BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
E. F. TIMME & SON, INC.)

Appearances:

For Appellant: Martin H. Webster
Attorney at Law

For Respondent: Lawrence C. Counts
Counsel

O P I N I O N

This appeal is made pursuant to section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of E.F. Timme & Son, Inc., for refund of tax in the amounts of $181.78, $363.33, $449.43 and $272.91 for the taxable years 1962 through 1965, respectively.

The issue presented is whether a federal statutory provision, Public Law No. 86-272 (73 Stat. 555 [1959], 15 U.S.C. § 381), precluded respondent from imposing the tax upon appellant's activity in this state.

Appellant, a foreign corporation, sells tangible personal property, principally fabrics and textile fibre products, to retailers and manufacturers. Appellant's principal supplier is Timme Corporation, an affiliated foreign corporation having a textile mill in North Carolina. This supplier manufactures fabrics and textile fibre products. Appellant does not purchase from this supplier, in the technical sense. Instead it acts as a factor and purchases the accounts receivable resulting from its sales and assumes all the credit risks relating to financial ability to pay. Some of appellant's customers are in California. The California customers are not informed that appellant does not own the goods.

Appellant employs approximately 50 people, almost all of them being located in its principal business office in New York City. However, appellant has a showroom in Chicago, Illinois, where three people are employed. One employee-representative is also located in Maryland.

During the years in question appellant had one employee-salesman in California. This employee, a California resident, accounted for approximately 60 percent of appellant's sales to California customers. He was paid on a salary and commission basis, and he did not maintain a business office in this state.

Appellant was also represented in this state each year by from one to three independent brokers. The sales generated by these brokers amounted to approximately 40 percent of appellant's sales to California customers.. These brokers also represented many other textile manufacturers in California.

Appellant does not maintain any office, display or sample room in California and has no inventory or other property here. Appellant is not listed in any telephone book or office building directory.

Appellant has only one other supplier, Athol Manufacturing Corporation, located in Massachusetts, which supplies some vinyl fabric. Appellant purchases these goods from Athol outright and resells them as a principal..

The activities of both the independent brokers and the California salesman are strictly limited to the solicitation of orders for appellant, which orders are always forwarded to appellant's New York office for approval and for direct shipment to the customers from stocks of goods located outside of California. Most shipments originate in North Carolina. No shipments originate within California. The salesman and the independent brokers have no authority to accept sales orders and they are not involved with the purchase of the accounts receivable. They do not participate in the installation, repair or delivery of the products.. They carry no samples for distribution, nor do they have authority to check credit, make adjustments, or accept returned merchandise. Most reorders from California customers are placed directly with appellant's New York office without any further solicitation In California.

Appellant filed returns for the years in question but later submitted these refund claims, urging immunity from the state corporation income tax under the aforementioned federal statute. Respondent apparently concurs with appellant's view that the franchise tax is inapplicable.

With respect to the income tax, Public Law No. 86-272 provides:

> (a) No State . . . shall have power to impose, ... a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State ... during such taxable year are ...
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
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> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

It further provides that a person is not considered to have engaged in business within a state merely by reason of sales, or solicitation of orders for sales, by independent contractors whether or not offices are maintained by the independent contractors. An "independent contractor" is defined, in part, as one engaged in selling, or soliciting orders for sales,, for more than one principal. A "representative" is excluded from the definition of an independent contractor. The statutory immunity is expressly inapplicable to domestic corporations or any individual who is domiciled in, or a resident of, the taxing state.

Respondent's principal contention is that the federal statute was not intended to extend immunity to

the solicitation of orders for sales of tangible personal property where the person selling has not produced or manufactured the goods and does not own them at the time the sales are solicited. Respondent points out that the statute was enacted as a result of the decisions in Northwestern States Portland Cement Co. v. Minnesota and Williams v. Stockham Valves & Fittings, Inc. (1959) 358 U.S. 450 [3 L. Ed. 2d 421], cases which sustained the imposition of state income taxes upon persons engaged in multistate businesses which produced, marketed and distributed their own products. Respondent also maintains that a company whose principal activity is the selling of tangible personal property owned by others is a service company beyond the scope of the exemption.

It is a well established rule that where the meaning of a statute is clear and unambiguous, the statute must be enforced as written. (Crooks v. Harrelson, 282 U.S. 55 [75 L. Ed. 156]; Durr Drug Co. v. United States, 99 F.2d 757; I. B. Dexter, 47 B.T.A. 285; Hatfried, Inc. v. Commissioner, 162 F.2d 628; Girard Investment Co. v. Commissioner, 122 F.2d 843, cert. denied, 314 U.S. 699 [86 L. Ed. 559].) Nowhere in Public Law No. 86-272 is the condition set forth, either expressly or impliedly, that the immunity is available only to sellers owning the property sold. Congress has simply determined that there is an undue burden on interstate commerce where the only connection with the taxing state by the multistate foreign seller is the solicitation of orders by salesmen or independent contractors. Through legislation it has expressly granted immunity where such solicitation is the only activity and where there is no place of business in the state seeking to tax. (International Shoe Co. v. Cocreham, 246 La. 244 [164 So. 2d 314], cert. denied, 379 U.S. 902 [13 L. Ed. 2d 177].) If Congress had wished to limit the law's application to sales of property by owners it could have easily altered the language.

We must conclude that appellant's activity was immune from tax liability.

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 E. F. Timme & Son, Inc., for refund of tax in the amounts of $181.78, $363.33, $449.43 and $272.91 for the taxable years 1962 through 1965, respectively, be and the same is hereby reversed.

Done at Sacramento, California, this 7th day of April, 1969, by the State Board of Equalization.

John W. Lynch, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary