

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
W. W. and Linda George) No. 90A-0164
)

Appearances:

For Appellant: Daniel J. Cooper,
Attorney at Law

For Respondent: Richard Gould,
Counsel

OPINION ON PETITION FOR REHEARING

On February 3, 1994, this board rendered its decision in the above-captioned matter modifying the action of the Franchise Tax Board on the protest of W. W. and Linda George against proposed assessments of additional personal income tax in the amounts of \$112,177.10 and \$3,675.57 for the years 1982 and 1983, respectively. In that decision, we determined that appellants constructively received a liquidating distribution from their wholly owned corporation in 1982 prior to becoming nonresidents of California, and that payments received from a covenant not to compete were California-source income to the extent of the corporation's sales in California. On March 4, 1994, respondent filed a timely petition for rehearing with respect to our findings regarding the covenant not to compete.

Essentially, respondent believes that our decision regarding the apportionment of income from the covenant not to compete is not supported by the evidence and that the standard used for that apportionment was inappropriate. For example, respondent points out that out-of-state sales were

generally made by independent contractors, that the corporation's tax returns apportioned 100 percent of its business income to California, and that a three-factor formula may be a more proper method to apportion the income from the covenant not to compete. However, many of these arguments were raised either during the hearing of this appeal or in written submissions to this board prior to the oral hearing. Therefore, respondent can take comfort in the fact that this board considered all such concerns prior to rendering its decision.

Moreover, documents that respondent submitted in support of its petition, such as the corporation's tax returns, were available to respondent prior to the oral hearing and were not presented to us. If respondent was surprised by any of the testimony given by appellants' witness or by the documentation submitted by appellants at the hearing, a request should have been made at that time for additional time to review the new information and to submit a rebuttal thereto, if necessary. No such request was made. In fact, respondent did submit a post-hearing brief, but it neither discussed the covenant not to compete nor analyzed or attempted to rebut the new evidence submitted at the hearing. Under such circumstances, we do not find sufficient cause for the granting of respondent's petition for rehearing. (See Appeal of Wilson Development, Inc., 94-SBE-007, Oct. 5, 1994.)

ORDER

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 19048 of the Revenue and Taxation Code, that the petition of the Franchise Tax Board for rehearing of the appeal of W. W. and Linda George from the action of the Franchise Tax Board on their protest against proposed assessments of additional personal income tax in the amounts of \$112,177.10 and \$3,675.57 for the years 1982 and 1983, respectively, be and the same is hereby denied and that our decision of February 3, 1994, be and the same is hereby affirmed.

Done at Sacramento, California, this 2nd day of August, 1995, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Dronenburg, Mr. Andal, Mr. Sherman and Mr. Halverson present.

Johan Klehs _____, Chairman

Ernest J. Dronenburg, Jr. _____, Member

Dean F. Andal _____, Member

Brad J. Sherman _____, Member

Rex Halverson* _____, Member

*For Kathleen Connell, per Government Code section 7.9.