

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the 'Matter of the Appeal
of
THE WALKER T. DICKERSON COMPANY)

Appearances:

For Appellant: Lucas and Lucas, Attorneys at
Law

For Respondent: Burl D. Lack, Chief Counsel;
Hebard P. Smith, Associate
Counsel

OP 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 protests of The Walker T. Dickerson Company to proposed assessments of additional corporation income tax in the amounts of \$401.01, \$151.79, \$164.32 and \$290.44 for the years ended October 31, 1947, 1948, 1949 and 1950, respectively. Since filing this appeal Appellant has paid the tax protested. Pursuant to Section 26078 of the Code, the appeal is, accordingly, treated as an appeal from the denial of a claim for refund.

The Walker T. Dickerson Company is a corporation organized under the laws of the State of Ohio. It is engaged in the manufacture and sale of women's shoes and its factory and principal office are located in the City of Columbus, Ohio. Its products are sold to retail stores in California and elsewhere in the United States, Orders from customers in this State are solicited by a salesman in California and are forwarded to the Columbus office. The orders are filled by shipment from outside the State directly to the purchaser in California. The salesman does not pass upon the credit of customers nor assist in the collection of accounts, those functions being performed at the out-of-state office.

Appellant does not maintain a place of business nor a stock of merchandise in California. Its salesman is compensated upon a commission basis and pays his own traveling

expenses. His commissions are paid by Appellant from a checking account in Columbus, Ohio. Any telephone listing or directory advertising in this State in Appellant's name is contracted and paid for by local retailers of the shoes manufactured by Appellant.

Sales to California customers for the fiscal year ended in 1950, arising from orders solicited by its salesman in California, amounted to \$257,915.30. Commissions paid Appellant's salesman for this period amounted to \$15,630.00. Sales to California customers and commissions paid the California salesman for other years on appeal were slightly less.

Upon demand of the Franchise Tax Board the Appellant filed returns under the Corporation Income Tax Act for the years in question, reporting no tax due for such years. Using a three factor formula of property, payroll and sales the Franchise Tax Board allocated a portion of Appellant's income to sources in this State and issued the proposed assessments in controversy here. In applying the formula, sales solicited in California were considered California sales and commissions paid the California salesman as California payroll. On April 21, 1952, Appellant paid the aggregate amount of the proposed assessments and interest.

Appellant makes no objection to the manner in which a portion of its net income is apportioned to this State or to the amount of the tax as computed by the Franchise Tax Board. It contends, however, that its income from sources within California is derived exclusively from interstate commerce and that the taxation of such income is prohibited by both the commerce clause of the United States Constitution and the due process clause of the Fourteenth Amendment.

Appellant acknowledges the distinction between a tax on net income derived from interstate commerce and a tax on the privilege of engaging in interstate commerce. Furthermore, it concedes that generally the impact of the California Corporation income tax does not amount to a privilege tax. As regards its own situation, however, it contends that the solicitation or orders in California by its salesman is not an intrastate activity within the State and that in the absence of such activity, or of property within California, the tax is in effect a tax on the privilege of engaging in interstate commerce.

In West Publishing Co. v. McColgan, 217 Cal. (2d) 705, aff'd. per curiam, 328 U. S. 823, the issue, as here, was the application of the California corporation income tax to net income derived wholly from interstate commerce. The constitutional objections raised by Appellant were presented to and discussed fully by the Court. The Court concluded that the State can exact a tax from a foreign corporation engaged

exclusively in interstate commerce without violating either the commerce clause or the due process clause.

It is true that the West Publishing Company maintained offices in this State and delegated more duties and responsibilities to its California salesmen. Those factors, however, were **not** regarded as material to the constitutional issue involving the commerce clause and were not considered by the Court in reaching its conclusion that a tax may be levied on net income from sources in this State wholly derived from interstate commerce. It is only in its discussion of the question of due process that the Court concerned itself with specific activities of the taxpayer within the State. On that question the court relied on International Shoe Co. v. Washington, 326 U. S. 310, in which the activities of the taxpayer in the State of Washington were less extensive than the activities of the West Publishing Company in California. The per curiam affirmance of the judgment in favor of the State by the United States Supreme Court without oral argument and by the mere citation of authorities leaves no doubt of that Court's approval of the reasoning of the California Court.

The activities of the International Shoe Company, which serve as the constitutional basis for the Washington tax, are described by the United States Supreme Court as follows:

"Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than \$31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

"The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections."

Aside from the number of salesmen employed, it is apparent that the only distinction between the Washington activities of the International Shoe Company and the California activities of Appellant is that the salesmen for the former were furnished samples and were reimbursed for the cost of rentals of display space. Unless the absence of this additional activity must be accepted as the decisive factor in determining the jurisdiction of this State to levy the tax in question, this appeal is controlled by the reasoning of that case and West Publishing Co. v. McColgan, supra. That such slight deviations are not the test appears from the statement of the United States Supreme Court in the International Shoe Co. case that "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less." To this the court added "The activities which establish its 'presence' subject it alike to taxation by the state and to suit to remove the tax."

Appellant adverts to language in recent decisions of the United States Supreme Court in Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, and Norton Co. v. Dept. of Revenue, 340 U. S. 534, in support of its contention that the imposition of the tax on its income is prohibited by the commerce clause. The Spector case involved the Connecticut corporation business tax and the Norton case concerned the Illinois occupation tax. Those taxes are on the privilege of doing business. The subject of the tax in question is net income from sources within the State. (West Publishing Co. v. McColgan, supra.) The difference is in the incidence of the tax and is not a matter of labels (Spector Motor Service,

Inc., supra). We cannot consider these cases as authority to preclude the imposition of a tax the incidence of which is not on the privilege of engaging in interstate commerce.

Appellant, during the years in question, carried on a systematic and continuous course of business in California. Its solicitation of orders within the State resulted in a large volume of interstate business in the course of which it received the benefits and protection of the laws of the State. California is the source of a substantial portion of its income. By enactment of the Corporation Income Tax Act (now part of the Bank and Corporation Tax Law) the Legislature of this State adopted the policy of taxing such income. That the tax is nondiscriminatory, fairly apportioned and does not constitute a burden on interstate commerce is no longer open to question. We are of the opinion that Appellant's activities in California render it subject to this State's power and jurisdiction to impose the tax.

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 action of the Franchise Tax Board in denying the claims of The Walker T. Dickerson Company for refunds of tax in the amounts of \$401.01, \$151.79, \$164.32 and \$290.44 for the years ended October 31, 1947, 1948, 1949 and 1950, respectively, be and the same is hereby sustained.

Done at Los Angeles, California, this 27th day of October, 1953, by the State Board of Equalization.

Wm. G. Bonelli, Chairman

Geo. R. Reilly, Member

J. H. Quinn, Member

Paul R. Leake, Member

Robert C. Kirkwood, Member

ATTEST: Dixwell L. Pierce, Secretary