



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
L'AIGLON APPAREL, INC.)

For Appellant: Archibald M. Mull, Jr., Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
Israel Rogers, Associate Tax Counsel

O P I N I O N

These appeals are made by L'Aiglon Apparel, Inc., pursuant to Section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on Appellant's protests against proposed assessments of additional corporation income tax in the amounts of \$53.19, \$66.40, \$68.63, \$62.25, \$102.15, \$132.27, \$90.79, \$170.95, \$143.96, \$205.66, \$394.08, \$508.76, \$342.14, \$453.92 and \$491.98 for the taxable years ended June 30, 1937 through 1951, respectively, and pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board denying Appellant's claim for refund of corporation income tax in the amount of \$296.91 for the taxable year ended June 30, 1952.

Appellant manufactures women's dresses which it sells to retail stores in various parts of the United States. Its manufacturing facilities are in Maryland and its home office is in Philadelphia. Appellant has not qualified to do business in California nor does it maintain an office or a stock of goods here. It has no telephone or other directory listings in California.

Since 1934, Appellant's sales to California retailers have been solicited by Mr. Clarence M. Ferry, whose territory extends west from Lenver. Beginning in June of 1949, Mr. Ferry's wife Elizabeth has solicited sales as Appellant's representative in the smaller cities of California and Nevada. The terms of their agreements with Appellant are not contained in written contracts.

The sales are made in Appellant's name. Appellant establishes the prices and conditions of sale and all orders are subject to acceptance by Appellant at its Philadelphia office. All matters such as shipment of goods, billing, payment, and adjustments are handled directly between Appellant and the stores. New accounts are subject to Appellant's approval and it absorbs all credit losses.

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Appellant provides the Ferrys with samples of its products and with stationery and order forms bearing the L'Aiglon name.

The Ferrys periodically hold commercial style shows in their territory at their own expense. They also make two or three trips a year to Philadelphia to view Appellant's new fashions. Appellant reimburses them for the travel expenses incurred on these trips but they are not compensated for their time.

The Ferrys work out of their home in Los Angeles and provide their own transportation. They arrange their own itineraries and set their own hours, days of work and vacation; they receive no paid vacation or sick leave. An affidavit of Appellant's president states that the Ferrys are authorized to hire salesmen or other employees to assist them. The Ferrys may represent other manufacturers if their level of business for Appellant reaches a certain point. However, they have never availed themselves of the privilege of either hiring helpers or representing another manufacturer.-

During the period from January 1 to June 30, 1949, Appellant paid Mr. Ferry a fixed monthly salary plus expenses. At all other times during the period under review, Mr. Ferry and his wife worked exclusively on a commission basis, receiving credit for every sale in their territory, whether or not personally solicited. They paid all of their business expenses, including the costs of transportation, hotels, meals, display rooms and style shows, excepting the costs of samples, stationery, order forms and trips to Philadelphia as previously indicated. Appellant withheld social security taxes and Federal income taxes from the amounts it paid the Ferrys. The Ferrys considered themselves to be employees of Appellant.

Under applicable sections of the Revenue and Taxation Code and the regulations adopted by the Franchise Tax Board pursuant thereto, foreign corporations which have neither employees nor stocks of goods in California, and which engage in no other activities here, are not subject to tax under the provisions of the Bank and Corporation Tax Law of this state, even though they ship goods to customers here. Likewise, such corporations are not taxable even though sales are made to customers in this state pursuant to orders taken by independent brokers or dealers. However, when goods are shipped to California customers pursuant to orders taken by employees in this state, a foreign corporation is, according to the California law subject to the California Corporation Income Tax on that portion of its income attributable to its activities here even though it neither maintains a stock of goods here nor engages in any other activity within our borders. (Rev. & Tax. Code, §§ 23501, 23040; Cal. Admin. Code, Tit. 18, Reg. 23040(b).)

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Upon the theory that the Ferrys were Appellant's employees, Respondent in 1958 affirmed the proposed assessments under review and denied Appellant's claim for refund of tax paid pursuant to a return filed for the year ended June 30, 1952.

