of the receipts to the other states.' Although appellant contends that respondent's approach is unreasonable because it is not based on the number of games actually broadcast from California, we think the games-played method is acceptable. Appellant sold the right to broadcast its games here, and its income was the same whether all, some, or none of its California games were actually broadcast. Thus, whether a particular game was broadcast had absolutely no effect on the amount of appellant's broadcasting revenues,

PAYROLL FACTOR

The next issue concerns the computation of appellant's payroll factor, That factor is defined in section 25132 of the Revenue and Taxation Code as a fraction whose numerator is the total compensation paid by the taxpayer in California during the income year, and whose denominator is the total compensation which the taxpayer paid everywhere during that year. Under Revenue and Taxation Code section 25133, compensation is deemed to have been paid in this state if:

> (a) The individual's service is per-- formed entirely within the state: or
>
> (b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state: or
>
> (c) Some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

Respondent argues that since the Bucks played several games in California during the appeal years, a portion of the compensation paid by appellant should be attributed to this state based on the number of working days its employees spent in California. Appellant contends that the compensation it paid to its employees should be attributed entirely to Wisconsin, and that according to the standard formula set forth in section 25133 the numerator of its payroll factor should therefore be zero. Appellant attacks respondent's position on the grounds that its employees generated no income by their activities in California since it did not share in the gate receipts from any games played in this state. Appellant also challenges respondent's "duty days" formula on the basis that the Legislature specifically rejected that concept by the enactment of UDITPA. We agree with respondent.

Under a literal reading of section 25133, appellant concededly paid no compensation in this state during the appeal years. However, as we have explained, section 25137 allows reasonable adjustments to the allocation and apportionment provisions of UDITPA if those provisions do not fairly reflect the extent of the taxpayer's business activity in this state.

In considering whether section 25137 should be invoked with respect to the payroll factor, we must bear in mind the purpose of that factor, which is to measure the value of employee productivity in generating business income. In the typical business for which the standard formula was designed, the locus of employee productivity is relatively static and does not shift so completely or with such regularity from state to state as is the case in professional sports. In professional basketball the key employees (players and coaches) who constitute the bulk of the entire operation in both number and compensation regularly move from state to state throughout the season while they ply their trade. Computing appellant's payroll factor in the manner prescribed by section 25133 would assign the entire payroll to Wisconsin, thus failing to recognize this reality. Respondent's approach, on the other hand, is based on the reasonable premise that compensation should be attributed to each state where the taxpayer's employees have performed services. The fact that appellant, as a visiting team, does not share in the gate receipts does not change this conclusion since, as we have indicated, without appellant's performance as a visiting team in California and other states, it would be unable to perform in Wisconsin where it retains 100 percent of the receipts from its home games.

We also believe that appellant's challenge to respondent's position based on the Legislature's rejection of the duty days concept by the enactment of UDITPA is without merit. It is true, as appellant asserts, that prior to the enactment of UDITPA in 1966, compensation was attributed to the state in which the services were performed for purposes of the standard formula payroll factor. Here, however, we are not dealing with the standard formula, which we have concluded did not fairly represent the extent of appellant's California business activity'. Rather, we are concerned with a special formula developed by respondent pursuant to section 25137. The fact that, by adopting UDITPA, the Legislature altered the composition of the standard payroll factor is of no overriding concern when we are considering the need for a special formula and its composition. Once the party challenging the standard formula, respondent in this case, has satisfied its burden of establishing the presence of exceptional circumstances, it may employ any reasonable method to effectuate an equitable apportionment of income. (Rev. & Tax. Code, § 25137.)

The final issue for determination is whether respondent properly assessed a 25 percent penalty for failure to file timely franchise tax returns. Appellant failed to file any returns for the three appeal years. Thereafter, following a conference, respondent directed appellant to file returns.. After its failure to do so, respondent imposed the subject penalty pursuant to section 25931 of the Revenue and Taxation Code. Section 25931 provides that if a taxpayer fails to file a timely return, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, respondent shall impose a penalty not to exceed 25 percent of the taxpayer's tax liability. It is appellant's position that it had reasonable cause not to file a return, even after being directed to do so, because it believed that it had derived no income from California sources, and therefore, no California return was required to be filed.

The term "reasonable cause" has been interpreted to mean no more than the exercise of ordinary business care and prudence. (Handley Motor Co., Inc. v. United States, 338 F. 2d 361, 365 (Ct. Cl. 1964).) However,,the mere belief by a taxpayer, no matter how sincere, that it is not required to file a tax return, is insufficient to constitute reasonable cause for the failure to file a return. (Handley Motor Co., Inc. v. United States, supra.) In view of the fact that respondent advised appellant of its liability and directed it to file a return, we cannot conclude that appellant's failure to file was due to reasonable cause.

Appeal of Milwaukee Professional Sports and Services, 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 Milwaukee Professional Sports and Services, Inc. against proposed assessments of franchise tax and penalties for failure to file timely tax returns in the to-tal amounts of $2,529.80, $3,480.66, and $3,708.56, for the income years ended May 31, 1970, 1971, and 1972, respectively, be and the same is hereby modified in accordance with respondent's concession and in accordance with the views expressed in this opinion.

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

William M. Bennett, Chairman

Richard Nevins, Member

George R. Reilly, Member

____________________, Member

____________________, Member