Corp. Tax Determinations
A-7
American Can Company

STATE OF NEW YORK

DEPARTMENT OF TAXATION AND FINANCE

BOARD OF CONFEREES - CORPORATION TAX BUREAU

In the Matter of the Application of AMERICAN CAN COMPANY for revision or refund of franchise tax under Article 9A for the calendar year 1962.	:	Hearing Case No. 3354

For the year 1962 we computed the following tax:

Adjusted Net Income	$57,099,633.79
Business allocation	09.394106%
New York Base	5,364,000.12
Tax at 5½%	295,020.01
Plus Subsidiary Capital Tax	41.92
Total Tax	295,061.93
Tax as computed by Taxpayer	244,298.25
Difference	$ 50,763.68

We adjusted net income reported by disallowing the net operating loss deduction of $9,825,054.20 for the A. W. Glass Corp., a former subsidiary which was merged into the taxpayer on October 15, 1962.

Said loss was allowable to the taxpayer under the Internal Revenue Code. Under Section 208.9(f)(2) of the Tax Law the loss is not allowable because the subsidiary was not subject to the tax imposed by Article 9A.

The tax was recomputed on January 24, 1964,and application for revision or refund was filed on June 23, 1964.

Subsequently, franchise tax returns were filed by A. W. Glass Corp. which, together with the file of the taxpayer, were sent to New York for a field audit.

In a memorandum dated May 4, 1965, the Bureau of Law gave the following opinion of the findings of the field audit:

"Your memorandum of January 8, 1965 requests my opinion as to whether I agree with the findings of a field audit in that the combination of a sales solicitation office in New York with the storage of merchandise for sale in a public warehouse in New York State is sufficient to hold a foreign manufacturing corporation subject to the New York franchise tax. Advice is also sought regarding whether a net operating loss sustained by a subsidiary may be carried forward by a parent corporation following a merger. The facts are as hereinafter stated.

"A. W. Glass Corp., formerly a 100% owned subsidiary of American Can Company, was incorporated in New Jersey in June,1960,

and did not file any franchise tax returns with New York State until after the merger on October 15, 1962 into American Can Company. The Corporation Tax Bureau disallowed a net operating loss deduction of $9,825,054.20 sustained by A. W. Glass Corp. from American Can Company's 1962 franchise tax return. Subsequently, A. W. Glass Corp. filed returns and paid taxes for the years 1960, 1961 and 1962.

"A field audit conducted by the New York District Office, dated November 30, 1964, ascertained the following facts concerning A. W. Glass Corp.'s operations in New York State:

> "From the date of incorporation on June 23, 1960 to December 31, 1960, subject company had no warehouse facilities, inventories, real or personal property or office in the State of New York, or any other evidence of doing business in New York State for franchise tax purposes.
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> "For the calendar year 1961, A. W. Glass Corp. paid a nominal rent to an associated company for sales office space at 165 Broadway, New York City. New York State Unemployment Insurance tax returns for salesmen were filed beginning with the quarter ended December 31, 1961.
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> "On December 22, 1961, subject corporation signed a one year lease for a sales office at 527 Madison Avenue, New York City, for the calendar year 1962. At various times during the year, two to four salesmen operated out of this office. These offices were maintained for sales solicitation only.
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> "All orders for 1961 and 1962 were accepted at the home office at 1131 Highway 18, East Brunswick, New Jersey, where Mr. Busby, Treasurer and Credit Manager, set up all credit lines and approved all orders. Dun and Bradstreet credit services were maintained only at the New Jersey location. In view of the aforementioned facts, subject corporation was not doing business in New York State for franchise tax purposes as a result of opening its New York sales office.
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> "A. W. Glass Corp. signed a three-month lease with Cambridge Warehouses, Inc., 116 Imlay Street, Brooklyn, New York, to commence on August 24, 1962.

These premises were used regularly as a public warehouse for storing of merchandise held for sale, beginning with August 25, 1962. Based on the foregoing, it is exeminer's opinion that taxpayer became subject to the New York franchise tax on August 25, 1962 and continued as such, until October 14, 1962, when it was merged into American Can Company."

"A foreign manufacturing corporation whose sold activity in New York State consists of a sales solicitation office is not subject to the franchise tax. Public Law 86-272, as enacted by Congress, provides that a foreign corporation shall not be considered to have engaged in business activities within a state during any taxable year by reason of the maintenance of an office in such state whose activities consist solely of soliciting orders for sale of tangible personal property which are accepted by the corporation outside the state.

