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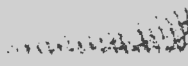
UTAH SUPREME COURT

BRIEF



INDEX

	Page
Statement of Facts	1-9
Questions of Law	10-11
Argument	11-41
1. *Can the Commission depart from the use of the normal allocation factors to impose a greater tax upon the Company. This involves a question of construction of the statutes which have been set forth above. It is the contention of the plaintiff that it was the intention of the legislature to limit the Commission in departing from the application of the normal allocation factors to those cases where a corporation doing business in and out of the State of Utah would be subjected to double taxation and an inequitable tax by the application of the normal fractions*	13-22
2. *The next question as we view the case is whether or not (if we concede, which we do not, that the Tax Commission has the power to ignore the allocation fraction) there are sufficient findings or is there sufficient evidence in this record to justify the Commission in making such a finding or in reaching the conclusion which it has reached*	23-28
3. *It is the position of the plaintiff that the Commission by departing from the use of the normal allocation fraction is subjecting this taxpayer to double taxation, and that by so doing, the Commission is violating the clear mandate of the law and the 14th amendment to the constitution of the United States and Article V of the constitution of Utah by taking the property of this plaintiff without due process of law*	28-31
4. *The Commission by so including financial revenue is violaing the clear mandate of the statute. This income cannot under the law be attributable to business done in the State of Utah*	31-36

5. *The inclusion of such financial revenue and the subjecting of such income to the allocation factor, subjects this plaintiff to double taxation contrary to the mandate of the franchise tax act, and the 14th amendment to the Constitution of the United States and Article V of the Constitution of Utah* 36-37

6. *The inclusion of financial revenue which is not attributable to business done within this state by using an allocation fraction which does not take into consideration intangibles located in and out of the State of Utah, is contrary to the 14th amendment of the Federal Constitution and Article V of the Constitution of Utah by reason of the fact that it takes this taxpayers property without due process of law* 37-41

Summary 41-42

TABLE OF CASES

Page

Arpin vs. Eberhardt (1914) 158 Wis. 20, 147 N.E. 1016....30

Baldwin vs. Missouri 281 U.S. 586, 50 S.Ct. Rep. 436....33, 37

Bass, Ratcliff and Gretton vs. State Tax Commission (1924) 266 U.S. 271, 69 L.Ed. 282....19

Beidler vs. South Carolina Tax Commission 282 U.S. 1, 51 S.Ct. Rep. 54....33, 37

Blodgett vs. Silberman, 277 U.S. 1, 48 S. Ct. 410....33, 37

Carlos Ruggles Lumber Co. vs. Commissioner, (1927) 261 Mass. 445, 158 N.E. 899....30

Commission vs. P. Lorillard Co., (1921) 129 Va. 74, 105 S. E. 683....22

Crescent Mfg. Co. vs. South Carolina Tax Commission, 129 S. C. 480, 124 S. E. 761....30

Curtis Companies et. al. vs. Wisconsin Tax Commission, Dec. 5, 1933, 251 N.W. 497....24

Farmers' Loan & Trust Co. vs. Minnesota, 280 U.S. 204, 50 S. Ct. Rep. 98....33, 37

First National Bank of Boston vs. Maine, 284 U. S. 312, 52 S. Ct. Rep. 174....37

Gorham Mfg. Company vs. Travis, 274 Fed. 975, affirmed in 1924 in 266 U.S. 265, 69 L. Ed. 279, 45 S. Ct. 80....18, 23

Hans Rees Sons Inc. vs. State of North Carolina, 75 L. Ed. 879, 283 U.S. 123....17, 18, 23

International Elevator Co. vs. Thoresen (1929) 58 N.D. 776, 228 N.W. 192....19

Meyer Auditor of Oklahoma vs. Wells Fargo & Co. 223 U.S. 298, 56 L. Ed. 445....32

Minneapolis Steel and Machinery Co. vs. Chickett, 263 "P" 926....12, 15

People ex. rel. Alpha Portland Cement Co. vs. Knapp et. al., State Tax Commission, Decided Nov. 23, 1920 230 N. Y. 48, 129 N.E. 202....38, 39, 40, 41

People ex. rel. Studebaker Corporation of America vs. Gilchrist et. al. State Tax Commission, 155 N.E. 68, 244 N.Y. 144 ....19, 20, 24, 25

Puerto Rico Merc. vs. Gallardo (1925) 6 F. (2nd) 526....21

Shaffer vs. Carter, 252 U. S. 37, 64 L. Ed. 445....32

Singer Mfg. Company vs. Gilpatric (1922) 98 Conn. 192, 118 Atl. 919 19

Stanley Works vs. Hackett, Connecticut, Decided Mar. 4, 1937, 190 Atl. 743....34, 35

Travis vs. Yale & T. Mfg. Company, 252 U.S. 60, 64 L. Ed. 460....32

Underwood Typewriter Co. vs. Chamberlain, 254 U.S. 113, 65 L. Ed. 165, 41 S. Ct. 45....16, 17, 23

Western Union Telegraph Co. vs. Query (1927) 144 S. C. 244, 142 S.E. 509....22

Wheeling Steel vs. Fox, 298 U.S. 193, 80 L. Ed. 1143....33, 34

STATUTES CITED

Page

Chapter 13, Title 80, Revised Statutes of Utah, 1933.... 1
Section 47, Chapter 13, Title 80, Revised Statutes of Utah, 1933.... 2

Subsection 6, 7, 8, Section 21 of Franchise Act....3, 4, 5

Section 21, Chapter 13, Title 80, Subsection 1....9, 31

Subparagraph (e), Subsections 6 and 8, Section 21 Chapter 13, Title 80, Revised Statutes of Utah, 1933....14

Subsection 8, Section 21, Chapter 13, Title 80, Revised Statutes of Utah, 1933....28

Subsection 3, Section 21, Chapter 13, Title 80, Revised Statutes of Utah, 1933 ....31, 32

In the
SUPREME COURT
of the
State of Utah

CALIFORNIA PACKING COR-
PORATION, a Corporation,
Plaintiff,

vs.

STATE TAX COMMISSION,
Defendant.

STATEMENT OF FACTS

The California Packing Corporation, the plaintiff in this action, which will hereinafter be called the Company, is a corporation organized and existing under and by virtue of the laws of the State of New York. It has qualified to do business in the State of Utah, and does business in this State. Because of its activities in the State of Utah, it is required to file returns and pay tax pursuant to the provisions of Chapter 13, of Title 80, Revised Statutes of Utah 1933 as amended. This law hereinafter in this brief will be referred to as the Franchise Tax Act. The Company filed its Franchise

Tax return for the fiscal year commencing March 1, 1935, and ending February 29, 1936. The State Tax Commission, hereafter in this brief called the Commission, audited the return of the Company and proposed a deficiency in tax. The tax payer objected to the proposed deficiency, and requested a hearing for redetermination of the deficiency. This hearing was granted, and on January 6, 1938, the matter was heard before the Commission. On June 24, 1938, the Commission rendered its decision in the matter, and the Company, being dissatisfied with the decision, and pursuant to Section 47, Chapter 13, Title 80, Revised Statutes of Utah, 1933, petitioned this Honorable Court to review the decision of the Commission. Under the provisions of the Franchise Tax Act, this Court by Certiorari may review the decision of the Commission on both the law and the facts.

Because the Court can review both the law and the facts in this case, and because the questions involved have never been passed upon or touched by this Court in any pervious decision, the Plaintiff is going to take the liberty of reciting the statutes and the facts very fully. We ask the Court's indulgence.

The California Packing Corporation is engaged primarily in the business of packing and canning fruits, vegetables, fish, and in general all canned merchandise, and in merchandising its products so processed. The products processed by the Company are commonly known under the trade name of "Del Monte Brand".

The company sells its products in all forty-eight states in the Union and in foreign countries. The Company owns and operates several canning factories in the State of Utah, where it cans fruits and vegetables. The products processed in the State of Utah are sold wherever the Company does business. The Company maintains no sales office in the State of Utah. All sales of its products made in the State of Utah are made by salesmen sent out from premises for the transaction of business owned or rented by the Corporation outside this state. It is apparent from the record in this case, that the business of this corporation is the normal business of processing and selling and that in the conduct of the business there is nothing exceptional.

Corporations which do business in the State of Utah and in other states, are required to allocate to the State of Utah their net income by using apportionment factors. This method of allocation of income is set forth in Subsections 6, 7, and 8 of Section 21 of Franchise Tax Act and is as follows:

> " (6) If the bank or other corporation carries on any business outside this state, the said remainder may be divided into three equal parts:
>
> (a) Of one third, such portion shall be attributed to business carried on within this state as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within this state and whose denominator is the value of all

the corporation's tangible property wherever situated.

(b) Of another third, such portion shall be attributed to business carried on within this state as shall be found by multiplying said third by a fraction whose numerator is the total amount expended by the corporation for wages, salaries, commissions or other compensation to its employees and assignable to this state and whose denominator is the total expenditures of the corporation for wages, salaries, commissions or other compensation to all of its employees.

(c) Of the remaining third, such portion shall be attributed to business carried on within this state as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this state, and whose denominator is the amount of the corporation's gross recipts from all its business.

(d) The amount assignable to this state of expenditures of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from, premises for the transaction of business owned or rented by the corporation outside this state.

(e) The amount of the corporation's gross receipts from business assignable to this state shall be the amount of its gross receipts for the taxable year from

(1st) *Sales, except those negotiated or effected in behalf of the corporation by agents or*

agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside this state, and sales otherwise determined by the tax commission to be attributable to the business conducted on such premises,

(2nd) Rentals or royalties from property situated, or from the use of patents, within this state.

(f) The value of the corporation's tangible property for the purpose of this section shall be the average value of such property during the taxable year.

(7) In the allocation of net income, gain or loss shall be recognized and shall be computed on the same basis and in the same manner as is provided in this chapter for the determination of net income.

(8) *If in the judgment of the tax commission the application of the foregoing rules does not allocate to this state the proportion of net income fairly and equitably attributable to this state, it may with such information as it may be able to obtain make such allocation as is fairly calculated to assign to this state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation.*

(Italics Ours)

The company in filing its Franchise Tax return, and in determining the allocation fraction to assign income attributable to business done in the State of Utah, used the three factors set out in the Statute:

	In Utah	Total	Fraction
1. Tangible Property	$1,121,746.55	$32,672,848.61	.034333
2. Salaries and Wages	284,014.19	10,936,056.31	.025970
3. Sales	None	55,511,789.30	.000000
Total			.060303
Allocation Fraction (1-3 of above)			.020101

It will be observed that the Company in determining the apportionment fraction did not allocate to Utah any sales as being made by salesmen or agents sent out from premises for the transaction, of business owned or rented by the Corporation inside the State of Utah. This is in conformity with the statute. There is no finding made by the commission, nor is there any evidence in the record which would support a finding that the Company did make sales from premises located in the State of Utah. The Tax Comission in its decision ignored the definition of sales as set forth in the statute and allocated to this State sales of goods which were stored in the State of Utah at the time of sale. It is the position of the Company that there is no foundation either by reason of any statute or evidence that the Commission in its decision was justified in departing from the normal manner of determining the sales factor, but that

on the contrary the decision of the Commission is entirely arbitrary and unwarranted by reason of both the law and the facts in this case. Under the decision of the Commission, the allocation fraction is as follows:

	In Utah	In and Outside Utah	Fraction
1. Total tangible property	1,121,746.55	32,672,848.61	.034333
2. Total wages, etc.	284,014.19	10,936,056.31	.025970
3. Total gross receipts	2,122,110.26	55,511,789.30	.038228
4. Total 1, 2, & 3			.098531
5. Apportionment fraction—1-3 of 4			.032844

The amount shown as No. 3, total gross receipts, represents sales of goods which were stored in Utah at the time the sale was made. The sales of these goods could have been consummated in any state in the Union, and they could have been consigned to any state in the Union. But none of these goods were sold by agents or salesmen sent out from premises within the State of Utah. The only evidence (if it can be called evidence) in this record which would in any way tend to sustain the ruling of the Commission is the introduction by the Commission of the franchise tax returns of the Utah

Packing Corporation. The Utah Packing Corporation before its dissolution, was a wholly owned subsidiary of the California Packing Corporation. The Utah Packing Corporation did no business outside of the State of Utah, and was a Utah Corporation. The return of the California Packing Corporation is in no way connected with the prior returns of the Utah Packing Corporation, and all that the returns of the Utah Packing Corporation show is that they paid a larger franchise tax than the California Packing Corporation. There is nothing in the evidence to show why the Utah Packing Corporation paid a larger tax or why the California Packing Corporation paid a smaller tax. The two are separate and distinct entities, and we submit there is no evidence or no linking up of the two returns which in any way make the returns of the Utah Packing Corporation relevant or material in this action. The Utah Packing Corporation at the time the returns in question were filed was out of existence, there having been a reorganization of the California Packing Corporation in which its subsidiary companies were dissolved and all of the business conducted by the parent corporation, the California Packing Corporation. More will be said relative to this evidence in the argument.

The Tax Commission in its decision reached another conclusion which the company deems to be contrary to the facts and to the law in this case. As has been said before, the California Packing Corporation is a corpora-

tion organized and existing under and by virtue of the laws of the State of New York. Most of its business is transacted and its main office is located in San Francisco, California. The California Packing Corporation owns stocks, bonds and other properties from which it obtains interest, dividends and rentals. The income of the Company by reason of the ownership of stocks, bonds and other intangibles, for the year in question, received outside of the State of Utah, and on the return of the Company specifically allocated outside the State of Utah amounted to $878,347.32. Section 21 of Chapter 13 Title 80 Revised Statutes of Utah, 1933, Subsection 1, provides as follows:

> "Rents, interest and dividends derived from business done outside this state, less related expenses, shall not be allocated to this state."

The company allocated specifically to the State of Utah rents and interest from properties located within the state, and specifically allocated outside the state, rents, interest and dividends received on property outside the state.

The Tax Commission in redetermining the tax of the company, included this income, which we shall term financial income, in that gross income, and apportioned it by using the allocation fraction. This the Company deems to be contrary to the law as set forth in the franchise Tax Act, and unconstitutional under the Federal Constitution.

QUESTIONS OF LAW

As the plaintiff views this case, the decision of the Commission raises the following questions of law:

1. Can the Commission depart from the use of the normal allocation factors to impose a greater tax upon the Company. This involves a question of construction of the statutes which have been set forth above. It is the contention of the plaintiff that it was the intention of the legislature to limit the Commission in departing from the application of the normal allocation factors to those cases where a corporation doing business in and out of the State of Utah would be subjected to double taxation and an inequitable tax by the application of the normal fractions.

2. The next question as we view the case is whether or not (if we concede, which we do not, that the Tax Commission has the power to ignore the allocation fraction) there are sufficient findings or is there sufficient evidence in this record to justify the Commission in making such a finding or in reaching the conclusion which it has reached.

3. It is the position of the plaintiff that the Commission by departing from the use of the normal allocation fraction is subjecting this taxpayer to double taxation, and that by so doing, the Commission is violating the clear mandate of the law and of the 14th amendment to the constitution of the United States and Article V of

the constitution of Utah by taking the property of this plaintiff without due process of law.

On the question of the inclusion of financial revenue to net income assignable to business done in this state and the apportionment of such income by the use of the allocation factors, the plaintiff believes that there is raised the following questions of law:

4. The Commission by so including financial revenue is violating the clear mandate of the statute. This income cannot under the law be attributable to business done in the State of Utah.

5. The inclusion of such financial revenue and the subjecting of such income to the allocation factor, subjects this plaintiff to double taxation contrary to the mandate of the franchise tax act, and the 14th amendment to the Constitution of the United States and Article V of the Constitution of Utah.

6. The inclusion of financial revenue which is not attributable to business done within this state by using an allocation fraction which does not take into consideration intangibles located in and out of the State of Utah, is contrary to the 14th amendment of the Federal Constitution and Article V of the Constitution of Utah by reason of the fact that it takes this taxpayers property without due process of law.

ARGUMENT

History and General Discussion of Utah Franchise

Tax Act

The State of Utah prior to the decision of the Supreme Court of this state, in the case of Minneapolis Steel and Machinery Company vs. Crockett, 263 "P" 926, imposed a tax upon corporations both foreign and domestic, based upon the authorized capital stock of such corporations without regard to where such capital was employed. This Court in the above cited case, held that such a license fee violated the Federal Constitution and that such method of taxation could not be employed. The basis of the decision was that the State of Utah was imposing a license fee or tax upon capital over which it had no jurisdiction.

The then Governor of the State appointed a commission to study the tax structure of the State. One of the purposes of this commission was to study a proper corporation tax which would be constitutional. The Commission recommended the adoption by the legislature of what is commonly called the Massachusetts system. The legislature in the main followed the advice of the Tax Revision Commission and enacted the present Franchise Tax Act. There are material variations between our present law and the Massachusetts law, but in theory, the two are the same. The difficulty encountered by most states in finding a constitutional tax has been the same difficulty which was present under the old Utah law, i.e., to allocate to the state only that proportion of income or capital employed which is connected with business

done in the state. Any method of allocating income such as is done under the Utah law must of necessity be arbitrary in its nature. Unless there is a showing by a particular corporation, that the method which is set forth by the legislature in its application to that corporation, taxes income which is not attributable to business done within the state, then such method of allocating is entirely constitutional. The legislature of the State of Utah, to insure the constitutionality of the Franchise Tax Act, granted the Tax Commission the power to make adjustments in such cases.

1. *Can the Commission depart from the use of the normal allocation factors to impose a greater tax upon the Company. This involves a question of construction of the statutes which have been set out above. It is the contention of the plaintiff that it was the intention of the legislature to limit the Commission in departing from the application of the normal allocation factors to those cases where a corporation doing business in and out of the State of Utah would be subjected to double taxation and an inequitable tax by the application of the normal fractions.*

With the general history of the Utah law in mind, and the difficulties which have been encountered in this state and other states in imposing either a tax based upon capital employed or upon income, we believe that it is proper that at this time we discuss the intent of the legislature and what we believe to be the limitations

imposed by the legislaure upon the Tax Commission in departing from the normal allocation factors. The Tax Commission in this case, departed from the normal allocation factor relating to sales. Their authority for doing so must be granted by the statute. The only possible authority which the Commission have under the statute must be derived from sub-paragraph (e) of subsection 6 of Section 21, Chapter 13, Title 80, Revised Statutes of Utah, 1933, or subsection 8 of the same section and Chapter. This law has been set out fully in the statement of facts. Under the first subparagraph cited, it will be observed that the legislature granted the Tax Commission the power to determine that certain sales were consummated by agents or agencies situated at, connected with, or sent out from premises for the transaction of business owned or rented by the corporation *outside this state.* But there is nothing in the statute which grants the Tax Commission power to determine that sales made by corporations from premises owned or rented by the corporation outside this state, were in fact made within this state. The statute very clearly says that the commission may attribute certain sales to business conducted from premises outside the state, but nowhere are they given the power to determine that sales which were in fact consummated by agents or agencies sent out from premises without the state, are sales which may be attributable to business done within this state. Under subsection 8 of the same section and Chapter, the Tax Commission is given further power

to disregard the normal allocation factors, but here again the legislature limited the Tax Commission in departing from the use of the factors to only those cases which would subject the taxpayer to double taxation and to an unconstitutional tax by using the normal allocation factors. By a careful reading of the two sections above discussed, and when the two are read together, we believe that it conclusively appears that the intention of the legislature was to strictly limit the Tax Commission to those cases, where a corporation doing business in and out of the State of Utah, would be subjected to more than its fair portion of tax by the use of the normal allocation factors. It must be remembered in this case that the Company is not attacking the use of the normal allocation factors set forth by the legislature, but is contending that the use of these factors properly reflects income attributable to business done within this state. The Tax Commission by departing from the use of the normal allocation factors, is subjecting this corporation to a burden of taxation which is not contemplated in the statutes. The Supreme Court of the United States has consistently held that a state may not tax income which is not attributable to business done within that state. This Court cited these cases and recognized this principle in the case of Minneapolis Steel and Machinery Company vs. Crockett, supra. The Supreme Court of the United States has also recognized the principle that a state may tax income attributable to business done within that state. Perhaps the leading case on this

question is the case of Underwood Typewriter Company vs. Chamberlain, 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45. In this case, the State of Connecticut taxed corporations doing business in and out of the State by apportioning income attributable to business done within the state by using only the tangible property factor, which is found in the Utah law. The Supreme Court of the United States, through Justice Brandies, in upholding the Connecticut law, said the following:

> 'The legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It therefore adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. "The plaintiff's argument on this branch of the case", as stated by the supreme court of errors, "carries the burden of showing that 47 per cent of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent of its gross earnings was derived after paying manufacturing costs, "94 Conn 47, 108 Atlantic 159. The corporation has not even attempted to show this; and, for aught that appears, the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result.

> "We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution. Adams Exp. Co. vs. Ohio State Auditor, 166 U. S. 185, 222, 41 L. Ed. 965, 978, 17 S. Ct. Rep. 604. Nor need we consider the contention made on behalf of the State, that the statute is necessarily valid, because the prescribed rule of apportionment is not rigid, and provision is made for rectifying, by proceedings in the superior court, any injustice resulting from its application."

The reasoning applied to the facts in the above case by Justice Brandies, does not hold valid all taxes based upon income where an apportionment factor such as the one used in Connecticut is applied. The holding in this case is that such an apportionment factor is not inherently arbitrary. The corporation in the cited case did not introduce evidence to show that the use of the apportionment factor allocated too much income to the State of Connecticut. In the cited portion of the decision, Justice Brandies also calls attention to the fact that the statute is not inflexible, in other words, the tax officials of the State of Connecticut, if the corporation could have shown that it was paying a tax on income which was not attributable to business done in the State of Connecticut, could have made adjustments. In the case of Hans Rees Sons, Inc., vs. State of North Carolina on the relation of Allen J. Maxwell 75 L. Ed. 879, 283 U. S. 123, the State of North Carolina imposed a franchise tax based upon income, using the same apportion-

ment factor which was used in the Connecticut statute. In this case, the Company by evidence proved that the use of the apportionment factor allocated income to the State of North Carolina was out of proportion with the business done in that state. The Supreme Court of the United States held that the tax as applied to the corporation was unconstitutional. Again we find in the case of Gorham Mfg. Co. vs. Travis, 274 Fed. 975, affirmed in 1924 in 266 U. S. 265, 69 L. Ed. 279, 45 S. Ct. 80, that the State of New York imposes a franchise tax based upon income using the tangible property factor, and where the taxpayer was given a right to a hearing to determine whether or not the apportionment factor used properly reflected income attributable to business done in that state, the court held that the statute was not inherently unconstitutional, but that the use of the apportionment factor did not properly reflect the income of the corporation attributable to business done in the State of New York.

We cite these cases at this time because the cases, with the exception of the Hans Rees Sons, Inc., vs. North Carolina, supra, were decided prior to the enactment of the Utah law. It is our position that the Tax Revision Commission appointed by the Governor of the State of Utah and the legislature, were cognizant of these cases at the time our law was passed, and that the purpose in allowing the Tax Commission in certain cases to disregard the use of the normal allocation fractions, was to

safeguard the Utah law from being declared unconstitutional as being arbitrary where the facts show that the use of the normal allocation fractions did not as to them properly reflect the business done by corporations doing business in and out of the State of Utah.

See also the following cases:

Bass, Ratcliff & Gretton vs. State Tax Commission (1924) 266 U. S. 271, 69 L. Ed. 282.

Singer Mfg. Co. vs. Gilpatric (1922) 98 Conn. 192, 118 Atl. 919.

International Elevator Company vs. Thoresen (1929) 58 N.D. 776, 228 N.W. 192.

A case which we deem to be in point is that of People ex. rel. Studebaker Corporation of America vs. Gilchrist, et. al., State Tax Commission, 155 N. E. 68, 244 N. Y. 144. In this case, the Studebaker Corporation of America was a corporation organized under the laws of the State of New York. All of the capital stock of the Studebaker Corporation of America was owned by the Studebaker Corporation, a corporation not organized under the laws of the state of New York. The Studebaker Corportion of America sold automobiles and parts manufactured by the parent corporation, such sales being made in the State of New York. The contract of the subsidiary with the parent was such that the sales company could not make a profit, all of the profits being made by the parent corporation which did no business in the State of New York. The State of New York imposed a

franchise tax based upon income. The Tax Commission of New York attempted to adjust the tax to reflect the proper income of the sales company by apportioning part of the profit of the parent to business done in the State of New York. New York had no statute which allowed the Tax Commission to demand a consolidated return from the corporation. In discussing the action of the Tax Commission in attempting to allocate a portion of the income to New York, Mr. Justice Cardoza, the then Chief Justice of the Court of Appeals in New York, said the following:

> "The taxing officers of the state are mere adminsirative agents. They may not devise new forms and methods of taxation, however convenient or useful. They have no more inherent power to tax a corporation upon the income of its stockholder where the stockholder is another corporation than they have where the stockholder is a natural person. They do not help themselves by saying that the stockholder is a natural person. They do not help themselves by saying that the stockholder in the long run may be expected to pay the bill, so that little harm will be done, whatever the method of assessment. Assessment, however handy, must find its warrant in the statute. A statute leveying a tax will not be extended by implication beyond the clear import of its terms. Gould vs. Gould, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211. If one method of assessment or collection is pointed out, the courts will not permit the application of another on the theory that the Legislature might just as well have chosen it, since in the final devolution of the burden the result will be the same or, at worst, not widely

> different. U. S. vs. Field 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A.L.R. 1461; Stebbins vs. Kay 123 N. Y. 31, 25 N. E. 207; People ex. rel. Mutual Trust Company vs. Miller, 177 N. Y. 51, 69, N. E. 124. We take the statute as we find it. One who serves as a conduit for a payment to someone else may not be taxed upon that payment as if he had kept it for himself."

It is the contention of this plaintiff that the Tax Commission of this state is attempting to do what the Tax Commission of New York in the cited case attempted to do, i.e., change the law without authority under the law, to apportion to this state the income which the Tax Commission would like to have apportioned to the state. We submit that the legislature in enacting the Utah Franchise Tax limited the Tax Commission in departing from the normal allocation fraction to only those cases where the application of the normal fraction would render the assessment of the tax unconstitutional as to that company.

The courts have recognized the rule that the legislature must set forth the rules for allocating income attributable to business done within any state. This is not a matter that can be left to the discretion of the administrative body. In the case of Puerto Rico Merc. vs. Gallardo (1925) 6 F. (2d) 526, the Circuit Court of Appeals for the First Circuit, declared that a statute of Puerto Rico which made no provision by which the proportion of income attributable to business done in Puerto Rico could be ascertained, and that in the absence of stat-

utory provision as to how the share of income fairly and reasonably attributable to business done in Puerto Rico could not be made workable, the tax could not be upheld. In the case of Western Union Telegraph Company vs. Query (1927) 144 S. C. 244, 142 S. E. 509, the Court held that a statute that required a taxpayer to allocate income to the state in its return to the Tax Commission, and that in the event of the failure of the taxpayer to allocate such income, the Tax Commission was required to make such allocation under rules and regulations promulgated by the Commission, that such a statute was unconstitutional. The same rule was laid down in the case of Commission vs. P. Lorillard Company (1921) 129 Va. 74, 105 S. E. 683. If these laws were held to be an improper delegation of power by the legislature to the administrative bodies without any showing that the formula as used by the administrative bodies was unreasonable or arbitrary, certainly a departure from an allocation factor which has been laid down by the legislature and is manufactured out of the whole cloth by the administrative body, is unconstitutional even though the legislature had intended that the Tax Commission have this power. The Tax Commission, if its decision in this case is upheld by this Court, could place a different construction on what constituted a sale attributable to business done within this state on every merchandising corporation doing business within and without this State, according to the fancy of the Commission.

2. *The next question as we view the case is whether or not (if we concede, which we do not, that the Tax Commission has the power to ignore the allocation fraction) there are sufficient findings or is there sufficient evidence in this record to justify the Commission in making such a finding or in reaching the conclusion which it has reached.*

The decision of the Tax Commission in the case before the court does not set forth any findings of fact, but is merely a decision of conclusions. An examination of the record which has been certified to this court will not reveal one iota of evidence which would justify the Tax Commission in determining that the normal allocation fraction does not apply. It is the position of this plaintiff that this case is the converse to the Underwood Typewriter Company vs. Chamberlain, supra; the Hans Rees Sons, Inc., vs. State of North Carolina, supra; and Gorham Mfg. Company vs. Travis, supra. We say this because in the three cited cases the corporations were attacking the normal statutory method of allocating income. In this case the plaintiff contends that the normal statutory method properly allocates income and the Tax Commission is the one who is attempting to disprove that the statutory method is not proper. It is our contention that the burden was on the Tax Commission to prove that the plaintiff Company in the exercise of its franchise, conducted its business in a manner which precluded it from apportioning its income to business done

in the State of Utah in the normal manner. We have outlined very fully in our statement of facts the method in which the California Packing Corporation conducts its business and we can find nothing which would justify a conclusion that it operated its business any differently than any other manufacturing and merchandising company. A case which we deem to be directly in point relative to the burden of proof, is Curtis Companies, et. al., vs. Wisconsin Tax Commission, decided December 5, 1933, 251 N. W. 497. In this case, the Wisconsin Tax Commission had the power to require consolidated returns where a wholly owned subsidiary filed under the Wisconsin act and the commission did not deem that the return of the subsidiary corporation reflected true income. This case is a good deal the same as the Studebaker Corporation of America vs. Gilchrist, supra, except that in this case the Wisconsin law gave the power to the Commission to require a consolidated return between the parent and the subsidiary. A consolidated return was filed and additional tax was assessed by the Wisconsin Commission. A review of the assessment was asked by the Company and the case decided by the Supreme Court of Wisconsin. The action of the Commission was reversed for the reason that the Commission made no finding or was there any evidence in the record that the contract between the parent and the subsidiary was unreasonable. The Court held that in the absence of any evidence showing an intent to evade the tax, the

Commission was not justified in demanding a consolidated return.

The plaintiff in this case makes the same contention that where there is no evidence or no findings that the conduct of the business of the company is in any way exceptional or that the business is conducted in such a way that the use of the normal allocation factors does not apply, that the decision based upon mere conclusions of the Tax Commission is wholly void and contrary to law. Upon this point, we believe that the language of Mr. Justice Cardoza in the case of Studebaker Corporation of America, vs. Gilchrist, supra, is also applicable.

As was stated in our statement of facts, the Commission have certified, as part of the record in this case, to the Supreme Court, the returns filed by the Utah Packing Corporation. We can anticipate that the Commission will make some contention that these returns are in some way applicable to the case now before the Court. We believe that we can anticipate the arguments which will be made and the use to which the Commission will try to put the inclusion of the returns of the Utah Packing Corporation. For that reason, we are going to give the Court our views as to why these returns are not competent evidence, and will assist the Court in no way in deciding this case. It was set out in our statement of facts that the Utah Packing Corporation did business only in the State of Utah. The books and records of the Utah Packing Corporation at the time it filed returns

with the State Tax Commission, were kept separately from those of the parent, the California Packing Corporation. The gross income of the Utah Packing Corporation was the amount of money paid by the California Packing Corporation to the Utah Packing Corporation for the products which it manufactured. We anticipate that it will be the contention of the Commission that the returns of the Utah Packing Corporation would reflect the income of the business done by the California Packing Corporation in the State of Utah, if the California Packing Corporation filed its returns on a separate accounting basis which showed only profit derived from the Utah operations of the California Packing Corporation. We submit that any such argument is so far-fetched and is so subject to variables, that the returns of the Utah Packing Corporation are absolutely worthless to sustain any such contention. The conditions of the market at the time the Utah Packing Corporation filed its returns may have been wholly different than the condition of the market at the time the return here under question was filed. There is no evidence in the record as to what market conditions were at the time the Utah Packing Corporation filed its returns or what market conditions were at the time the California Packing Corporation filed its return. The condition of the market may have made the difference between profit and loss of Utah operations. At the time of the hearing, the Commission requested that the California Packing Corporation file a return, if it could do so, on a separate

accounting basis. Because all of the subsidiaries of the California Packing Corporation had been consolidated and their accounting system was such that they could not segregate the Utah operations from the other operations of the corporation, it was impossible to file the return on a separate accounting basis showing Utah operations. The Supreme Court of the United States in the cases which have been heretofore cited have recognized that large corporations operate as a unit and that their operations cannot be broken down to cover profits earned from any one state or district. This is true with the California Packing Corporation. The entire operation is a consolidated and unitary one. It might very well be that the California Packing Corporation in its operation for the year here in question lost money on its Utah operations but made money, for example, on its Florida grapefruit canning operations. There is no way of determining just where the profits were made. If it is true that their profits were made from operations outside of the State of Utah, and this is entirely probable and possible, then the State of Utah is deriving profits from business done outside of the state. It is our position that by the unitary method of operation the amount of tax paid by this corporation will equalize in the years when the Utah crop and pack is unprofitable the State of Utah will have the advantage of packs in other states which are profitable, and so in years when the Utah crop and pack is good and that in other states is bad, it might be that some profit will be

lost to this state. We believe that this amply illustrates the utter futility to this court, in considering the returns of the Utah Packing Corporation as having any bearing whatsoever on this case. For all that appears from this record, the canneries located in this state may not even have operated in the State of Utah in the year under consideration and still, the California Packing Corporation made a profit as a unit, and Utah received its portion of that profit. We submit to the Court that the returns filed by the Utah Packing Corporation in prior years have no bearing, weight, or relevancy to the issues involved in this case, and that such returns should be ignored by the Court.

3. *It is the position of the plaintiff that the Commission by departing from the use of the normal allocation fraction is subjecting this taxpayer to double taxation, and that by so doing, the Commission is violating the clear mandate of the law and of the* 14*th Amendment to the Constitution of the United States by taking the property of this plaintiff without due process of law.*

Subsection 8 of Section 21, Chapter 13 of Title 80, Revised Statutes of Utah, 1933, specifically directs the Tax Commission to allocate income on business done within the State of Utah in such a manner as to avoid double taxation. It is the contention of this plaintiff that the Tax Commission have flown directly in the face of this direction in the decision in this case. The decision of the Tax Commission, instead of tending to avoid

a double taxation on the income of this corporation, have made it more possible that the same income will be taxed, in different jurisdictions. To illustrate our point, if the State of California, (which has a franchise tax very similar to ours), construed sales as being made within the state where they are made by agents or agencies working from offices or premises located in the State of California, then the sales made by the California Packing Corporation of its merchandise which was stored in Utah at the time of the sale, such sales would be taken into consideration in determining the allocation factor for allocating income attributable to business done in the State of California. The State Tax Commission by determining that such sales were made in the State of Utah is subjecting the same income to tax as being attributable to business done within the State of Utah. If this were true of all states in which the California Packing Corporation does business, then the same income could be subject to three or four taxes. But if the State Tax Commission adopted the normal allocation factors and the statutory definition of sales, then the same income of this corporation would not be subject to a double tax. We cannot see by what stretch of the imagination the Tax Commission can determine that a sale is attributable to business done in the State of Utah, merely because the goods which are sold are located in the State at the time of sale. It might be, under the theory of the Tax Commission, that the California Packing Corporation would ship a car of Florida

grapefruit to the State of Utah and warehouse it, and later, by salesmen located in the State of Idaho, sell all of the grapefruit in the State of Idaho. Certainly the transaction could not be said to be attributable to business done within the state of Utah merely because the corporation had used a Utah warehouse. Under the decision of the Commission, that sale of goods in Idaho would be determined to have been consummated in the State of Utah and a tax upon the income, paid to the State of Utah. Idaho could also determine that the sales were consummated in that state. We believe that any such ruling is so arbitrary and unreasonable on its face that this court cannot reach any other conclusion but that the administrative legislation by the State Tax Commission is not warranted by the statutes of the State and is on its face an unconstitutional taking of the property of this plaintiff without due process of law. See the cases of Carlos Ruggles Lumber Company, vs. Commissioner (1927) 261 Mass. 445. 158 N. E. 899, Arpin vs. Eberhardt (1914) 158 Wis. 20, 147 N. E. 1016. The Crescent Mfg. Company vs. South Carolina Tax Commission, 129 S. C. 480, 124 S. E. 761. We also wish to call the Court's attention to the cases which have been cited heretofore in this brief. The Courts in the cited cases have uniformly held that a state may only tax that income which is derived from business done within the state. Merely because the property is stored in the State of Utah prior to sale does not make such a sale attributable to business done within the State of Utah.

We submit that the application of the statute by the Tax Commission in its decision is unconstitutional as taxing income which can in no way be attributable to business done within this state. We appreciate, as we have said before, the use of allocation fractions in measuring business done within any state is inherently arbitrary, but for an administrative agency to promulgate decisions which are even more arbitrary than the statute itself, is on its face unconstitutional. The State Tax Commission has substituted its definition of a sale, for the definition of the legislature, without any delegation of power by the legislature to the Tax Commission. It is just a case of an administrative body making an arbitrary formula worse. We submit that as to this corporation the decision of the State Tax Commission in disregarding the normal allocation fractions and setting up one of its own, is unconstitutional and is depriving this company of its property without due process of law. The decision of the Commission should be rectified by this Court.

