

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
AeroVironment, Inc.) No. 94A-0925
)

Representing the Parties:

For Appellant: Joseph A. Vinatieri, Esq.

For Respondent: Craig Swieso, Counsel

Counsel for Board of Equalization: Randy M. Ferris, Tax Counsel

OPINION

This appeal is made pursuant to section 25666¹ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of AeroVironment, Inc. against proposed assessments of additional franchise tax in the amounts of \$114,952 and \$73,238 for the income years ended April 30, 1988, and April 30, 1989, respectively.

The issue presented in this appeal is whether solar energy tax credit may be applied at the unitary group level. At the hearing of this appeal on November 15, 1996, the Board decided this issue in favor of the Franchise Tax Board, and directed its legal staff to prepare a formal written opinion setting forth the legal basis for its decision.

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

Appellant filed its California corporate franchise tax returns, computing its income on a combined report basis. The returns included the income and factor information of appellant's fellow unitary group members. Pursuant to the terms of a Schedule R-7, appellant acted as key corporation on behalf of the other members. AV Wind Energy II, Inc. (AVWE II), a California corporation, was one of the members of this unitary group. Among other things, AVWE II was a partner in three partnerships (the Pan Aero partnerships) that held partnership interests in three other partnerships (the Mesa partnerships). The Mesa partnerships were allegedly engaged in the development and construction of wind turbine generators eligible for solar energy tax credits under former section 23601.4.² Thus, AVWE II was apparently entitled to claim these credits, which passed through from the Mesa partnerships to the Pan Aero partnerships to AVWE II.

Based on AVWE II's apparent entitlement, appellant claimed solar energy tax credits of \$133,662 and \$84,349 against the total tax liabilities of the California members of the unitary group for the income years ended April 30, 1988, and April 30, 1989, respectively. Appellant calculated these credit claims on a unitary group basis, not a single entity basis. After examining the tax returns at issue, respondent limited solar energy tax credit to AVWE II's tax liability for the income years in question.

Appellant contends that respondent's limitation of solar energy tax credit to AVWE II's tax liability is erroneous and that such credit should, rather, be applied at the unitary group level. Appellant argues that this error stems from respondent's reliance on authority that this Board has overruled. However, we need not address appellant's argument to decide the instant appeal.

In 1976, the California Legislature enacted former section 23601, which is former section 23601.4's precursor.³ Former section 23601, as originally enacted, provided that, under certain circumstances, solar energy tax credit could be claimed by unitary group members who did not own the premises on which a solar energy system was installed.⁴ (See Stats. 1976, ch. 168, § 3, pp. 279-280.) In 1978, however, the Legislature amended former section 23601. (See Stats. 1978, ch.

²Section 23601.4 was repealed, operative December 1, 1989, by its own terms.

³Section 23601, was repealed, effective January 1, 1987, by its own terms; when enacted, section 23601.4 applied to income years beginning on or after January 1, 1987.

⁴As originally enacted, section 23601, subdivision (d), provided:

“When either (1) the income from sources within this state of two or more corporations which are commonly owned or controlled is determined in accordance with Chapter 17 (commencing with Section 25101) of this part or Part 18 (commencing with Section 38001) of this division, or (2) two or more commonly owned or controlled corporations derive income from sources solely within this state, whose business activities are such that if conducted within and without this state, the income derived from sources within this state would be determined in accordance with Chapter 17 (commencing with Section 25101) of this part or Part 18 (commencing with Section 38001) of this division (hereinafter referred to as “wholly intrastate corporations”), then such corporations shall determine the credit prescribed in subdivision (a) as if such corporations were one corporation. As to wholly intrastate corporations, the amount of the credit prescribed in subdivision (a) shall be prorated among them in the ratio to which the cost of such device to each corporation bears to the total cost of such devices for all corporations.” (Stats. 1976, ch. 168, § 3, pp. 279-280.)

1159, § 2, pp. 3561-3564.) This amendment, among other things, eliminated the application of solar energy tax credit at the unitary group level and provided that only entities that qualified as “owners” under the amended statute could claim such credit.⁵ The Legislature incorporated this ownership restriction, with certain modifications not relevant to the instant appeal, into subdivision (I)(3) of former section 23601.4, the solar energy tax credit statute presently at issue.

We conclude that the 1978 amendment to former section 23601, which eliminated language allowing the application of solar energy tax credit at the unitary group level, provides dispositive evidence that the Legislature intended to bar unitary group members, like appellant, from receiving solar energy tax credit when they cannot establish that they were “owners” of premises on which solar energy systems were installed. (See Appeal of Standard Oil Company of California, Cal. St. Bd. of Equal., Mar. 2, 1983.) Thus, appellant is not entitled to the claimed tax credits because it has not established that it qualifies as an “owner” under former section 23601.4, subdivision (I)(3).

Accordingly, respondent’s action in this matter is sustained.

⁵As amended in 1978, section 23601, subdivision (g)(2), provided:

“‘Owner’ includes duly recorded holders of legal title, lessees with at least three years remaining on their lease, a person purchasing premises under a contract of sale, or who holds shares or membership in a cooperative housing corporation, which holding is a requisite to the exclusive right of occupancy to the premises.” (Stats. 1978, ch. 1159, § 2, p. 3563.)

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 AeroVironment, Inc. against proposed assessments of additional franchise tax in the amounts of \$114,952 and \$73,238 for the income years ended April 30, 1988, and April 30, 1989, respectively, be and the same is hereby sustained.

Done at Culver City, California, this 15th day of November, 1996, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Dronenburg, Mr. Andal and Mr. Halverson present.

Johan Klehs _____, Chairman

Ernest J. Dronenburg, Jr., Member

Dean F. Andal _____, Member

Rex Halverson* _____, Member

_____, Member

Opinion adopted at Sacramento, California, this 10th day of January, 1997, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Klehs, Mr. Andal, Mr. Halverson and Mr. Chiang present.

Ernest J. Dronenburg, Jr., Chairman

Johan Klehs _____, Member

Dean F. Andal _____, Member

Rex Halverson* _____, Member

John Chiang** _____, Member

*For Kathleen Connell, per Government Code section 7.9.

**Acting Member, 4th District.