BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 83R-1299-MW
TEE TROPICANA INN, INC.)

For Appellant: Richard A. Harris
Attorney at Law

For Respondent: John A. Stilwell, Jr.
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a), 1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of The Tropicana Inn, Inc., for refund of franchise tax in the amount of $23,367 for the income year 1980.

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

Appeal of The Tropicana Inn, Inc.

The question presented by this appeal is whether appellant and Mooney Investment & Management Co., Inc. ("Mooney Investment"), were entitled to file a combined report for income year 1980.

Appellant was incorporated under the laws of California in 1976 as "Mooney Fair Car Wash." It purchased a one-acre parcel of land in Visalia, California, on which was located a coffee shop and car wash. The car wash constituted the major portion of tne business appellant operated.

Until June 1980, appellant was owned equally by three individuals. At that time, Sami Zraikat, *one of* the stockholders, purchased the one-third interest of one of the other stockholders. The remaining third was owned by Sami's brother, Elias. After Sami Zraikat became controlling stockholder, appellant sold the car wash business and the cash from the sale was loaned to Sami Zraikat.

Mooney Investment was incorporated in 1979 and was 87.5 percent owned by Sami Zraikat and 12.5 percent owned by Elias Zraikat. Mooney Investment owned a small apartme'nt building and a vacant commercial lot in Visalia, California. On January 1, 1980, Mooney Investment sold these properties and purchased the Tropicana Inn, a motel and restaurant in Fresno. On October 29, 1980, appellant purchased the stock of Mooney Investment and merged Mooney Investment into appellant. In 1981, appellant changed its name from Mooney Fair Car Wash to The Tropicana Inn, Inc.

Appellant originally filed a separate franchise tax return for the 1980 income year. Later, it filed an amended return, using a combined report which included the operations of Mooney Investment as well as its own, and claimed a refund. Respondent determined that the two corporations were not entitled to file a combined report and denied appellant's claim for refund.

For income years beginning on or after January 1, 1980, two or more corporations.which derive income solely from sources within this state are entitled.to file a combined report if their business activities are such that they would be required to file a combined report if' their business activities were conducted both within and without this state. (Rev. & Tax. Code, § 25101.15.) In other words, they may file a combined report if they meet all the criteria of a unitary business except for the requirement that their income be derived from or

from or attributable to sources both within and without this state. Where truly separate businesses are involved, however, the separate accounting method is used to determine the income of each separate business. (Edison California Stores, Inc. v. McColgan, 30 Cal.2d 472 [183 P.2d 16] (1947).)

Respondent's determination is presumptively correct and the appellant bears the burden of proving that it is incorrect. (Appeal of John Deere Piow Company of Moiine, Cal. St. Bd. of Equal., Dec. 13, 1961.) Appellant must show that the relationships between the two companies were of sufficient substance to demonstrate the existence of a single unitary business.

The existence of a unitary business is established if either of two tests is met. (Appeal of F. W. Woolworth Co., Cal. St. Bd. of Equal., July 31, 1972.) The California Supreme Court has determined that the existence of a unitary business is definitely established by the presence of: (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, 'accounting, and management divisions; and (3) unity of use in a centralized executive force and general system of operation. (Butler Bros. v. McColgan, 17 Cal.2d 664, 678 [111 P.2d 334] (1941), affd., 315 U.S. 501 [86 L.Ed. 991] (1942).) The court has also 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., supra, 30 Cal.2d at 481.) For purposes of section 25101.15, this "contribution or dependency" test must be restated to require that the operations of the two intrastate companies must be dependent upon or contribute to each other. Implicit in this latter test is an ownership requirement. (Appeal of Revere Copper and Brass Incorporated, Cal. St. Bd. of Equal., July 26, 1977.)

We have held that the ownership requirement for a unitary business is only met when controlling ownership of all involved corporations is held by one individual or entity. (Appeal of Douglas Furniture of California, Inc., Cal. St. Bd. of Equal., Jan. 31, 1984.) This requirement was not met by appellant and Mooney Investment until June 1980, when Sami Zraikat became majority shareholder of appellant. Therefore, the two companies could not have been engaged in a single unitary business until that time.

Appellant contends that it was unitary with Mooney Investment because both corporations were in the business of real estate management and development, Sami Zraikat made all management decisions for both corporations, and Mooney Investment was dependent upon financial contributions from appellant. For the reasons discussed hereafter, we find the evidence insufficient to support a finding that the two corporations were engaged in a single unitary business.

Both corporations did own real estate, at least initially. However, it appears that appellant sold its commercial property at about the same time that the corporations first had the common ownership necessary for a unitary business. There is no evidence of appellant engaging in any business activity thereafter until the corporations were merged. We cannot conclude, therefore, that the corporations were engaged in the same or similar businesses between June and November of 1980.

It appears that Sami Zraikat, the controlling shareholder; provided all the financial and policy guidance for both corporations. However,- this by itself is insufficient to prove that the two corporations were unitary. This type of executive guidance is ordinarily found where enterprises are closely held and reveals nothing more than an owner's interest in overseeing his assets. (Appeal of Mole-Richardson Company, Cal. St. Bd. of Equal., Oct. 26, 1983.)

Appellant alleges that Mooney Investment was financially dependent upon appellant. We must doubt that assertion, however, because the money from the sale of appellant's property was loaned to Sami Zraikat, and appellant apparently had no income-generating ability after its business was sold. Any cash from appellant to Mooney Investment before June 1980 is irrelevant because a unitary business could not exist until common ownership existed.

Appellant has shown us no.evidence of unity between these.two companies other than common controlling ownership for part of 1980. With no evidence of operational or functional integration between the two, we must conclude that a single unitary business did not exist. Therefore, the action'of the Franchise Tax Board must be sustained.

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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 claim of The Tropicana Inn, Inc., for refund of franchise tax in the amount of $23,367 for the income year 1980, 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