DISTRICT OF COLUMBIA TAX COURT

CARNATION COMPANY, Petitioner, v. DISTRICT OF COLUMBIA, Respondent.	)))))))))	DOCKET NO. 1330

FILED
JUN 19 1953
District of Columbia Tax Court

FINDINGS OF FACT and OPINION

This is an appeal from the assessment of corporation franchise taxes for the calendar years 1948, 1949 and 1950. It raises the question whether the petitioner was engaged in business in the District of Columbia during such years within the meaning of Section 4(h) of Title I of the District of Columbia Income and Franchise Act of 1947, as amended by the Act of May 3, 1948.

Findings of Fact

The parties hereto have stipulated, and the Court finds as follows:

"It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided however, that this stipulation shall not prejudice the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated.

I.

"The petitioner is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 5045 Wilshire Boulevard, Los Angeles 36, California.

II.

"The tax in controversy is corporation franchise tax as follows:

Calendar Year	Tax	Interest	Total
1948	$1,957.83	$366.76	$2,324.59
1949	2,590.12	329.79	2,919.91
1950	3,930.51	264.64	4,195.15
TOTAL	$8,478.46	$961.19	$9,439.65

III.

"(a) The notices of assessment were dated May 29, 1952, and true copies of said notices are attached to the petition as Exhibit A.

"(b) The tax and interest thereon, as itemized in paragraph II, were paid by petitioner under protest in writing on June 6, 1952.

IV.

"(a) Petitioner was engaged during the years involved in the production and sale of a number of dairy products, malted milk and dog food. The principal product material to this case is Carnation Milk, an evaporated milk sold in cans. For convenience in handling, the cans are in turn packed in cardboard cartons containing 48 cans each, either in six ounce or fourteen and one-half ounce sizes.

"(b) Petitioner had no manufacturing plant in the District of Columbia during the years involved. Most of the merchandise sold by petitioner to customers in the District of Columbia was produced in petitioner's plant at Clarksburg, West Virginia.

"(c) Petitioner's total sales during the years involved, petitioner's sales to customers in the District of Columbia, and petitioner's net taxable income is as follows:

Year	Total Sales	Sales to Customers in District of Columbia	Net Taxable Income
1948	$194,031,184	$1,041,300	$7,297,181
1949	176,742,071	1,178,100	7,772,313
1950	186,253,855	1,216,800	12,032,778

"(d) Petitioner's sales to customers in the District of Columbia during the years involved consisted of sales in carload lots and less than carload lots as follows:

Year	Sales to Customers in District of Columbia	Sales in Carload Lots	Sales in Less Than Carload Lots*
1948	$1,041,300	$764,144	$277,156
1949	1,178,100	887,590	290,510
1950	1,216,800	925,622	291,178

* It is estimated by petitioner that 50% of less than carload sales were allocated to specific customers prior to shipment and picked up by the customers upon arrival."

In addition to the facts set forth in the foregoing stipulation, the following facts are found by the Court:

During the three taxable years here involved the petitioner maintained a branch or district office in Baltimore, Maryland. The district or geographic area pertaining to such office was Maryland, District of Columbia, four counties in Virginia, six counties in West Virginia and one county in

Pennsylvania. At all times during the taxable years involved, the petitioner had two representatives assigned to the District of Columbia, the "territory" of one being the north or northwestern part of the District of Columbia, Montgomery County in Maryland, and Fairfax and Arlington Counties in Virginia; and the "territory" of the other representative being the southern or southeastern part of the District, Prince Georges County and the other counties in Southern Maryland.

The primary duty of the representatives was to promote sales, principally by checking the petitioner's products on the retail merchants' shelves to see that they were kept fresh and unspoiled, and to arrange and suggest advertising displays for the purpose of inducing and increasing the sales of the petitioner's products. In addition the representatives did solicit and take orders from the retail merchants or grocery stores, and from jobbers and other customers.

When any such order was received by the representative from a retail merchant, he mailed it to the District office in Baltimore, which in turn transmitted the order to that jobber in Washington selected by the retail merchant, if any such selection had been made or suggested, and, if not, then to a jobber in Washington selected by the Baltimore office. The jobber then filled the order from his stock, billed the merchant and collected the price of the merchandise.