"However, where such sales activities are coupled with the maintenance of a stock of goods, no matter how small, within the state, irrespective if maintained at a public warehouse, the place of business of the corporation, etc., and which is utilized for delivery to its customers within and without the state, the foreign corporation is doing an intrastate business which would subject it to tax under Article 9-A of the Tax Law. (People ex rel. Parke, Davis & Co. v. Roberts, 171 U.S. 658, 43 L. Ed. 323; Cunningham v. Mellins Food Co., 121 Misc. 353 rev'd on other grounds 216 App. Div. 725)

"The test of interstate commerce is transportation from one state or another. If the goods are already in the state when sold there can be no transportation into the state under a contract and the transaction is not interstate commerce. Foreign corporations which carry on the business of selling their goods in New York State in such a manner deprive themselves of the protection of the commerce clause and are "doing business" within the state. (Portland Co. v. Hall & Grant Construction Co., 121 App. Div. 779; American Can Co. v. Grassi Contracting Co., 102 Misc. 230; P-H New York Taxes P.7525)

"The Regulations provide, in part, as follows:

"(g) A foreign corporation, which regularly maintains a stock of goods in New York and makes deliveries to its customers from such stock, is doing business in New York so as to be subject to tax.

* * * * * * * * * * *

Example 2: A foreign corporation is engaged in the business of manufacturing. Its factory is located outside

> New York but it maintains a stock of merchandise in New York. Orders are filled from its New York stock. The corporation is subject to the New York franchise tax."

(20 NYCRR 1.6 (g))

"Accordingly, in my opinion, A. W. Glass Corp. became subject to Article 9-A of the Tax Law on August 25, 1962, when it began regular use of a Brooklyn warehouse for storing of merchandise held for sale and continued as such until October 14, 1962, when it was merged into American Can Company.

"With regard to your inquiry concerning whether the net operating loss sustained by the former subsidiary, A. W. Glass Corp., may be carried forward by the parent, American Can Company, following their merger, my memorandum to you dated April 9, 1965 with regard to Midland-Ross Corporation (a copy of which is herewith enclosed) dealt with section 208(9)(f) of the Tax Law, and states, in part, as follows:

> "The intention of the Committee therefore, was to assist new corporate businesses and those corporations with fluctuating income. I can fathom no intent by the Legislature to grant the deduction to taxpayers which acquired, by virtue of merging, net operating losses of other corporations whose operations had not been subject to the franchise tax imposed by Article 9-A of the Tax Law.
>
> "Accordingly, in my opinion, the taxpayer is not entitled to the net operating loss deduction provided for in section 208(9)(f) of the Tax Law, as the operations of the corporation which incurred such losses were not subject to the franchise tax prior to its merging into the taxpayer."

"As A. W. Glass Corp. was subject to the franchise tax only for the period from August 25, 1962 through October 14, 1962, inclusive, in my opinion, only that portion of the net operating loss, if any, incurred by A. W. Glass Corp. during that period can be carried forward as a deduction by American Can Company on its 1962 New York franchise tax return."

Based on the foregoing, this Board recommends that the tax be recomputed as follows:

Income taxed		$57,099,633.79
Less:	A. W. Glass Corp. net operating loss ($4,642,464) for 1962 prorated 51/287 on basis of days covered by report and days subject to tax in N.Y.State	825,039.00
Corrected Net Income		$56,274,594.79

Business allocation per field audit	09.326869%
New York Base	5,248,657.74
Tax at 5½%	288,676.18
Plus Subsidiary Capital Tax	41.92
Total Tax	288,718.10
Previous Tax	295,061.93
Reduction	$ 6,343.83

Chairman

Approved
E. A. Doran

Approved
5/6/66

WFS:MB
April 29, 1966

Approved — see my concurring memo dated today
6/21/66

American Can Company and A. W. Glass Corp.

I agree with the conclusion expressed in the Board of Conferees Report dated April 29, 1966, which in effect denies American Can Company's claim of a portion of the net operating loss of its 100%-owned subsidiary, A. W. Glass Corporation. A. W. Glass Corporation was merged into taxpayer American Can Company on October 15, 1962. The 1962 return submitted by American Can Company sought the benefit of net operating losses sustained by A. W. Glass Corporation for 1960, 1961 and 1962.

Pending

A. W. Glass Corporation was incorporated in New Jersey in June 1960. It appears not to have filed franchise tax returns with us prior to the submission of American Can Company's 1962 franchise tax return.

On January 24, 1964, upon our recomputing American Can's 1962 tax and return, the A. W. Glass NOL included therein was disallowed. Subsequently franchise tax returns were filed by A. W. Glass Corporation for 1960, 1961 and 1962. I understand remittances which accompanied those returns were in relatively small amount.

This case presents an unusual situation of a merged foreign corporation, which had normally not paid a New York franchise tax, seeking retroactively after merger to be declared a New York taxpayer so that its absorbing parent can claim a carryback net operating loss it never sustained.

I have given this chronology of facts against the possibility that the complaining taxpayer, American Can, may petition for a formal hearing that may result in a denial taken to the Appellate Division of the Supreme Court. I believe these facts should be recited at such time as we may issue a determination after formal hearing. It would show belated self-assessment for the purpose of tax avoidance. If A. W. Glass was not subject to a New York franchise tax for the period in which its NOL was sustained, the latter could not be utilized by American Can Company despite the merger. This appears from Law Bureau's memorandum as well as from the Board of Conferrees' report.

Excepted from these observations is such portion of the NOL of A. W. Glass Corporation incurred while it was liable in 1962 for a New York franchise tax, a period I understand of about 51 days.

June 21, 1966

IRA J. PALESTIN