4. *The Commission by so including financial revenue is violating the clear mandate of the statute. This income cannot under the law be attributable to business done in the State of Utah.*

Subsection 1 of Section 21 of Chapter 13, Title 80, Revised Statutes of Utah, 1933, which has been quoted, and subsection 3 of the same section which provided as follows:

> "Rents, interest and dividents derived from business done in this state, less related expenses, shall be allocated to this state."

It is the Company's interpretation of the law that where rents, interest, and dividends are derived from business done in this state than the full amount of such income received in this manner shall be allocated to the State in full and under no interpretation of the statute shall such income be allocated by the use of apportionment factors. The State Tax Commission in its decision, have determined that the interest and dividends herein received by the company, were not received in connection with business done at any particular place but were received in the conduct of the general business of the company. It is our position that intangibles and also the income from intangibles must have a situs at some particular place, either the domicile of the owner or they must acquire a business situs for the purpose of taxation.

See also the following cases:

> Shaffer vs. Carter 252 U.S. 37, 64 L. Ed. 445.
> Travis vs. Yale and T. Mfg. Co. 252 U. S. 60, 64 L. Ed. 460.
> Meyer, Auditor of Oklahoma vs. Wells Fargo and Co., 223 U. S. 298, 56 L. Ed. 445.

The intangibles from which interest and dividends were received, had neither a situs in the State of Utah by reason of domicile, this company being a New York corporation, nor had they acquired a business situs. The business situs of the intangibles was at the main place of business in San Francisco. There is no finding made by the Commission that any of the intangibles were

located in the State of Utah. The statute says that income derived "from business done outside this state shall not be allocated to this state". Surely there is no evidence in this record that this income was received from business done within this state. The question as to the situs of intangibles for purposes of taxation, has arisen a great number of times in inheritance tax cases. The rule first adopted by the Supreme Court of the United States was that intangibles have a situs for tax purposes at the domicile of the owner. Blodgett vs. Silberman, 277 U. S. 1, 48 S. Ct. 410; Farmers Loan and Trust Company vs. Minnesota, 280 U. S. 204, 50 S. Ct. Rep. 98; Baldwin vs. Missouri, 281 U. S. 586, 50 S. Ct. Rep. 436; Beidler vs. South Carolina Tax Commission, 282 U. S. 1, 51 S. Ct. Rep. 54. The Supreme Court of the United States susequent to the decisions in the above cited cases has to some extent modified the rule and has held that intangibles can acquire a business situs in a state other than where the owner is domiciled. See the case of Wheeling Steel vs. Fox, 298 U. S. 193, 80 L. Ed. 1143. In this case, the Steel Company was incorporated under the laws of the State of Delaware, and its principal place of business was located at Wheeling, West Virginia. The State of West Virginia imposed a tax on the intangibles in accordance with their law. The company contended that the situs of the intangibles for the purpose of taxation was at the domicile of the owner, which was the State of Delaware. The Supreme Court of the United States held that because the Com-

pany held the intangibles in its main office in West Virginia, and dividends and interest were received in West Virginia, that the intangibles had acquired a situs for tax purposes in the State of West Virginia and were properly taxed in that state. In the case now before the Court, the intangibles under consideration have never been in the State of Utah, dividends and interest are received at a place outside the State of Utah, and the domicile of the corporation is located in the State of New York. The receipt of the income from these intangibles cannot, by any stretch of the imagination, be deemed to be attributable to any business done within this state. The statute has specifically set forth the manner in which such income must be allocated. Certainly the holding and the receipt of interest and dividends from the intangibles in a place outside of this state cannot be construed to be attributable to business done within this state. The case of Stanley Works vs. Hackett Conn., decided March 4, 1937, 190 At. 743, is a case which construes the meaning of the phrase "from business done". The corporation in this case was organized under the laws of Connecticut. It owned the stock of three Canadian corporations from which it received dividends. The provision of the Connecticut Statute relative to dividends, interest and rentals is as follows:

> "Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its

principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place of business of the taxpayer, and a similar rule shall apply to such income received in connection with business without the state."

Sec. 420 c (1) Chapter 66 b Cumulative Supplement of the General Statutes of Connecticut, 1935.

This case is interesting because of the construction which the Connecticut Court put on the phrase "in connection with business". The Court held that all of the dividends were earned upon business done in the Dominion of Canada and should be allocated outside the state.

Under the provisions of the Utah Statute, this income must be allocated wholly within the State of Utah or without the State of Utah. The Company in its return has conceded that certain rents were derived from property located within the State of Utah, and in its return allocated the whole of the income to business done in the State of Utah and has not attempted to have this income allocated by use of the apportionment factor. We submit that this method of reporting is in absolute conformity with the statute and that the interest, dividends and rents reported as received from business done

without the State of Utah were by the taxpayer properly excluded as having any bearing on business done in this state, by the taxpayer. The State Tax Commission in its decision has again wholly ignored the clear mandate of the statute and has legislated a method of apportionment entirely of its own which can be justified neither by the statute nor by the law.

5. *The inclusion of such financial revenue and the subjecting of such income to the allocation factor, subjects this plaintiff to double taxation contrary to the mandate of the Franchise Tax Act, and the* 14*th Amendment of the Constitution of the United States.*

The whole legislative intent in enacting the franchise tax law as we have heretofore stated, has been an attempt to eliminate all possible double taxation of income. Again the commission by its decision has fostered, rather than eliminated, the possibility of double taxation, for example the California law relative to the specific allocation of financial revenue, is similar to the Utah law. If the business situs theory, for the taxation of intangibles or the income from intangibles is adopted then the full amount of the financial revenue (except that portion which the company concedes was attributable to business done in the State of Utah) would be specifically allocated to the State of California. Such income would not be subject to any apportionment factor. The State of California would receive a tax upon the full amount of the income and the State of Utah would

attempt to tax a portion of it. And so, if the taxable situs of the income was the domicile of the corporation, then the State of New York would tax the full amount of the income and the State of Utah would tax a portion of it. The method devised by the State Tax Commission may be a fair and equitable method and it might be proper if it were adopted by all states, but it is not provided for by the statutes of this State nor of any other state which we know. We wish to call the Court's attention to the language of the Supreme Court of the United States relative to double taxation of intangibles in the cases of Blodgett vs. Silberman, supra; Farmers Loan and Trust Company vs. Minnesota, supra; Baldwin vs. Missouri, supra; Beidler vs. South Carolina Tax Commission, supra; and also in the case of First National Bank of Boston vs. Main, 284 U. S. 312, 52 S. Ct. Rep. 174. We submit that the attempt of the Tax Commission to tax this income as being attributable to business done in the State of Utah is wholly arbitrary and unconstitutional for the reason that it deprives this taxpayer of its property without due process of law.

