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Solicitation of Business by a Foreign Railroad Corporation

Vernon K. Sessions

a loss. The court felt that the fact of the taxpayer's use of the property for two summers, as a residence, was immaterial.[18]

In summary, it may be stated that if it can be proved that the original purchase of the property was for the purpose of resale, the loss on the sale of the property may be deducted.[19] If the taxpayer has lived on the property for a substantial number of years, short periods of residency excepted, the loss will not be allowed even though the original intent was to enter into a profit making transaction.[20] If the property is actually rented after its use as a residence, a loss will be allowed as a basis for computation of the market value of the property at the time of rental, less the amount received as the sale price.[21] Mere listing of the property for sale or rent with a real estate agency is not sufficient to take a loss on the sale of the property as a deduction.

ROBERT A. GISH, JR.

SOLICITATION OF BUSINESS BY A FOREIGN RAILROAD CORPORATION

When a corporation is doing sufficient business within a state to make it amenable to courts of that state, is a question that has been decided many times, although the actual meaning of the term "doing business" is one which has never received a standard definition.[1] As a result of this omission, the courts are forced to formulate a rule on each set of facts presented.[2] They must study the type of activity engaged in by the corporation to determine: (1) whether such activity within the state is a part of that for which it was organized and not merely incidental thereto;[3] (2) whether it is a single transaction or a continuous course of business within the state;[4] and (3) whether it would be a violation of the notion of fair play and substantial justice for it to take jurisdiction.[5]

The Supreme Court of the United States laid down the general rule[6] that to support the jurisdiction of a court to render a personal

18. Campe v. Commissioner, 17 B.T.A. 575 (1929).
19. Gordon v. Commissioner, 12 B.T.A. 1191 (1928); Sincheimer v. Commissioner, 7 B.T.A. 1099 (1927); Croker v. Commissioner, 12 B.T.A. 508 (1928); Campe v. Commissioner, 17 B.T.A. 575 (1929).
20. Wilkes v. Commissioner, 17 T.C. 865 (1951).
21. Heiner v. Tindle, 276 U.S. 582, 48 S.Ct. 326, 72 L.Ed. 714 (1928).
22. Grammer v. Commissioner, 12 T.C. 34 (1949); Morgan v. Commissioner, 76 F.2d 390, 15 A.F.T.R. 1150 (5th Cir. 1935); Cullman v. Commissioner, 16 B.T.A. 991 (1929).

1. 18 Fletcher, Corporations § 8711 (perm. ed. 1955).
2. St. Louis Southern Ry. Co. v. Alexander, 227 U.S. 218, 33 S.Ct. 245, 57 L.Ed 486 (1913).
3. Rich v. Chicago B. & Q. Ry. Co., 34 Wash. 92, 74 Pac. 1008 (1904).
4. Ibid.
5. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).
6. Philadelphia & R. Ry. Co. v. McKibbin, 234 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710 (1917).

judgment against a foreign corporation, it is essential, in the absence of consent, that the corporation should be, at the time of the service of the process, doing business within the state in such a manner and to such an extent as to warrant the inference that through its agents it was present and found there.

A Washington court held that a corporation must transact, within the state, some substantial part of its ordinary business. Such business must be continuous in the sense that it is distinguished from merely casual or occasional transactions.[8] This is a basic principal which the majority of the courts consider when dealing with solicitation by agents of a foreign corporation.

