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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

DEKALB AGRESEARCH, INC.,  
A Delaware Corporation,  
  
Petitioner,

DOCKET 325 PAGE 296  
MEMORANDUM AND ORDER

vs.

STATE OF NEBRASKA, DEPARTMENT  
OF REVENUE, and FRED A.  
HERRINGTON, State Tax  
Commissioner of the State of  
Nebraska,  
  
Respondents.

CLERK'S OFFICE, DISTRICT COURT  
LANCASTER COUNTY, NEBRASKA  
**FILED**  
APR 28 1981  
**KANDRA HAHN**  
*Clerk District Court*

This is an appeal from an order of the State Tax Commissioner dated February 1, 1979, which order sustained a deficiency determination against the petitioner in the amount of \$41,210.16

The petitioner is a Delaware Corporation with its principal place of business in Illinois, and does business in Nebraska and several other states.

Exhibit D, attached to the stipulation of facts (Vol. II of Transcript) lists 36 corporations, which petitioner held stock and received dividends and interest. The percentage of stock owned by petitioners in these corporations ranged from 100% to 24%. The question is whether or not the income from these corporations and from the sale of property in California is "business income" or "non-business income" under Section 77-2735 R.R.S. 1943.

The Commissioner found that the petitioner exercised management and control over the above investments; that the income from these investments and gain from the sale of real estate went into petitioner's bank accounts and was used in the business and the same officers who managed the petitioner corporation made investment decisions which resulted in the disputed income. Additionally, it was found that the acquisition of the real estate was for a business purpose.

Based on these findings the Commissioner concluded that the income from these investments and from the sale of real estate was "business income" because the petitioner's investment activities

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were within the regular course of its trade or business and that the investment activities which produced the interest and dividend income constituted integral parts of the taxpayers' regular trade or business operations. Also the acquisition and subsequent sale of the real estate was an integral part of the taxpayers regular trade or business operation.

The Commissioner in effect is saying that if the property produces income, then it contributes and the income is "business income".

After considering decisions of the courts of several other states, I believe this interpretation is erroneous. In American Smelting and Refining Co. v. Idaho Tax Commissioner, 99 Idaho 924, 592 P. 2d 39 in discussing a statute nearly identical to 77-2735 the Idaho Supreme Court stated: ". . . the critical question is whether this income arose from ASARCO's business activities and whether ASARCO's acquisition, management or disposition of the underlying stock constitutes an integral or necessary part of its mining, smelting and refining business". The Idaho court went on to say that all income from investments may benefit a corporation but such an approach would virtually include all income as business income.

Another case which indicates that the definition of "business income" is more broad than that adopted by the Commissioner is Square D. Company v. Kentucky Board of Tax Appeals, 415 S.W. 2d 594. These cases seem to say that if the dividends are paid by a company that is engaged in the same business, or that supports or supplements the taxpayer's business, such as supplying materials or sales and if the businesses are integral, or inseparable then the dividends are business income. This is sometimes referred to as "unitary business". The Commissioner relies principally on Mobile Oil Corp. v. Commissioner of Taxation, 445 U.S. ; 63 L. Ed. 2d 510, 100 S. Ct. 1223 which dealt with the constitutionality of Vermont's tax statute; however, this case does not support the Commissioner's conclusion in the case

at bar. In fact, the Supreme Court stated:

"So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability."

I conclude and find that this matter should be remanded to the State Tax Commissioner to reconsider from the record already adduced before the Commissioner, each separate item of income from the standpoint of whether there is a functional relationship between the corporations and whether there is sufficient ownership, control, and management participation by the petitioner to support inclusion for apportionment. The Commissioner shall also reconsider from the record whether the gain from the sale of the California property was "business income" in light of Target Stores Inc. v. Comm. of Rev., 244 N.W. 2d 143 (Minn).

IT IS THEREFORE ORDERED that this case is remanded to the State Tax Commissioner for proceedings consistent with the findings of the court.

Dated this 28<sup>th</sup> day of April, 1981.

BY THE COURT:

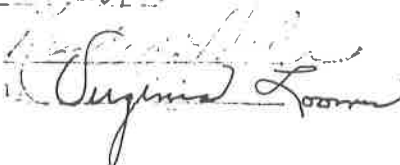
  
District Judge

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CERTIFICATE

I, Kandra Hahn, Clerk of the District Court of Lancaster County, Nebraska, do hereby certify that the foregoing is a full and correct copy of the original instrument duly filed and of record in this Court.

This certificate, filed in the District Court of Lancaster County, Nebraska, on 4-29-81

  
Kandra Hahn  
Clerk