6. *The inclusion of financial revenue which is not attributable to business done within this state by using an allocation fraction which does not take into consideration intangibles located in and out of the State of Utah, is contrary to the 14th Amendment of the Federal Constitution by reason of the fact that it takes this taxpayers property without due process of law.*

In determining the allocation factors, the Court will observe that the only things taken into consideration for determining the amount of income to be apportioned to the State of Utah is tangible property in and out of the State of Utah, salaries and wages paid in and out of the State of Utah, and sales assignable to business done in and out of the State of Utah. In no place in the statute for the apportionment of income are intangibles from which the Company receives rents, interest and dividends, or as we have termed it, financial revenue, taken into consideration. The case which we deem to be direcly in point in the case of People ex. rel. Alpha Portland Cement Company vs. Knapp et. al., State Tax Commission, is a New York case decided November 23, 1920, 230 N. Y. 48, 129 N. E. 202, Certiorari denied by the Supreme Court of the United States, 256 U. S. 702, 41 S. Ct. Rep. 624.

The corporation was organized under the laws of New Jersey and was doing business in the State of New York. A corporation which was doing business in and out of the State of New York was by statute required to allocate its income by using the following allocation factors: The real property and the tangible personal property in New York are to be compared with the like property in New York and elsewhere. The bills and accounts resulting from manufacturing, sales and services in New York, are to be compared with the like bills and accounts in New York

and elsewhere. The shares of stock in other corporations, if found to have a situs in New York, but not exceeding 10 per cent of the value of the local realty and the local tangible personalty, are to be compared with the total shares in other corporations, but not exceeding 10 per cent of all realty and all the tangible personalty.

The Statute made no provision for interest paid on bonds and a foreign corporation paid a tax on income which included interest on bonds. The value of the bonds in no way entered into the determination of the allocation fraction.

> Cardoza Justice
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> "I think, therefore, that in substance, though not in form, in tendency, though not in name, this tax is equivalent to a tax upon relator's income. The only question, then, is whether the method of allocation is reasonably adapted to the apportionment of income according to the situs of its origin. The State substantially concedes that a tax on income could not stand if allocated on such a basis. Meyer, Auditor of Oklahoma vs. Wells Fargo and Company 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445; Shaffer vs. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed 445; and Travis vs. Yale and Towne Manufacturing Company 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460, are sufficient in themselves to justify the concession."
>
> "In the first case the tax was measured by the entire income. The scheme of allocation limited the assessors to the comparison of the receipts of business done within the state with the receipts of business there and elsewhere. Investments in bonds and lands were disregarded

in the apportionment, though the income from such investments was included in the measure. On that ground, as well as on others, the statute was held invalid. There is no distinction between that case and this (so far as the objection just stated is concerned), except in the label of the burden. Here, as there, the statute prescribes a rule of allocation which as applied to foreign corporations holding bonds and shares in other states, involves an artificial and arbitrary augmentation of the value of the local privilege. It measures the value of the franchise, here and elsewhere, by income from all sources, and excludes some of the same sources when the value is apportioned, to take from assets elsewhere is equivalent to adding to assets here. The statute would be little different in principle if it announced the arbitrary rule that all investments in bonds and stocks should be conclusively presumed to have their situs in New York. The resulting vice in the proportion is not the consequence of adventitious circumstances of inequalities developing unexpectedly in the practical workings of the statute, but hardly to be avoided by reasonable foresight. The exclusion of bonds and stocks is the result of an explicit mandate. The principle of allocation is not followed to its natural and obvious outcome in accordance with the situs of the assets, but is consciously checked, its normal course is thwarted, by an artificial and designed exception. Something which, in the absence of express exclusion, would be within its operation, is knowingly taken out of it. I am unable to avoid the conclusion that a method of apportionment which purposely ignores realties, which compels an assessor to look to some of the assets only, and close his eyes to all others, is arbitrary

> and unreasonable in its increase of the local burden.''

The holding in this case clearly renders the attempted method of apportioning income derived from intangibles unconstitutional under the 14th Amendment of the Federal Constitution, by reason of the fact that it takes this taxpayers property without due process of law.

SUMMARY

The questions of law which we have deemed to be involved in this case are somewhat interlocking. We have tried to make this division of our points in such a manner as to clarify the issues. We may or may not have succeeded in doing this. Practically all of the cases cited under the first three points discussed, have a definite bearing on the last three points discussed. We have not cited these cases again for the reason that we believe the Court in reading the cited cases will recognize this fact. It is our position hat the Commission by its interpretation of the statutes of the State of Utah, relative to the allocation and apportionment of income to business done in the State of Utah, and placed upon those statutes an unconstitutional interpretation. The rule of law that where there are two possible constructions of a statute, the Court must adopt that construction which will render the statute constitutional, is so elementary, that we do not believe that it necessitates the citing of any cases. The plaintiff does not contend that the statutes are unconstitutional, but it does con-

tend that the interpretation and construction placed upon the statutes by the Tax Commission in its decision in this case, if such interpretation and construction is correct, is unconstitutional. We earnestly submit that this corporation in filing its franchise tax return followed the clear mandate, intent and spirit of the statutes. There is no evidence that the use of the normal method of allocation of income does not properly reflect the income of this corporation attributable to business done in the State of Utah. The method adopted by the Commission in allocating financial revenue, is not justified by the statutes, the law, and is contrary and in violation to the Constitution of this State and of the United States. We ask this Court to set aside the deficiency as proposed by the State Tax Commission and to direct the State Tax Commission to accept the return of this taxpayer as it was filed, and to accept as payment in full, the taxes which were paid by the taxpayer upon the filing of the return.

Respectfully submitted,

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NED WARNOCK

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