In *Green v. Chicago B. & Q. Ry. Co.*,[9] the United States Supreme Court in 1907, originated the solicitation doctrine, to the effect that mere soliciting of orders is not enough to constitute doing business. Here, a foreign railroad corporation employed a general agent who had clerks and traveling passenger and freight agents working for and reporting to him. He was generally known as the district freight and passenger agent. He had an office in the state. He sold no tickets, but would take money from those desiring transportation and purchase tickets from a local railroad which would allow them, on arrival in Chicago, to ride on the company line. He occasionally sold to railroad employees who already had tickets over intermediate lines, orders for reduced rates over his company's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods over the company's line, he exchanged bills of lading over its line, which were not in force until the freight had been actually received by the company. The court held that although this was considerable business, it was in substance nothing more than that of solicitation and hence not sufficient to bring the corporation within the jurisdiction of the court. This decision, while never expressly overruled, has, in subsequent decisions been sharply curtailed and limited. Seven years later, the same court in *International Harvester Co. v. Kentucky*,[10] labeled it as extreme. They said that the solicitation of orders which were sent to another state, and in response to which, the machines of the company were delivered back into the state was sufficient to bring them within the jurisdiction of the court. They held that this was a course of business rather than a single transaction. There were, however, additional facts which allowed the court to circumvent the *Green* decision without overruling it. The agents not only solicited such orders in Kentucky, but could receive payment in money, checks or drafts. They could also take notes which were probably payable in the Kentucky

7. 23 Am.Jur. 475 § 487.
8. Rich v. Chicago B. & Q. Ry. Co., 34 Wash. 92, 74 Pac. 1008 (1904).
9. Green v. Chicago B. & Q. Ry. Co., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916 (1907).
10. International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479 (1914).

banks. The court also considered the fact that there was a continuous flow of goods into the state as a result of the solicitations.

The reasoning used by the courts adhering to the solicitation doctrine is: solicitors of business are not considered as agents of the corporation in the sense required for jurisdictional purposes. Such reasoning was extended in a later opinion[11] where the court said that such solicitation was just an incident to the corporate business, important though it may be.

The reasoning above is not applicable where the agents do more than just solicit business. Additional activities such as adjusting claims;[12] being clothed with apparent authority to negotiate for the corporation;[13] selling tickets and occasionally issuing bills of lading;[14] engaging in business that is strictly local in character;[15] maintenance of an office for an assistant secretary and treasurer and use of such office by members of the board of directors to transact some corporate business,[16] have been held sufficient to give jurisdiction. The above activities, when taken alone, may not be sufficient to give the forum jurisdiction, but when they are coupled with others such as maintaining an office, employing several employees, soliciting freight and passenger traffic, handling customers' complaints and questions, advertising and creating good will would be sufficient. A Utah court[17] held that the amount or nature of the business was not of controlling importance so long as the agent was directly connected with the corporation, or conducting some of its business. They qualified this by requiring that a State must have statutory provisions for service on such an agent or person. This case, although decided three years after the *Green* decision appears to disregard the solicitation doctrine and look at the problem realistically. In a dictum the court said that solicitation by agents was one of the prime functions of a railroad company and was as important to its existence as the party who receives the freight or sells the tickets. This realistic approach to the problem was a prelude to the theory which the courts would in later decisions follow.

The trend in the modern decisions is away from the solicitation doctrine as established in the *Green* case and toward the recognition of the importance of solicitation. The United States Court of Appeals for the District of Columbia in 1943 said[18] that solicitation was the heart of a sale and the actual completion was only a mere formality. They suggested that the mere solicitation rule should be abandoned

11. Vicksburg S. & P. Ry. Co. v. DeBow, 148 Ga. 738, 98 S.E. 381 (1919).
12. St. Louis Southern Ry. Co. v Alexander, 227 US. 218, 33 S.Ct. 245, 57 L.Ed 486 (1913).
13. Ibid.
14. Walsh v. Atlantic Coast Line Ry. Co., 256 Fed. 47 (Dist.Mass. 1916).
15. Reynolds v. Missouri K. & T.R. Co., 224 Mass. 379, 113 N.E. 413 (1916); affirmed in 228 Mass. 584, 117 N.E. 913 (1917).
16. Rothenberg v. Western Pacific Ry. Co., 206 App.Div. 52, 200 N.Y.Supp. 428 (1923).
17. Briston v. Brent, 38 Utah 58, 110 Pac. 356 (1910).
18. Frene v. Louisville Cement Co., 134 F.2d 511 (D.C.Cir. 1943).

