BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| In the Matter of the Appeal of EVERGREEN MARINE CORPORATION (CALIF.) LTD. | ) ) ) ) | No. 82A-1607-KP |

For Appellant: Norman J. Laboe
Attorney at Law

For Respondent: Karl F. Munz
Counsel

## O P I N I O N

This appeal is made pursuant to section 25666 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Evergreen Marine Corporation (Calif.) Ltd. against proposed assessments of additional franchise tax in the amounts of $108, $12,000, and $20,567 for the income years 1976, 1977, and 1978, respectively.

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

Appeal of Evergreen Marine Corporation (Calif.) Ltd.

The issues presented by this appeal are whether appellant, its parent corporation and various other affiliates were engaged in a single unitary business, and, if so, whether appellant is entitled to use a special allocation and apportionment method pursuant to section 25137.

Appellant, its Panamanian parent corporation and approximately 23 other affiliated entities were engaged in various aspects of the ocean freighter business during the appeal years. All of the parent corporation's subsidiaries, including appellant, were wholly or majority owned and controlled by the parent corporation.

During the income years at issue, appellant filed California franchise tax returns employing separate accounting for its activities. Upon audit, respondent determined that appellant, its parent corporation and all of the other affiliates were part of a unitary business organization. Respondent rested its determination on the common majority ownership of all of the affiliates by the parent corporation, the fact that all of the affiliates were engaged in the shipping industry or support industries (e.g., record keeping, bookkeeping, shipping agent), the fact that the entire revenue of the support corporations, of which appellant was one, was obtained from the other (shipping) members of business group, and, finally, the similarities of the various corporations' names. Accordingly, respondent put the entire business group on a combined reporting basis and issued the appropriate assessments. Appellant protested, the protest was denied, and this appeal followed.

A taxpayer which, derives income from sources both within and without California is required to measure its California franchise tax liability by its net income derived from or attributable to California sources. (Rev. & Tax. Code, § 25101.) Even if a taxpayer does business solely in California, its income is derived from or attributable to sources both within and without California when that taxpayer is engaged in a unitary business with affiliated corporations doing business outside of California. (Appeal of Kikkoman International, Inc., Cal. St, Bd. of Equal., June 29, 1982.) In such a case, the amount of income attributable to California sources must be determined by applying an apportionment formula to the total income derived from the combined unitary operations of the affiliated corporations. (See

Edison California Stores, Inc. v. McColgan, 30 Cal.2d 472 [183 P.2d 16] (1947).)

In Butler Bros. v. McColgan, 17 Cal.2d 664, 678 [111 P.2d 334] (1941), affd., 315 U.S. 501 [86 L.Ed. 9911 (1942), the California Supreme Court determined that the existence of a unitary business had been definitely established by the presence of unity of ownership, unity of operation as evidenced by central planning, advertising, accounting, and management divisions, and unity of use in a centralized executive force and general system of operation. In a subsequent decision, the court stated that 'a business is unitary when the operation of the portion of the business done within California is dependent upon or contributes to the operation of the business outside California. (Edison California Stores, Inc. v. McColgan, supra, 30 Cal.2d at 481.) The existence of a unitary business is established if either of these tests is met. (Appeal of F. W. Woolworth Co., Cal. St. Bd. of Equal., July 31, 1972.)

Respondent's determination that appellant is engaged in a unitary business with its parent and its parent's affiliates is presumptively correct, and the burden is on the appellant to show that such determination is erroneous. (Appeal of John Deere Plow Co. of Moline, Cal. St. Bd. of Equal., Dec. 13, 1961.) Appellant must, therefore, prove by a preponderance of the-evidence that, in the aggregate, the unitary connections relied on by respondent are so lacking in substance as to compel the conclusion that a single integrated economic enterprise did not exist. (Appeal of Saga Corporation, Cal. St. Bd. of Equal., June 29, 1982,)

Appellant has made no attempt to discredit the unitary connections relied upon by respondent in reaching its determination. Appellant simply states that all of the affiliated corporations were separate and distinct legal entities with each business having its own board of directors, officers and employees. Therefore, appellant concludes, the affiliates did not constitute a unitary business group. No other evidence or argument is presented, however, to support appellant's conclusion. Such unsupported assertions are insufficient to overcome the presumptive correctness of respondent's determination. (Appeal of New Home Sewing Machine Company, Cal. St. Bd. of Equal., Aug. 17, 1982; Appeal of Shachihata, Inc., U.S.A., Cal. St. Bd. of Equal., Jan. 9, 1979.) We

conclude, therefore, that respondent's determination of unity is correct.