Frequently the representatives in carrying out the duties were accompanied by the District Manager, and at times by the Supervisor, both of whose offices were in Baltimore.

At no time were there more than two representatives assigned to the District of Columbia. There was, however, a "turnover" in personnel of the representatives and several persons were so employed in the District of Columbia during the three taxable years involved. Of such three were residents of the District of Columbia.

The representatives visited the Baltimore office once or twice a month. Contact between them and that office between such visits was maintained by mail or visits by the District Manager, and occasionally by telephone calls to their homes. Representatives made calls to Baltimore office from their homes.

Each representative was furnished with an automobile which was kept by him at his home, and which was registered and licensed in the District of Columbia in the name of the petitioner.

The petitioner's transactions, other than those with retail merchants as above detailed, were of three kinds or classes, one involving carload shipments, and two involving or relating to less than carload shipments, or "pool car".

The mechanics of a carload shipment were as follows: The transaction was with a large customer, such as a chain store or large jobber. The customer signed an order specifying the types of merchandise making up the carload lot, with shipping instructions, including a statement that delivery be made at customer's warehouse in the District of Columbia, and under terms and conditions that the petitioner assumed all risk of loss or damage prior to passage of property, or title to customer at customer's warehouse, with freight to be paid by petitioner. Such order was either mailed by customer to the Baltimore office of petitioner, or procured by representative and mailed by him to Baltimore. No representative had any authority to approve or accept orders.

A copy of the order was then mailed to the principal office of petitioner in Los Angeles, California for acceptance as to credit and availability of the product. If accepted, instructions as to shipment, etc., were sent to the petitioner's plant in West Virginia and an acknowledgment of the order, informing the customer that the carload shipment was to be made from Clarksburg, West Virginia was sent to customer. The carload was then shipped, F.O.B. Washington, and an invoice was mailed to customer from the plant in Clarksburg, West Virginia. The invoice, in addition to stating the amount, shipping information and the like, carried the following:

> "CLAIMS FOR LOSS OR DAMAGE MUST BE
> REPORTED TO CARNATION COMPANY IMMEDIATELY
> AND BE SUPPORTED BY ORIGINAL BILL OF LADING,
> FREIGHT BILL AND CARRIER'S O.S.& D. REPORT."

The carload shipment was delivered to the customer's warehouse. It was shipped on a Uniform Bill of Lading.

The most important customer of the petitioner in the District of Columbia to whom carload shipments of milk were made was Safeway Stores, Inc., a large chain grocery store company operating principally in the District of Columbia, and for convenience hereinafter referred to as "Safeway". Sales of its products by the petitioner to Safeway during the taxable years here involved represented in amount fifty-five per centum of the total sales to customers in the District of Columbia. No solicitor or other representative of the petitioner picked up or secured orders for petitioner's products from Safeway. All of such orders from Safeway were mailed by it to the petitioner's Baltimore office which, in turn, transmitted the orders to petitioner's Los Angeles office, which latter office directed delivery to Safeway. Such orders were mailed by Safeway two or three times a month. Once a month and oftener, at times, during the taxable years here involved the supervisor or the manager of the Baltimore office, both of whom resided outside the District of Columbia, came to the District of Columbia and called upon Mr. M. P. Thomas, the buyer of Safeway. The purpose of such visits was to stimulate and increase the sale of petitioner's products by Safeway by creating good personnel relations with Safeway, assisting or advising it in promotion programs, such as the display of its products and the dispensing of recipes featuring the use of petitioner's milk products, which programs occurred four or five times a year, and in discussing and arranging advertising, and the like. None of the sales of petitioner's products to Safeway in the District of Columbia were secured, negotiated or effected by any representative or branch of the petitioner located in the District of Columbia.

In addition to sales to Safeway, there were sales to customers in the District of Columbia on orders mailed by such customers to the petitioner's office in Baltimore. There is no evidence bearing upon such orders or upon the method of their procurement and no findings of fact can be made regarding the same.