when the soliciting activity is a regular, continuous and sustained course of business. The court went on to say that the trend is toward a wider assertion of power over a foreign corporation than was considered permissible when the tradition about mere solicitation grew up. This theory was adhered to in a recent Federal District court decision in California.[19] It held that the continued solicitation of business by a foreign corporation maintaining a regular office within the state was sufficient to bring the corporation within the jurisdiction of the court. Whether the corporation is doing business or may be found in the state for jurisdictional purposes must be decided on the basis of realities and not fiction. The court contended that the maintenance of an office and the solicitation of business, when judged by common knowledge and experience, constitutes an activity which requires the presence of the corporation. It suggested that the fictions used in older decisions to exclude a corporation from the jurisdiction of the forum state should be done away with. There is still considerable authority which gives lip service to the solicitation doctrine but generally these decisions are liberal in finding other activities which allow them to extend their jurisdiction over the foreign corporation.

This liberality is clarified in the leading United States Supreme Court decision of *International Shoe Co. v. Washington.*[20] The foreign corporation employed from eleven to thirteen salesmen who were residents of the state and who were compensated for their employment by commissions amounting to approximately $31,000 yearly. The corporation had no office in the state, made no contract for sale or purchase there, maintained no stock of merchandise nor did they deal in intrastate commerce. The corporation supplied samples which were displayed to prospective customers and occasionally rented display rooms, office space and paid for same. The salesmen took the orders and forwarded them to their home office where they were accepted or rejected and, if accepted, the merchandise was shipped f.o.b. from points outside the state. The salesmen made no collections for the goods ordered. In holding the foreign corporation subject to the jurisdiction of the court, they established the test of "certain minimum contacts with it (the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." They were of the opinion that the regular and systematic solicitation of orders within the state, which resulted in a continuous flow of their products into the state was sufficient to constitute doing business, and thus bring them within their jurisdiction. This decision makes the mere solicitation rule outmoded as laid down in the *Green* case and gives the courts a more elastic criterion with which to work. They no longer have to determine whether a corporation is "present" within the state. The ties and connections with the forum

19. Perkine v. Louisville & N.R. Co., 94 F.Supp 946 (Dist.Calif. 1951).
20. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

state plus the extent of its activity therein are the tests used by the courts to determine whether it would offend the notion of fair play and substantial justice to subject the corporation to the jurisdiction therein.

The courts by using this criterion and looking at the activities realistically are able to extend their jurisdiction over corporations in a manner which would not have been permissible under the solicitation doctrine.

VERNON K. SESSIONS

POSSIBLE ACTION TO FORCE THE WYOMING LEGISLATURE TO REAPPORTION

The Wyoming legislature during the past 22 years has failed to pass any statute apportioning representation in the House and Senate of the state legislature among the various counties of the state according to county population or otherwise. This is directly contra to the command of the Wyoming Constitution which states:

> "The legislature shall provide by law for an enumeration of the inhabitants of the state in the year 1895, and every tenth year thereafter, and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust apportionment for senators and representatives, on a basis of such enumeration according to ratios to be fixed by law."[1]

The present apportionment of the legislature in Wyoming is based upon a statute enacted in 1933. Using the federal census of 1930 as a basis, the 1933 Act provides that each county shall have one senator for every 11,000 inhabitants or major portion thereof,[2] and one representative for every 4,150 inhabitants or major portion thereof.[3] Each organized county is entitled to be represented by at least one senator and one representative regardless of the number of inhabitants in the county.[4] The statute then specifies the exact number of senators and representatives from each of the 23 counties.

If these same ratios, namely one senator for every 11,000 inhabitants and one representative for every 4,150 inhabitants, were used today in accordance with the 1950 census to apportion the legislature, Albany, Fremont and Natrona counties would each gain one senator; Laramie county would gain two senators, and none of the present counties in the state would lose any senators. Each of the following counties would gain the number of representatives following their enumeration: Albany (2), Carbon (1), Fremont (2), Laramie (5), Natrona (2), Park (2), Sheri-

1. Wyo. Const., Art. 3 § 48.
2. Wyo. Comp. Stat. § 17-102 (1945).
3. Wyo. Comp. Stat. § 17-103 (1945).
4. Wyo. Comp. Stat. § 17-105 (1945).