OPINION NO. 853

DISTRICT OF COLUMBIA TAX COURT

FILED

JUN 10 1953

District of Columbia Tax Court

AMERICAN BRAKE SHOE COMPANY, Petitioner,	)	
vs.	)	Docket No. 1361
DISTRICT OF COLUMBIA, Respondent.	)	

FINDINGS OF FACT AND OPINION

The petitioner is here appealing from the assessment of, and denial of claims of refund of franchise taxes under the District of Columbia Income and Franchise Tax Act of 1947 on the ground that the petitioner is not engaged in trade or business in the District of Columbia within the meaning of that Act.

Findings of Fact

The petitioner is a Delaware corporation with its principal place of business or office at No. 230 Park Avenue, New York, N.Y. It consists of ten departments or "divisions" segregated as to products manufactured and sold by each, that is to say, Brake Shoe and Castings Division, which manufactures and sells brake shoes for railroad cars, Ramapo Ajax Division which manufactures and sells railroad track fittings, such as switch stands, frog switches, crossing stud bolts, guard rail braces and the like, Kellogg Division which manufactures and sells air compressors, paint spray equipment and the like, Brake Block Division which manufactures and sells brake linings for trucks, buses and automobiles, American Manganese Steel Division, which manufactures and sells steel castings principally, and five others. The five divisions specifically named sell to customers in the District of Columbia. The other five divisions do not do so.

The petitioner's name formerly was "The American Brake Shoe & Foundry Company".

The petitioner had no office in the District of Columbia during the taxable years involved. It did maintain for the sleeping accommodation of its officers and agents, who come to the District to transact business, a

suite of rooms in a local hotel consisting of a sitting room, bedroom and bath. In such suite such officers or agents made and received telephone calls in connection with petitioner's business of the type and character of calls usually made and received by commercial travellers in their hotel rooms. It was not an office.

The transactions of the five divisions relating to the District of Columbia during the taxable years 1949, 1950 and 1951 are as follows:

Brake Shoe and Castings Division

Washington Terminal Company - Pennsylvania Railroad Company: On April 6, 1927, the petitioner and the Pennsylvania Railroad Company entered into an agreement for the purchase of brake shoes for itself and any other company which it controlled or operated. Such contract together with its accompanying proposal and schedules "A" and "B" were as follows:

TRIPLICATE

SELLER'S No._____ BUYER'S No. 5103

AGREEMENT FOR THE PURCHASE

of Brake Shoes

THIS AGREEMENT, made in Triplicate, this sixth day of April, A.D. 1927, by and between The American Brake Shoe and Foundry Company (hereinafter called the "Seller"), party of the first part, and The Pennsylvania Railroad Company (hereinafter called the "Buyer"), party of the second part:

That for and in consideration of the performance of the mutual covenants hereinafter contained, the parties hereto do covenant and agree as follows:

The Seller agrees to sell and the Buyer agrees to buy, on the following terms and conditions, the material hereinafter specified.

MATERIAL	Brake Shoes
SPECIFICATIONS AND PLANS	In accordance with P.R.R. specification No. 50, with the exception of the "Improved Perfecto" type.
QUANTITY	As consumed by the Buyer from Seller's maintained stocks at Buyer's shops.
~~Time of Delivery~~	It is hereby understood and agreed that the covenants in Seller's proposal dated April 6, 1927 together with Schedules "A" and "B", are made a part of this agreement.
~~Price~~	
~~Place of Delivery (Exact railroad point)~~	
~~Remarks~~	
STANDARD PROVISIONS	It is hereby understood and agreed that the "STANDARD PROVISIONS" printed on the back hereof are made a part of this agreement

IN WITNESS WHEREOF, the parties hereto have duly executed these presents the day and year first hereinbefore written.

The American Brake Shoe & Foundry Co.

By A. H. Elliot
Title Agent

WITNESSES:

William Hargrave

N. O. Anderson

The Pennsylvania Railroad Company

By C.E. Welsh
Title Purchasing Agent

THE PENNSYLVANIA RAILROAD COMPANY

[illegible] STREET, [illegible], N.Y.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY (hereinafter called the "Brake Shoe Company") proposes to furnish to

THE PENNSYLVANIA RAILROAD COMPANY,
Philadelphia, Pa.

(hereinafter called the "Purchaser") and the Purchaser agrees to purchase from the Brake Shoe Company brake shoes for itself and any other companies or railroads it may purchase, control or operate, upon the following terms:

TYPES AND PRICES

LOCOMOTIVE DRIVER BRAKE SHOES	**PER NET TON**
Improved Perfecto	[illegible]
The above named type made to specifications and designs shown on blueprints from the Brake Shoe Company's tracings.	
Pennsylvania Special	60.00
FLANGED CAR BRAKE SHOES	
Diamond-S	54.00
UNFLANGED CAR BRAKE SHOES	
Special Chilled	58.00
Diamond-S	49.00

The Pennsylvania Special Locomotive brake shoes, and the Diamond-S and Special Chilled Car brake shoes will be in accordance with the latest revision of Pennsylvania Specification No. 50.

