

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
HAUSERMAN, INC.) No. 86A-1549-JG

For Appellant: Ernest James Krtil
Attorney At Law

For Respondent: Elleene K. Tessier
Counsel

OPINION

This appeal is made pursuant to section 25666^{1/} of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Hauserman, Inc., against proposed assessments of additional franchise tax in the amounts of \$895.14 and \$1,010.23 for the income years ended June 30, 1978, \$1,207.06 for the income year ended June 30, 1979, and \$18,620.55 and \$2,856.49 for the income year ended June 30, 1980.

^{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.

The question presented for decision is whether Hauserman, Ltd. (Ltd), a Canadian corporation, is immune from California taxation under the provisions of Public Law 86-272 (15 U.S.C. § 381).

Appellant Hauserman, Inc. (Inc), is an Ohio corporation qualified to do business in California. Inc owns 100 percent of the stock of E.F. Hauserman Co. (Co), also an Ohio corporation, which does business in California. Co owns 100 percent of the stock of Ltd.

Co is engaged in the United States in the business of marketing, installing and servicing a variety of movable interior space dividers, furniture and related storage components and design accessories. Ltd does the same thing in Canada.

Effective August 1, 1978, Inc and Ltd entered into an exclusive sales representation agreement under which Inc was to solicit orders and submit bids for the sale of Ltd's products. The agreement provided that Ltd would set prices and terms and would accept or reject the orders. The orders were to be filled from Ltd's inventories in Canada. It was further provided that Inc would select, obtain and maintain a number of showrooms/sales offices in the United States. Under this provision showrooms/sales offices were opened in Chicago, Houston, New York City and, in April 1979, Los Angeles. As to all the showroom/sales offices, Ltd owned the office furniture which was displayed therein, and owns the furniture in the sales offices. These displays were not for sale. As to all the showroom/sales offices, Inc owned leasehold improvements. Inc also employed, on behalf of Ltd, sales representatives. Such persons were paid by Co. For its efforts Inc was to receive a 15-percent commission on each order in the United States.

For the appeal years, Inc and Co each filed California returns on a separate accounting basis. Later, Inc filed amended returns for the income years ended June 30, 1978, and 1979, claiming immunity under Public Law 86-272. After examination, respondent determined that Inc, Co and Ltd were engaged in a single unitary business. It, therefore, recomputed Inc's^{2/} tax liability using a combined report and formula apportionment, and issued notices of proposed assessment reflecting the results of combination. During the income year ended June 30, 1978, only Co was engaged in business within this state. Accordingly, only Co's property, payroll and sales were included in the numerator of the apportionment formula for that period. Respondent determined that, as of April 1, 1979, when the lease on the Los Angeles showroom became effective, both Inc and Ltd were doing business in California. Respondent's calculations reflected that determination. Appellant protested, the protest was denied, and from such action this timely appeal is brought.

Inc first takes the position that it was merely an agent selling the property of another and therefore it was not doing business in California (App. Ltr. at 2). Not surprisingly, no authority is cited

^{2/} Inc authorized respondent to issue notices of proposed assessment to it in lieu of notices to each corporation in the combined group.

for this novel proposition. Later (App. Br. at 3 et seq.) Inc describes itself as an independent contractor and, therefore, claims that Ltd was not doing business in California, but Inc was.

15 U.S.C. section 381(d) states:

For purposes of this section-

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor. (Emphasis added.)

Since Inc did not do what the emphasized language says must be done in order to be an independent contractor, Inc was not, for purposes of Public law 86-272, an independent contractor.

We hold rather that Inc was what it was appointed to be by the agreement: a sales representative.

Section 23151 provides that, with the exception of financial corporations and corporations expressly exempt, a tax shall be imposed upon every corporation doing business in this state. Section 23101 defines "doing business" as actively engaging in any transaction for the purpose of financial or pecuniary gain or profit.

During the income years ended June 30, 1979, and 1980 Ltd's California sales were \$1,776,000 and \$3,050,000, respectively. Under the sales representation agreement, Inc received a 15-percent commission on these amounts. It certainly seems like some effort was made toward financial or pecuniary gain or profit and we so hold. We also hold that Inc's being a party to the Los Angeles showroom/sales office and owning leasehold improvements in this state is further evidence of its doing business.

We also hold that Ltd is not excused from taxation by Public Law 86-272. Wholly aside from the fact that Ltd was a foreign country corporation, any possible immunity was destroyed by its maintenance of a showroom/sales office in Los Angeles.

In Wis. Dept. of Rev. v. Wrigley Company, 505 U.S. __ [120 L.Ed.2d 174] (1992), the United States Supreme Court considered the question of whether the Public Law 86-272 immunity was available to Wrigley which had sales representatives soliciting orders in Wisconsin. Wrigley had no offices in that state. In the course of the opinion, the court stated:

As we have discussed earlier, the text of the statute (the "office" exception in subsection (c)) requires one exception to this principle: Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the State, by the company or on its behalf, would go beyond the "solicitation of orders." We would not make any more generalized exception to our immunity standard on the basis of the "office" provision. It seemingly represents a judgment that a company office within a State is such a significant manifestation of company "presence" that, absent a specific exemption, income taxation should always be allowed. [Citations.]

(Wis. Dept. of Rev. v. Wrigley Co., supra, 505 U.S. at __ [120 L.Ed.2d at 190].)

Although dictum, we have no doubt that it is a correct statement of the law. (See also Appeal of Nardis of Dallas, Inc., Cal. St. Bd. of Equal., Apr. 22, 1975.)

In its early filings appellant raised a question of sales factor distortion. In later submissions the issue seems to have been abandoned. We therefore do not address the question.

For the above reasons, respondent's action in this matter will be sustained.

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 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Hauserman, Inc., against proposed assessments of additional franchise tax in the amounts of \$895.14 and \$1,010.23 for the income year ended June 30, 1978, \$1,207.06 for the income year ended June 30, 1979, and \$18,620.55 and \$2,856.49 for the income year ended June 30, 1980, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of September, 1993, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

Brad Sherman _____, Chairman

_____, Member

Ernest J. Dronenburg, Jr. _____, Member

Windie Scott* _____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9

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