



Appeal of RKO Radio Pictures, Inc.

corporations for the income year ending December 13, 1935, and subsequent income years,

As tentatively agreed upon, the income of the entire group of affiliated corporations was to be combined. A segregation was then to be made of income derived from the production and distribution of its own pictures and income derived from the distribution of pictures made by independent producers. Income derived from the production and distribution of owned pictures was to be allocated to California on the basis of total **prop-erty**, payroll and sales of the group. Income derived from the distribution of independently produced pictures was to be allocated on the basis of property, payroll and sales of the group used in or attributable solely to the distribution of pictures. In reliance upon the memorandum Appellant, for the years following the merger, continued in the same manner to segregate and separately allocate its own net income.

In a letter dated November 9, 1945, the Franchise Tax Commissioner notified the Appellant that, commencing with its return for the income year 1945, a single formula should be used to allocate the income from all of its activities. In a following exchange of correspondence the Appellant objected to the use of a single formula and was informed by the Franchise Tax Board that the principal reason for the change was the extensive use of the collapsible corporation device by producers, thus limiting the State to a tax on net **income** derived from distribution. A conference was held in March of 1946, and after a letter from the Appellant on May 15, 1946, again objecting to the change, there was no further communication on the subject,

The Appellant in its returns for the years in question continued to use a separate formula for the allocation of net income derived from the distribution of independently produced pictures. On June 26, 1952, the Franchise Tax Board (successor to the Franchise Tax Commissioner) issued the notices of additional tax proposed to be assessed which are here in issue. Each notice set forth the reason for the proposed additional assessment as follows:

"Income from distribution of independent pictures considered to be unitary business income and properly allocable by usual three factor formula."

The contention of the Franchise Tax Board is that the Appellant is engaged in but a single unitary business and that the income therefrom is properly allocable by the use of a single formula,

Appeal of RKO Radio Pictures, Inc.

Basically, the position of Appellant is that property and payroll of its California motion picture studios should be excluded from the formula used to allocate net income derived from the distribution of independently produced pictures. In support of this position Appellant presents two arguments: (1) that it is engaged in two separate and independent operations rather than one unitary business; and (2) that if its entire business is unitary the formula urged by the Franchise Tax Board, which takes into account the studio property and payroll, is intrinsically arbitrary and unreasonable, and results in the taxation of extraterritorial values.

In attempting to sustain its first contention Appellant is immediately confronted with a dilemma which it is unable to resolve. Since the same facilities and personnel are used in the distribution of all pictures, it is readily apparent that there is a mutual dependence and contribution between the distribution of independently produced pictures and the distribution of pictures produced by Appellant, the two activities being so closely integrated as to be inseparable. Equally apparent is the interdependence and integration of the studio operations in this State and the out-of-State activity of distributing the pictures produced therein, (John Deere Plow Co. v. Franchise Tax Board, 38 Cal. 2d 214, app. dismissed, 343 U.S. 939; Edison California Stores, Inc. v. McColgan, 30 Cal. 2d 472; Butler Brothers v. McColgan, 17 Cal. 2d 664, affirmed, 315 U.S. 501.)

The difficulty experienced by Appellant in attempting to establish the separate character of a portion of its business is demonstrated by the record before us. In its apportionment of income to this State, Appellant has treated the entire income from the production and distribution of its own pictures as unitary income subject to allocation under a single formula. Only income purportedly derived from the distribution of independently produced pictures has been segregated from other income and separately allocated,

If the basis for the segregation and separate allocation of a portion of its income for franchise tax purposes is the separate character of a portion of its business, Appellant must necessarily establish that the activity giving rise to the segregated income is separate and unrelated to other segments of its business. This it has not done and, in its argument before this Board, it admits, as it must, the interrelationship between the distribution of its own pictures and the distribution of pictures produced by others. It now asserts, however, that "In this case there are two distinct businesses. One is the production of motion pictures carried on entirely within California. The other is the distribution of these pictures as well as pictures produced by others." This assertion is not only inconsistent with the segregation of income made by

Appeal of RICO Radio Pictures, Inc.

Appellant. In the light of the above cited authorities, the concept of the production of motion pictures in this State and their out-of-State distribution as two separate and distinct businesses is also untenable.

From the foregoing discussion it seems clear that no single segment of the business conducted by Appellant is unrelated to or independent of all other portions of its business. In this situation the several parts of the business cannot be fairly considered by themselves and the entire business may be properly treated as unitary. Butler Brothers v. McColgan, supra.