Brake shoes from stocks maintained by the Brake Shoe Company at the Purchaser's shops shall be invoiced at place prices based on the above prices and shown in Schedule "A" to be attached hereto.

The above named prices shall be subject to revision by the Brake Shoe Company on the first day of April, July, October and January in each year. The Brake Shoe Company, on or before each revision date, shall mail to the Purchaser a notice setting forth the prices which shall prevail for the succeeding three (3) months on all orders received on and after such revision date. The Purchaser shall have thirty (30) days after each such revision date within which to reject by written notice to the Brake Shoe Company the prices so submitted. A rejection of the said prices by the Purchaser shall constitute a cancelation of this agreement.

DELIVERY

Improved Perfecto, Special Chilled and Diamond-S unflanged types, f.o.b. the Brake Shoe Company's plants at Baltimore, Md.; Buffalo, N.Y.; Chicago, Ill.; Mahwah, N.J. and Pittsburgh, Pa.

Pennsylvania Special type, f.o.b. the Brake Shoe Company's plants at Baltimore, Md.; Buffalo, N.Y.; Mahwah, N.J. and Pittsburgh, Pa.

Flanged Diamond-S type, f.o.b. the Brake Shoe Company's plant at Mahwah, N.J.

Narrow Gauge patterns, f.o.b. the Brake Shoe Company's plant at Pittsburgh, Pa.

PAYMENT Net cash thirty (30) days from date of invoice.

ORDERS The Purchaser shall send all orders and communications relating thereto to the Brake Shoe Company's office at No. 30 Church Street, New York, N.Y.

STOCK OF BRAKE SHOES Upon the execution of this agreement, the Brake Shoe Company will maintain a stock of its Locomotive Driver Brake Shoes, Flanged Diamond-S Brake Shoes, and Unflanged Diamond-S and Special Chilled Brake Shoes, satisfactory to the Purchaser, at such of the Purchaser's Shops as agreed upon in Schedule "B" to be attached hereto.

These stocks will be based on the Purchaser's current records of consumption and will generally be not less than thirty (30) nor more than sixty (60) days' supply at each Shop.

As soon as may be possible, the Purchaser will furnish the Brake Shoe Company a statement showing its average consumption at each Shop of each pattern of brake shoe maintained at that Shop, and the Brake Shoe Company will make shipments of a sufficient quantity of each pattern, to each Shop, to cover such consumption, sending shipping notices to the Purchaser's storekeepers at these Shops.

Upon the execution of this agreement and on the first day of each month thereafter, the Purchaser will send to the Brake Shoe Company, at its office No. 30 Church Street, New York, N.Y., a statement showing the quantity of each pattern of brake shoes on hand on that date; the quantity of each pattern of said brake shoes received during the preceding month; and the quantity of each pattern of said brake shoes consumed and shipped during the preceding month, in each one of the maintained stocks; and will make payment to the Brake Shoe Company, of its invoice for the quantity of each pattern of said brake shoes consumed or shipped from each of the maintained stocks during the preceding month, at the price in effect for that month.

Following receipt of the Purchaser's statements, the Brake Shoe Company will promptly ship to each of the maintained stocks, sufficient of each pattern of brake shoes to replenish this stock; sending shipping notices of each shipment to the Purchaser's storekeepers at these shops.

The Purchaser will keep the Brake Shoe Company informed, as far as possible, of the probable changes in consumption of brake shoes in these maintained stocks, so that the Brake Shoe Company can modify the stocks accordingly.

If, through no fault of the Brake Shoe Company, a pattern of brake shoe in its maintained stocks, at any of these Shops, becomes obsolete and cannot be used elsewhere, the Purchaser will reimburse the Brake Shoe Company for these shoes, at the price then in effect.

The Brake Shoe Company reserves the right to inspect for its own purpose, at its own expense, at any time in regular shop hours during the term of this agreement, all brake shoes in stock at Purchaser's Shops, as well as the stock records of the Purchaser at these Shops insofar as they relate to the Brake Shoe Company's business under this agreement.

Upon the termination of this agreement, the Brake Shoe Company will invoice the Purchaser for all the brake shoes on hand in these maintained stocks, at the prices then in effect.

NEW EQUIPMENT

In event the Purchaser shall specify the above named types of brake shoes on new locomotives and cars that may be either built or ordered during the term of this agreement, the Brake Shoe Company will sell the said brake shoes for such new locomotives or cars to locomotive or car builders at its current prices, f.o.b. the Brake Shoe Company's plant nearest to the point of destination at which the patterns are located.