The transactions involving less than carload shipments, sometimes called "pool cars" were of two types, namely, (a) those allocated to specific customers, and (b) those with others, principally commissaries and the like. With respect to the first type, the mechanics of such transaction were as follows: The representative solicited and obtained an order from a customer. Such order stated that the merchandise covered by the order would be shipped in the next "pool car", or on a certain date. The order was sent to the Baltimore office, which in turn sent the order to the Los Angeles office for credit approval. When accepted orders from Washington accumulated in quantity enough to have filled a freight car, approximately, the Los Angeles office sent instructions to the Clarksburg, West Virginia, plant to make up the "pool car". Such "pool car" had to contain at least 710 cases, and most, if not all instances, contained more, including a number of cases in addition to those covered by the orders, which additional cases were destined for consignment in storage for use in a transaction hereinafter to be described. The "pool car" was shipped from Clarksburg, West Virginia, to the warehouse of National Trucking & Storage, Inc., 1435 New York Avenue, Northeast, Washington, D.C., which unloaded such car and placed the contents, including the consigned cases, in storage for delivery under an arrangement between the petitioner and National Trucking & Storage, Inc.

As soon as the "pool car" left Clarksburg, the Baltimore office was notified. The Baltimore office then sent invoices to each customer covering their respective orders, and at the same time sent a "release sheet" to National Trucking & Storage, Inc., which instructed or authorized National Trucking & Storage, Inc. to deliver to the customer, when called for by the customer, the quantities of cases covered by their respective orders. Upon receipt of the "release sheet" National Trucking & Storage, Inc., also notified the customers that it held for their account and delivery the quantity of cases covered by their respective orders. Upon such notification, the customers picked up the cases at the warehouse of National Trucking & Storage, Inc., and transported them to their establishments in their own trucks.

The other type of transaction involving less than carload lots arose in the manner following: The petitioner had several approved customers, mostly armed services commissaries, whose storage facilities were limited, or who for one reason or another did not order cases of the petitioner's products in large quantities, such as the commissaries of the Marine Barracks, Fort Belvoir, and the like. As stated above, in most less than carload shipments or "pool cars" there were a number of excess cases of petitioner's products delivered to the warehouse of National Trucking & Storage, Inc. Such merchandise was set aside to take care of the orders of the commissary type of customers. The commissary sent the order to the Baltimore office and that office directed the National Trucking & Storage, Inc. to withdraw from storage the number of cases covered by the order, and to deliver the same to the customer at the customer's place of business.

During the three taxable years here involved, the petitioner had in storage in the District of Columbia a substantial amount of merchandise. According to the personal property tax returns filed by it for the fiscal years ended June 30, 1949, 1950, 1951 and 1952, the petitioner had merchandise in storage in the District of Columbia for the months and of the value following:

Year	Month	Amount	Year	Month	Amount
1948	January	$1,014.75	1949	July	$6,399.74
"	February	1,734.25	"	August	8,868.17
"	March	2,266.50	"	September	6,078.95
"	April	2,253.20	"	October	9,382.33
"	May	5,529.80	"	November	7,213.83
"	June	1,490.40	"	December	1,476.07
"	July	4,667.04	1950	January	4,168.56
"	August	10,015.81	"	February	4,274.13
"	September	5,397.00	"	March	5,926.77
"	October	1,994.77	"	April	2,663.72
"	November	1,280.89	"	May	11,994.58
"	December	4,871.78	"	June	2,900.72
1949	January	13,937.67	"	July	1,338.97
"	February	7,967.31	"	August	21,388.87
"	March	15,890.62	"	September	15,471.22
"	April	8,731.10	"	October	13,422.65
"	May	9,064.42	"	November	8,622.25
"	June	5,276.77	"	December	458.57

This proceeding was filed on August 25, 1952.

Opinion

This proceeding involves the validity of corporation franchise taxes assessed against the petitioner for the privilege of carrying on or engaging in business within the District of Columbia, and of receiving income from sources within the District during the calendar years 1948, 1949 and 1950, under Section 2, Title VII of the District of Columbia Income and Franchise Tax Act of 1947 (47-1571a, D.C. Code, 1951 Ed.), which provides the following:

> "SEC. 2. IMPOSITION AND RATE OF TAX. For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation whether domestic or foreign (except those expressly exempt under title II of this article)."