By its second contention Appellant attacks the adequacy of a single three factor formula of property, payroll and sales as a means of apportioning a fair share of its earnings to this State. In support thereof it has presented various computations intended to show the amount of net income allocable to California under the single formula as compared to the amount of net income attributed by Appellant to the State after segregating its income into two parts and separately allocating each part. Interspersed with this showing are references to income attributable to California under separate accounting. In evaluating the several computations presented by Appellant, however, we have noted the omission of one step in its allocation process. It has not shown us how the initial segregation was made between net income derived from the distribution of independently produced pictures and net income derived from its other activities, including the distribution of its own pictures. Since Appellant separately allocated each class of income by formulas containing different values in their factors, the accuracy of the final result cannot be ascertained without first determining the accuracy of the initial segregation. Even if we assume, however, that the segregation of income by Appellant was reasonably accurate, neither that fact nor the different result obtained by the use of two formulas necessarily requires the Franchise Tax Board to use more than one formula for the apportionment of the income of a single unitary business.

The use of a single three-factor formula of property, payroll, and sales in the apportionment of the income of a unitary business has consistently been approved by the courts of this State. Butler Brothers v. McColgan, supra; Edison California Stores, Inc. v. McColgan, supra; El Dorado Oil Works v. McColgan, 340 Cal. 2d 731, app. dismissed, 340 U.S. ; John Deere Plow Co. v. Franchise Tax Board, supra. We do not doubt, however, but within the discretion granted to it the Franchise Tax Board may make adjustments in the use of the three-factor formula by a particular taxpayer in appropriate circumstances. The use of two formulas in the instant case

Appeal of RKO Radio Pictures, Inc.

may well produce a more precise and accurate measurement of Appellant's income producing activities within and without the State than does a single formula, and, but for the practical administrative difficulties involved, may present an appropriate situation for the adjustment sought by Appellant, Altman and Keesling, Allocation of Income in State Taxation (1950), p. 108.

It is the Franchise Tax Board, however, and not this Board in which is vested the discretion to make such adjustments. The decision of the Franchise Tax Board may be set aside only if Appellant establishes by "clear and cogent evidence" that the refusal by that Board to make the desired adjustments in its formula allocation will result in "extra-territorial values being taxed." Butler Brothers v. McColgan, 315 U.S. 501. This high standard of proof is not met, in our opinion, by computations which start with the assumption that property and payroll employed in one segment of the unitary business contributed nothing toward the earning of some portion of the net income derived from the unitary operations.

Appellant has made certain procedural arguments concerning the notices of proposed assessments. It contends, first, that the Franchise Tax Board's original reason for terminating the use of the formulas previously approved was entirely unrelated to the merits of the claim it is here asserting. This argument overlooks the fact that the statute requires only that the Franchise Tax Board set forth in its notice of proposed assessment the reason for its action. As heretofore pointed out, the Franchise Tax Board complied with this requirement and has since consistently maintained the position outlined in its notices. We have considered and determined the correctness of the proposed assessment on the basis of the evidence presented and the applicable law. As the Tax Court said in Charles Crowther, 28 T.C. No. 153 (1957), however, "we are without jurisdiction to consider and determine the propriety of the respondent's motives in making such determinations..."

Appellant also argues that the applicable statute of limitations, Section 25663a, has run on the years in question. That section provides:

"If any taxpayer agrees with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in federal income tax for any year, the period for mailing notices of proposed deficiency tax for such year shall, unless otherwise agreed between the Franchise Tax Board of the taxpayer, be

Appeal of RKO Radio Pictures, Inc.

four years after the return was filed or six months after the date of the expiration of the agreed period for assessing deficiencies in federal income tax, whichever period expires the **later.**"

It is not disputed that the notices of proposed assessments herein involved were issued within six months after the expiration of a waiver given by Appellant to the United States Commissioner of Internal Revenue, Appellant contends, however, that the section is applicable only to proposed assessments based upon a change in income made by the United States. We cannot read such a restriction into the unambiguous language of the section.

Appellant's final point is that the Franchise Tax Board is estopped from making any assessments for the two years in question because it would result in irreparable-injury to the Appellant in that it can no longer deduct the amount of the tax from the income reported on its federal return for the year involved, Appellant's position on this point is untenable. It was informed in late 1945 that the Commissioner would thenceforth require it to use a single allocation formula but it chose to disregard those instructions. There is nothing to show that the Commissioner or the Franchise Tax Board ever retreated from that position,

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 in denying the protests of RKO Radio Pictures, Inc., to proposed assessments of additional franchise tax in the amounts of \$7,439.94 and \$40,195.49 for the income years 1945 and 1946, respectively, be and the same is hereby sustained.

Appeal of RKO Radio Pictures, Inc.

Done at Sacramento, California, this 17th day of December, 1957, by the State Board of Equalization.

Robert E. McDavid, Chairman

J. H. Quinn, Member

Geo. R. Reilly, Member

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Paul R. Leake, Member

ATTEST: Dixwell L. Pierce, Secretary