

DEPARTMENT OF TAXATION AND FINANCE
BOARD OF CONFERES - CORPORATION TAX BUREAU

In the Matter of the Applications of

HERBERT B. PEARL, INC.

for revision or refund of franchise
taxes under Article 9-A of the Tax
Law for the calendar years 1959, 1960
and 1961.

Hearing Case

Nos. 2644 and 3309

The taxes were audited and stated or recomputed on May 12, 1961 and May 1, 1964.

Timely applications were filed on May 9, 1963 and June 18, 1964.

The taxes were assessed as follows:

	<u>1959</u>	<u>1960</u>	<u>1961</u>
Entire Net Income	\$49,609.87	\$73,821.58	\$13,184.00
Tax at 5½%	2,728.54	4,060.19	725.12
Plus Subsidiary Capital Tax	73.88	99.65	8.95
Total Tax	\$ 2,802.42	\$ 4,159.84	\$ 734.07

Question involved: Whether the taxpayer is entitled to a business allocation.

An informal hearing was held in New York City on October 6, 1964 before William F. Sullivan, conferee, with the taxpayer being represented by Herbert B. Pearl, president, and James S. Strauch, controller.

The testimony indicates the following:

The taxpayer was incorporated under the laws of New York State on January 6, 1955.

In 1958 the taxpayer acquired the capital stock of O.W. Siebert Company located in Gardner, Massachusetts.

In 1959 the taxpayer formed a new subsidiary, Eclipse Lumber Co., Inc. of Delaware, and that company, early in 1959, acquired all of the net assets of the Eclipse Lumber Company, an Iowa corporation. The operating assets that were acquired were all located in the State of Iowa, with headquarters in Clinton, Iowa.

In 1960 Eclipse Lumber Co., Inc. was merged by O.W. Siebert Company.

In 1961 O. W. Siebert Company acquired all the assets of a corporation of 14 millwork warehouses located in seven or eight midwestern states with headquarters in Des Moines, Iowa. This is operated as the Great Western Millwork division of W. W. Siebert Company.

For the years under review, in addition to holding the stock of the above three corporations, the taxpayer gave management and supervisory

services to Eclipse Lumber Co., Inc. and Great Western Millwork division.

The taxpayer entered into an agreement dated May 1, 1959 with Eclipse to render consulting and management services as Eclipse may from time to time request.

The total business receipts of \$85,000 and \$120,000 for the calendar years 1959 and 1960 were paid by Eclipse for the consulting and management services rendered by the taxpayer.

In 1961 the total business receipts amounted to \$50,975, of which Eclipse paid \$41,417 and Great Western Millwork division paid \$9,558.

The taxpayer has submitted schedules showing that Mr. Pearl spent the following number of days in travelling outside New York in connection with the management services rendered:

Total days in 1959	122
" " " 1960	97
" " " 1961	135

As part of the management services the taxpayer had a full time employee at Eclipse's headquarters in Clinton, Iowa, to supervise the accounting and control functions of Eclipse.

Mr. Herbert Pearl and Mr. George Sasine also acted as president and vice president of Eclipse.

The taxpayer had no employees in its own name other than the one in Clinton, Iowa. In New York City the officers of the taxpayer occupied desk space in the offices of its subsidiary, O. W. Siebert Company.

To sum up:

The taxpayer is subject to tax because it was incorporated in New York. If the taxpayer was a foreign corporation, it is doubtful if the activities conducted in New York would subject it to the New York franchise tax.

Section 210.3(a)(4) provides that if the taxpayer does not have a regular place of business outside the State, other than a statutory office, the business allocation shall be one hundred per cent.

A regular place of business is any ~~business~~ fixed office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business.

As noted above, practically all of the business receipts for the years involved were received from Eclipse Lumber Company, Inc. for management services rendered by the taxpayer. Since the taxpayer had a full time employee at Eclipse's headquarters in Clinton, Iowa, this Board considers such premises as other space which was regularly used by the taxpayer in

carrying on its business. As noted, Mr. Pearl spent considerable time in Clinton on Management matters.

Based on the foregoing, we recommend that the taxes be corrected as follows:

	<u>1959</u>	<u>1960</u>	<u>1961</u>
Business Income	\$49,609.87	\$76,470.00	\$13,184.00
Business allocation	02.94%	12.5%	12.5%
New York Base	1,458.53	9,558.75	1,648.00
Tax at 5 1/2%	80.22	525.75	90.64
Plus Subsidiary Capital tax	73.88	99.65	8.95
Total Tax	154.10	625.40	99.59
Original Tax	2,802.42	4,159.84	734.07
Reduction	\$ 2,648.32	\$ 3,534.44	\$ 634.48

/s/

WILLIAM F. SULLIVAN

Chairman

/s/

DONALD H. GILHOGLY

WFS:MB
September 2, 1965

Approved
E. A. DORAN

Approved
JAMES R. MACDUFF
9-10-65