Section 4 of Title I of the Income and Franchise Tax Act, as amended by the Act of May 3, 1948 (47-1551c (h), D.C. Code, 1951 Ed.), defines trade or business as follows:

> "SEC. 4. GENERAL DEFINITIONS.--For the purposes of this article and wherever appearing herein, unless otherwise required by the context---
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> * * *
>
> "(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; * * * Provided, however, That the words 'trade or business' shall not include, for the purposes of this article---
>
> "(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent or representative having an office or other place of business in the District, during the taxable year; or
>
> "(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no officer, agent, or representative in the District except for the sole purpose of doing business with the United States, * * *."

From the foregoing it will be seen that the tax imposed on corporations is an excise tax. Its measure is "that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District, and

such other net income as is derived from sources within the District."[1]

Provision for allocation and apportionment is found in Section 2 of Title X of the Income and Franchise Tax Act (47-1580a, D.C. Code, 1951 Ed.):

> "SEC. 2. ALLOCATION AND APPORTIONMENT. -- The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

Pursuant to the foregoing section there were adopted the following regulations pertaining to allocation:[2]

> "Sec. 10-2(d). Income from Trade or Business. * * * If the trade or business is carried on partly within and partly without the District, that portion of the gross income from trade or business to be apportioned to the District shall be determined as follows:
>
> "(1) Income from sales of tangible personal property. a. Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase 'District sales' shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase 'total sales' shall mean the gross receipts from all sales.
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> * * * *

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(1) Section I, Title X, D. C. Income and Franchise Tax Act, (47-1580, D.C. Code, 1951 Ed.)

(2) Paragraphs 13-901 to 13-916a, C. C. H. District of Columbia Tax Reports.

In the petition filed in this proceeding there are found two assignments of error. After the hearing the petition was amended to include a third assignment of error. From the brief for the petitioner it is taken that the third such assignment of error is now abandoned. The first assignment of error is as follows:

> "a. The Assessor of the District of Columbia incorrectly determined that Petitioner was engaged in business in the District of Columbia during the calendar years 1948, 1949 and 1950."

The petitioner is a corporation engaged in the manufacture and sale of canned milk and kindred products. Receipts from the sale of its products to customers in the District were substantial during the taxable years involved.

At all times during the three taxable years involved the petitioner had assigned to the area in which the District of Columbia was included two employees, whose principal duties were to check upon the condition of the petitioner's products as to freshness and the like on the shelves of its customers, to arrange sales displays and otherwise to stimulate the sale of its products. Such employees as occasion presented itself took orders for the petitioner's products from grocery stores and the like. Such orders were transmitted to Baltimore, Maryland, wherein was located a branch office of the petitioner. From that branch office the orders were transmitted to petitioner's jobbers and wholesale houses in the District of Columbia so as to permit such jobbers and wholesalers to fill such orders from the stocks which the jobbers and wholesalers had acquired from the petitioner.

During the taxable period here involved three of theemployees above described lived in the District of Columbia. They kept their records in their residences, and used the telephone therein to communicate with petitioner's customers and with the branch office in Baltimore and to receive telephone calls and written communications from that branch office.

In addition to the activities detailed in the two paragraphs immediately preceding, the petitioner had certain kinds of transactions in the District of Columbia, three in number as follows.

The first class was what might be called "carload" transactions, and were in the most, if not every instance, with chain store companies and similar large customers. Under such transactions the petitioner, after having received, and having accepted the order without the District of Columbia, shipped the carload on a Uniform Bill of Lading under an agreement to deliver the carload to the customer's warehouse or siding. The petitioner paid the freight and retained title to the merchandise until delivery to the customer's warehouse or siding. Any loss to the merchandise before such delivery was borne by the petitioner, and it made the claim against the carrier for loss or damage to the shipment. It is clear from the facts as found by the Court that in this transaction title passed in the District. Sales in Carload lots during the taxable years amount to the sums following: in 1948, $764,144, in 1949, $887,590 and in 1950, $925,622.