For the years on appeal., appellant's income derived from or attributable to California sources must be determined in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) contained in sections 25120 through 25139. (Rev. & Tax. Code, § 25101.) Generally speaking, UDITPA requires-that the business income of the unitary business be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three, (Rev. & Tax. Code, § 25128.) The numerators of the respective factors are composed of the taxpayer's property, payroll, and sales in California; the denominators consist of the taxpayer's property, payroll, and sales everywhere. (Rev. & Tax. Code, §§ 25129, 25132, and 25134.) Methods other than the standard three-factor formula may be used only in exceptional circumstances where UDITPA's provisions do not fairly represent' the extent of the taxpayer's business activity in this state. (Rev. & Tax. Code, § 25137.) The party seeking to deviate from the standard formula bears the burden of proving that such exceptional circumstances are present. (Appeal of New York Football Giants, Inc., Cal. St. Bd. of Equal., Feb. 3, 1977.)

Appellant argues that separate accounting must be used because the payroll factor does not account for the disparity between California and Taiwanese labor costs. Arguments similar to appellant's, which focus only on one factor of the apportionment formula, have been considered and rejected by the California courts... (See, e.g., Chase Brass & Copper Co. v. Franchise Tax Board, 70 Cal.App.3d 457 [138 Cal.Rptr. 901] (1977); Household Finance Co. v. Franchise Tax Board, 230 Cal.App.2d 926 [41 Cal.Rptr. 565] (1964).) The challenge to the apportionment formula must attack "each element of the formula equation, and show that the formula [as a whole] unfairly apportions net income to California." (Household Finance Co. v. Franchise Tax Board, supra, 230 Cal.App.2d at 931.) Consequently, "the profitability or productivity of one group of employees as against another, based on separate accounting in each [country], is not relevant to the apportionment formula used for unitary business." (Chase Brass & Copper Co. v. Franchise Tax Board, supra, 70 Cal.App.3d at 472; see also Container

Corp. v. Franchise Tax Bd., 463 U.S. 159, 181-182 [77 L.Ed.2d 545] (1983).)

Appellant's next contention is that separate accounting would be more accurate and a better approach to the determination of its California income. Section 25137, however, does not authorize deviation from UDITPA's normal provisions simply because one purports to have found a better approach. (Appeal of Kikkoman International, Inc., supra.) As long as the normal apportionment methods fairly represent the extent of the taxpayer's business activity in this state, their use will be upheld. (Appeal of Kikkoman International, Inc., supra.) Appellant's mere allegations of distortion, based upon separate accounting principles, are insufficient to persuade us that the normal factors should not be used. (Appeal of New Home Sewing Machine Company, supra.)

Finally, appellant contends that California's statutory scheme of taxing unitary businesses is unconstitutional. We are precluded by article III, section 3.5, of the California Constitution from determining that the statutes involved are unconstitutional or unenforceable. We note, however, that constitutional objections substantially the same as those raised by appellant were considered by the United State Supreme Court in Container Corp. . Franchise Tax Board, supra, and rejected.

Consequently, we find that appellant has failed to show any error in respondent's determination of unity and also has failed to show that the allocation and apportionment provisions of UDITPA did not fairly reflect the extent of its business activity in California. Accordingly, respondent's action in this matter will be sustained.

Appeal of Evergreen Marine Corporation (Calif.) Ltd.

## 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 Evergreen Marine Corporation (Calif.) Ltd. against proposed assessments of additional franchise tax in the amounts of $108, $12,000, and $20,567 for the income years 1976, 1977, and 1978, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day of March, 1986, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Collis, Mr. Dronenburg and Mr. Harvey present.

Richard Nevins, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Walter Harvey*, Member

, Member

*For Kenneth Cory, per Government Code section 7.9