Appellant argues that the taxes are barred by Public Law 86-272, a Federal act which places certain limitations upon the power of a state to tax income derived from interstate commerce. By its terms, the act does not apply to taxes "assessed" prior to its effective date, September 14, 1959. The tax for the year ended June 30, 1952, was self-assessed and paid long before that date. Since a proposed assessment is considered to be an assessment within the meaning of Public Law 86-272 and all of the proposed assessments under appeal were issued prior to September 14, 1959, we conclude that they are not barred by the Federal act. (Appeal of American Snuff Co., Cal. St. Bd. of Equal., April 20, 1960, CCH Cal. Tax Rep. Par. 201-538, 2 P-H State & Local Tax Serv. Cal. Par. 13223.) Appellant's constitutional objections to the application of California's corporation income tax are answered in Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 [3 L. Ed. 2d 421].

We must decide then, whether the Ferrys are Appellant's employees or are independent contractors. In construing the business relationship between Appellant and the Ferrys it is the total situation that controls. (Bartels v. Birmingham, 332 U. S. 126[91 L. Ed. 1947].) The most important factor in determining this question is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. (Empire Star Nines Co. v. Cal. Emp. Corn., 28 Cal. 2d 33, 43 Cl68 P. 2d 686]) Where there is no express agreement as to the right of the claimed employer to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown. (Burlingham v. Gray, 22 Cal. 2d 87, 100 [137 P. 2d 9].)

Appellant argues that the Ferrys are not its employees but states that it is willing to pay corporation income tax for the first six months of 1949, the period during which Mr. Ferry received a fixed salary plus expenses rather than sales commissions. Although there are a number of California Supreme Court and District Courts of Appeal decisions dealing with the employee versus independent contractor question, none appears to be sufficiently close to the instant case, factually, to be considered controlling. In support of its position, Appellant has called our attention to a number of decisions of the California Unemployment Insurance Appeals Board, an agency frequently called upon to decide questions of this nature. Appellant primarily

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relies on the decision in the petition of Jay Herbert of California, (Cal. Unemploy. Ins. Appeals Bd., Tax Decision No. 2327, Jan. 15, 1960.)

The Herbert case involved two representatives soliciting sales in this state for a dress manufacturer, who were found by the appeals board to be independent contractors. Appellant states that the same factors are present in both that case and the instant appeal; that is, the salesmen were compensated solely by commission and paid all of their own expenses, they arranged their own working hours and itineraries, and the manufacturer merely supplied them with samples and order blanks. One of the Herbert salesmen had his own business establishment and represented two other dress lines from which he earned 50 percent of his income. The other salesman sold only for Herbert, maintaining an office and showroom in his home. Appellant argues that there is no rational distinction between this latter salesman and the Ferrys.

On the other hand, there appears to be no rational distinction between the Ferrys and the two salesmen of a women's and children's clothes wholesaler, whom the same appeals board found were employees in the petition of J. R. Rosenthal & Co., (Cal. Unemploy. Ins. Appeals Bd., Tax Decision No. 634, May 19, 1949.) The same factors mentioned above as being common to the instant appeal and the Herbert case are also present in Rosenthal. Obviously, the appeals board does not regard these factors as conclusive by themselves.

Some of the facts in the matter before us which are not parallel to those in the case cited by Appellant and which tend to support a different result are that the Ferrys did not maintain permanent showrooms, they were required to reach a certain level of sales before they could represent other manufacturers, and they received traveling expenses from Appellant for trips to Philadelphia.

We are mindful of the fact that the terms of Appellant's arrangement with the Ferrys were never formalized in writing and, therefore, the actions of the parties which reflect their understanding and intent are the best evidence of the true nature of their relationship.

The affidavit of Appellant's president states that the Ferrys had authority to hire employees to assist them in their work for L'Aiglon. It does not state whether the Ferrys were ever informed that they had such authority. While the right to hire helpers could be considered a factor in favor of independent status, we note, as a matter of fact, that when Mr. Ferry's work load increased to the point where he needed help, it was Appellant who hired Mrs. Ferry. The fact that Mr. Ferry did not take it upon himself to hire his wife as an assistant is a manifestation of