The other two transactions related to less than carload lots. One of such transactions might be called "less than carload-jobbers", and involved the taking or receiving of orders for the petitioner's products in less than carload lots and accumulating the same until they amounted to enough or nearly enough to make up a carload or "pool car", which frequently in addition contained products not ordered by any particular customer, and set aside on arrival at the warehouse in the District for disposal in the other class of less than carload transactions, to which references will hereafter be made. The shipment originated at Clarksburg, West Virginia, and was consigned to the petitioner in care of National Trucking & Storage Company, a public warehouse, under an arrangement with that company. As soon as the "pool car" left Clarksburg the jobbers and wholesalers whose orders were filled by the merchandise therein were sent invoices, and at the same time a "release sheet" was sent to National Trucking & Storage Inc., 1435 New York Avenue, Washington, D.C., authorizing that company to

deliver to the jobbers and wholesalers, respectively, the number of cases of petitioner's products allocated to them on such release sheet. The jobbers and wholesalers picked up the cases allocated to them and transported the same in their own trucks to their respective places of business in the District of Columbia. It will be seen that in this class of transaction title to the purchase passed in the District of Columbia, National Trucking & Storage, Inc. acting as the agent of the petitioner in making delivery.

The second kind of less than carload transaction involved the surplus or extra quantities of cases of petitioner's products shipped in the "pool car", along with those allocated to the jobbers and wholesalers. The records show that quite frequently the quantity of cases necessary to fill the pool car was made up in part with such surplus or extra number of cases. These were not allocated to any customer at the time of shipment. Upon arrival the cases were retained by National Trucking & Storage, Inc. in a pool for the account of the petitioner. The petitioner had a class of customers, consisting of service commissaries, post exchanges, and like units or organizations in the District of Columbia. Whenever any one of such class of customers ordered a quantity of petitioner's products the order was filled from such pool of cases in storage with National Trucking & Storage, Inc., and delivered by that company to the customer. As in the other two kinds of transactions, title passed to the customer in the District of Columbia. In the two "less than carload" transactions sales in 1948 amounted to $277,156, in 1949 to $290,510, and in 1950 to $291,178.

While it is true that the passing of title is no longer a factor in determining whether the income of the petitioner was "fairly attributable to any trade or business carried on or engaged in within the District of Columbia and such other net income as is derived from sources within the District", the Court is of the opinion that the "carload" and "less than carload" transactions of the petitioner as found herein involving the passing of title in the District, in other words, transactions whereby at the time that the petitioner's products reach the District they will belong to the petitioner, are facts in determining whether the petitioner engaged in "commercial activity or activities", in the District of Columbia. It also appears that orders were solicited by the agents of the petitioner in the District of Columbia. Such transactions

and activities, however, did not amount to, or constitute the engaging in or carrying on of a trade or business within the meaning of the District of Columbia Income and Franchise Tax Act of 1947, as amended by the Act of May 3, 1948, unless it can be saidthat the petitioner physically had or maintained a warehouse, or had an agent or representative having an office or other place of business in the District of Columbia (3) during the taxable years here involved.

The petitioner had no warehouse of its own in the District, but it did contract for and obtain warehouse or storage space in the warehouse of National Trucking & Storage, Inc., in which its products, while still its property came to rest preparatory to distribution to its customers, and of sufficient size or capacity to take care of its substantial business in the District of Columbia.

This Court has had two previous occasions to consider the legal effect of renting warehouse space as distinguished from owning it in relation to "engaging in or carrying on of any trade or business", as that term is defined in the District of Columbia Income and Franchise Tax Act, as amended by the Act of May 3, 1948, in both of which the public warehouse was the same as here, namely, National Trucking & Storage, Inc., and the facts concerning the taxpayers' transactions in the District of Columbia and those relating to the storage arrangements were essentially identical with those in this case. In the first case decided, North Lubec Manufacturing and Canning Co. v. District of Columbia, Docket No. 1238, there is found in the opinion the language following:

> "As will be seen from the foregoing, in order that there may be excluded from taxation the commercial activity of a corporation in the District, it is necessary that during the taxable year it have neither an office, warehouse or other place of business in the District, and that it have no officer, agent or representative having offices or other place of business therein during the taxable year. Petitioner had a warehouse in the District during the taxable year, unless the expression "have or maintain (a) warehouse or other place of business in the District" is restricted to the meaning of a freehold title to such warehouse or other place of business. It is not believed that that was the intent of Congress. The intent of Congress was to exclude from taxation those corporations which choose to stay at home in all respects except to solicit orders which are sent to the home office for acceptance and filling (compare Norton Co. v. Department of Revenue, U.S. Supreme Court, February 26, 1951.)

(3) It is plain that the petitioner had no office nor officer having an office in the District of Columbia during 1948, 1949 or 1950.

"Petitioner, during the fiscal year ended March 31, 1949, did not choose to stay at home and merely solicit business in the District. By means of its occupancy of space in a warehouse under contract, it just as effectively had a warehouse within the meaning of the statute as if it had had a lease or a fee simple title thereto. The meaning of the word "have" in the statute is similar to a person saying he has a bank in a certain city, or that he has a safe deposit box in a certain bank, or that he has a lawyer in a certain city. It is obvious that by these phrases availability for use or service rather than ownership is connoted.

"Petitioner cites certain dictionary definitions of "have" as meaning to hold as owner, possessor, occupier or controller, etc., but words generally have different shades of meaning, and are to be construed if reasonably possible, to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering as well, the context, purposes of the law, and the circumstances under which the words were employed, Puerto Rico v. Shell Co., 302 U.S. 253,258.

"A legislative purpose shown by the context of a statute should not be defeated by mere blind adherence to definitions of words found in dictionaries, C. & C. I.R. Co. v. Public Service Commission, 185 Ind. 678, 114 N.E. 414.

"The inquiry is not what the strict and accurate definitions of words may be according to the lexicographers, but as to the legislative intent, J.W. Kelly Co. v. State, 123 Tenn. 516, 132 S.W. 193.

"Neither the courts nor this Board should "make a fortress out of the dictionary," and should refuse to pervert the process of interpretation by mechanically applying definitions in unintended contexts, Farmers Irrigation Co. v. McComb, 337 U.S. 755, 764; Cabell v. Markham, 148 F.(2d) 737, 739, aff'd 326 U.S. 404, 409."

Then followed Atlantis Sales Corp. v. District of Columbia, Docket 1233, in which it was held:

"In North Lubec Manufacturing and Canning Company v. District OF Columbia, Docket No. 1238, this Board held that the use of a warehouse by North Lubec in a manner similar to that used by petitioner in this case as to its potato mix, was to "have" a warehouse in the District within the meaning of the statute.

"Except for a possible difference in the ratio of merchandise shipped into the District for the purpose of filling specific orders, and merchandise shipped in without previous orders therefor, the cases are parallel, with this further exception:

"In this case, unlike the North Lubec case, some of petitioner's sales to District of Columbia customers were shipped directly to the customers, without passing through a warehouse in the District. These sales had been solicited in the District, and there is no evidence to indicate that they were not taxable in the District, unless the requirement of section 47-1551-c-h that sales of tangible personal property by a corporation which does not physically have or maintain a warehouse in the District compels a different result.

"The immunity from taxation which is conferred by section 47-1551-c(h) is lost when a corporation has a warehouse within the meaning thereof, not only as to the merchandise sold from the warehouse, but as to all merchandise sold in the District under circumstances which, in the absence of that section, would properly be considered as giving rise to income from District of Columbia sources."

The Court believes that the petitioner did have and maintain a warehouse in the District of Columbia during the taxable years within the meaning of the Income and Franchise Tax Act, as amended; that, therefore, it engaged in and carried on a trade or business within the District of Columbia during those years; and that it is liable for a corporate franchise tax measured upon that portion of the net income of the petitioner as is fairly attributable to that trade or business and upon such other income as is derived from sources within the District. Owens-Illinois Glass Company, v. District of Columbia, ----- U.S. App. D.C. -----, ----- F.2d. ------, (decided January 8, 1953.)

In view of the ruling just made to the effect that within the meaning of the statute the petitioner had a warehouse in the District of Columbia during the taxable years involved, it is not necessary to consider whether the fact that during such taxable years there were present in the District of Columbia three representatives of the petitioner who had their residence in the District, wherein they kept their records, received communications by letter from the petitioner, and from which they transmitted and received telephone calls to and from the petitioner and its customers in the District of Columbia would support a ruling that the petitioner had a "representative having an office or other place of business in the District during the taxable year." It is appropriate, however, to consider the activities of the representatives to determine whether they amounted to a "commercial activity" and, therefore, constituted a "trade or business" within the meaning of the statute.

From the findings of fact it appears that the petitioner's representatives activities in the District of Columbia consisted of checking and inspecting its products on the shelves of its customers and other purveyors of its products, mostly retail grocery stores, to see if, in accordance with

its marketing policy, fresh products only were being sold to the public; of arranging sales displays and otherwise stimulating sales of its products; and of soliciting and receiving orders from retail grocery stores. The fact that such orders were transmitted to local jobbers, through the Baltimore branch office for filling, does not seem to the Court to be material, in other words, regardless of such practice, the Court holds that such activities were "commercial".

Since it has been held hereinbefore in this case that the petitioner had a warehouse in the District of Columbia within the intent of the statute, it is brought within the effect of the decision in the Owens-Illinois Glass Company case, in other words, the petitioner has lost its immunity against the taxation under the Income and Franchise Tax Act. It does not necessarily follow, however, that the franchise tax to be assessed should be based upon or measured by the income from the sales to all the customers in the District of Columbia, which observation brings into focus the second assignment of error in the petition, stated as follows:

> "(b) The Assessor of the District of Columbia arbitrarily allocated income to District of Columbia sources for the calendar years 1948, 1949 and 1950, and erred in assessing a corporation franchise tax thereon."

As facts upon which the petitioner relied as a basis for this proceeding it was, among other things, alleged that

> "(a) Petitioner has no employees, agents, officers or branches located in the District of Columbia.
>
> (b) All sales made to customers located in the District of Columbia were negotiated by the Baltimore, Maryland, office of petitioner."

The respondent's position is that the foregoing assignment of error and allegations do not raise the issue of the amount and measure of the franchise tax within the scope of the opinion of the United States Court of Appeals in Lever Brothers Company v. District of Columbia, _____ U.S.

its marketing policy, fresh products only were being sold to the public; of arranging sales displays and otherwise stimulating sales of its products; and of soliciting and receiving orders from retail grocery stores. The fact that such orders were transmitted to local jobbers, through the Baltimore branch office for filling, does not seem to the Court to be material, in other words, regardless of such practice, the Court holds that such activities were "commercial".

Since it has been held hereinbefore in this case that the petitioner had a warehouse in the District of Columbia within the intent of the statute, it is brought within the effect of the decision in the Owens-Illinois Glass Company case, in other words, the petitioner has lost its immunity against the taxation under the Income and Franchise Tax Act. It does not necessarily follow, however, that the franchise tax to be assessed should be based upon or measured by the income from the sales to all the customers in the District of Columbia, which observation brings into focus the second assignment of error in the petition, stated as follows:

> "(b) The Assessor of the District of Columbia arbitrarily allocated income to District of Columbia sources for the calendar years 1948, 1949 and 1950, and erred in assessing a corporation franchise tax thereon."

As facts upon which the petitioner relied as a basis for this proceeding it was, among other things, alleged that

> "(a) Petitioner has no employees, agents, officers or branches located in the District of Columbia.
>
> (b) All sales made to customers located in the District of Columbia were negotiated by the Baltimore, Maryland, office of petitioner."

The respondent's position is that the foregoing assignment of error and allegations do not raise the issue of the amount and measure of the franchise tax within the scope of the opinion of the United States Court of Appeals in Lever Brothers Company v. District of Columbia, _____ U.S.

App. D.C. _____, _____F. 2d_____, decided March 26, 1953, that is to say, whether all or a part of the income from the sales to customers in the District was "fairly attributable to any trade or business carried on or engaged in within the District, and such other net income as is derived from sources within the District" as that term is interpreted by the Commissioners in Regulation 10-2(d)(1)a pertaining to the Income and Franchise Tax Act of 1947. As a corollary the respondent contends that the Court's Order of April 27, 1953, granting the petitioner's motion for further hearing in Lever Brothers Company case for the purpose of showing what portion, if any, of petitioner's sales during the taxable years involved were principally secured, negotiated or effected by any employees, agents, officers or branches of the petitioner located in the District of Columbia, within the meaning of Section 10-2(d)(1)a, Regulations Pertaining to Income and Franchise Taxes (October 16, 1950) in the light of the decision of the United States Court of Appeals, was inappropriate. The Court does not believe that the position of the respondent can be sustained. It is of the opinion that the issue as to the measure and amount of the tax is sufficiently raised in the petition. District of Columbia v. Owens-Illinois Glass Company, _____ U.S. App. D.C. _____, _____F. 2d _____, decided January 8, 1953, as amended by the Order of March 26, 1953. CF. Helvering v. Terminal Railroad Ass'n. of St. Louis, (CCA-8) 89 Fed. 2d 739; Com. v. Kerbaugh, (CCA-1) 74 F. 2d 749; Goodman, T.C. memo. op., 5 TCM, 1126, Dec. 15,549 (M).

Under Section 10-2 of the regulations the portion of said income which is "fairly attributable to any trade or business or such other income as is derived from sources within the District of Columbia" are to be determined by Sections 10-2(b), 10-2(c), 10-2(d), and 10-2(e). The only one of the above mentioned sections which applies to the business conducted by the petitioner is Section 10-2(d) and the only

portion of that section which applies relates to the sale of taxable personal property is sub-section (1)a, which has been quoted in the early part of the opinion, and from which it will be seen that both "attributable" and "source income" shall be such percentage of gross income as District sales made during the taxable years bear to the total sales made everywhere during such taxable years; and that the term "District sales" is defined to mean "gross receipts from all sales which were principally secured, negotiated or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District".

The testimony is to the effect that fifty-five per centum of the sales to customers in the District of Columbia was represented by sales to Safeway, all of which were upon orders mailed by Safeway to the Baltimore office of petitioner, and none of which was secured, negotiated or effected by any agent, representative, or branch of the petitioner located in the District of Columbia; and a finding to that effect has been heretofore made by the Court. The Court also found that five per centum of the orders mailed to the Baltimore office were from customers other than Safeway. It was not, however, found that such sales were not secured, negotiated or effected by agents of the petitioner located in the District of Columbia. Bearing in mind that during the period here involved the petitioner had an agent, and sometimes two agents or solicitors, living in the District of Columbia and maintaining, for all practical purposes, offices in their residences, it must be held upon the state of the evidence that forty-five per centum of the sales to customers in the District of Columbia during the taxable years involved were District sales. In the opinion of this Court in Owens-Illinois Glass Company v. District of Columbia, Docket No. 1215, entered June 10, 1953, there was discussed at length Section 10-2(d)(1)a in the light of the decision of the United States Court of Appeals in

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the Lever Brothers Company case. Reference is here made to that opinion in respect of that section of the regulations as far as it is applicable to this case. The discussion by the Court therein will not be here repeated. It can be observed, however, that from the unanimous opinion of the United States Court of Appeals in the Lever Brothers Company case it is clear that that Court did not believe that Section 10-2(d)(1)a of the regulations was violative of the letter or the spirit of the Income and Franchise Tax Act of 1947. It, in effect, held, if it did not actually hold, that such regulation was valid, otherwise it would not have remanded the Lever Brothers Company case to this Court with positive instructions to apply that regulation and make findings of fact and decision thereon.

The respondent maintains that the testimony of the manager of the Baltimore office of petitioner as to the percentage of sales to District customers represented by those to Safeway is not sufficient upon which a finding of fact could be based. The Court believes that such position is unsound. The manager was familiar with the business of the petitioner conducted in the Baltimore office and particularly that done with Safeway, and his testimony that fifty-five per centum of sales were to Safeway was not a guess, but an estimate based upon facts within his knowledge. It was competent and sufficient evidence upon which a finding could be made. (4)

For the reasons stated the Court holds that fifty-five per centum of the amount of the sales by the petitioner to customers in the District of Columbia during the taxable years 1948, 1949 and 1950 were not District sales within the meaning of Section 10-2(d)(1)a, and that the assessment of taxes here involved must be reduced accordingly with appropriate refund to the petitioner.

Decision will be entered under Rule 30.

Jo. V. Morgan
Judge

(4) Cohen vs. Comm. 39 F. 2d 540, which has been followed by the United States Tax Court in numerous cases.