TERM OF AGREEMENT

This agreement shall become effective on the SIXTH day of April, 1927, superseding agreement 72175 and supplements thereto, and shall continue for a period of one year and thereafter from year to year unless terminated by either party by sixty (60) days' written notice to the other prior to the end of the first, or of any succeeding, twelve (12) months' period, except for the provisions of the paragraph herein entitled "TYPES AND PRICES".

It is understood that the Brake Shoe Company will not be liable for delays in deliveries hereunder occasioned by acts of God, strikes, fires, or other causes beyond its control.

An acceptance of this proposition shall constitute an agreement between the Purchaser and the Brake Shoe Company, their successors and assigns, in accordance with the terms and conditions herein set forth.

[illegible] AND FOUNDRY COMPANY

By: [illegible]

[illegible] Agent

ACCEPTED this Sixth day of [illegible]
[illegible] FOUNDRY

By: [illegible]

[illegible]

of

[illegible]

between

[illegible] MANUFACTURING COMPANY

and

[illegible]

In accordance with the provisions under the heading "Types and sizes" in the agreement, the prices of brake shoes used from Government stock during the months of April, May and June 1927 will be [illegible] below:

[illegible]	[illegible]
[illegible] type, pattern -[illegible]75	1.95
-[illegible]676	[illegible]
-[illegible]86	[illegible]
-[illegible]	1.[illegible]
-[illegible]	[illegible].10
-[illegible]	[illegible].46
-[illegible]	[illegible].66
-14728	[illegible].10
-[illegible]	[illegible].61
-[illegible]	[illegible].01
-[illegible]	1.65
-[illegible]	1.71
-[illegible]	1.20
-[illegible]	[illegible].35
-14737	[illegible].01
-14738	1.11
-[illegible]	[illegible].67
-15299	1.65
-15400	1.[illegible]9
Improved [illegible] type, pattern [illegible]-[illegible]	1.69
[illegible]	
Diamond- type, pattern [illegible]-[illegible]54	.68
[illegible]	
Special [illegible] type, pattern [illegible]-40	.38
Diamond- type, pattern [illegible]	.69
Diamond- type, pattern [illegible]	.64

[illegible] BRAKE SHOE AND FOUNDRY COMPANY

By: [illegible]

ACCEPTED this [illegible] day of [illegible]

THE PENNSYLVANIA [illegible]

By: C. E. [illegible]

[illegible]

[illegible]

SCHEDULE "B"

of

AGREEMENT

between

THE AMERICAN [illegible]

and

THE [illegible]

Dated [illegible]

[illegible] In accordance with the paragraph [illegible] "Shoes" in the above agreement, the [illegible] Shoe Company will maintain stocks of [illegible]

[illegible] DRIVER FULL SHOES [illegible]ivers special type	[illegible] Altoona, [illegible] [illegible] Columbus, Ohio [illegible] Meadowe, N. J. Olean, N. Y. Altoona, Pa. Wilmington, Del. Washington, D. C.
Improved Perfecto type	Washington, D. C.
FLANGED CAR [illegible] Diamond-S type	Bayonne, N. J.
WHEELSEAT CAR [illegible] Diamond-S type	Altoona, Pa. Baltimore, Md. Buffalo, [illegible] Camden, [illegible] Canton, Ohio [illegible] [illegible] Columbus, Ohio [illegible] [illegible] Fort Wayne, Ind. Harrisburg, [illegible] Meadowe, [illegible] Northumberland, Pa. Altoona, [illegible] ~~Conway, Pa.~~ Dunmyrile, [illegible] West Philadelphia, [illegible] Wilmington, Del. Washington, D. C.
Special Chilled type	Altoona, Pa. - [illegible] Altoona, Pa. - [illegible] Baltimore, Md. Buffalo, N. Y. Camden, N. J. Cleveland, O. Chicago, Ill. Canton, O. Elmira, N. Y. Sholl, Pa. ~~Erie, Pa.~~ Fort Wayne, Ind. Galesburg, [illegible] ~~Conway, Pa.~~ Meadowe, [illegible] Mt. Carbon, Pa. Northumberland, Pa. Altoona, [illegible] ~~Conway, Pa.~~ West Philadelphia, [illegible] West Morrisville, Pa. Wilmington, Del.

THE AMERICAN [illegible]

By: [illegible]

President

ACCEPTED this eighth day of July 1920

THE PENNSYLVANIA RAILROAD COMPANY

By: C. E. Walsh

Purchasing Agent

The above quoted contract is still in force. Under it the petitioner sells and delivers brake shoes to the Washington Terminal Company, a corporation which operates the Washington railroad terminal, for use in repairing and maintaining railroad locomotives and cars of the Pennsylvania Railroad Company and other railroad companies who enter the Washington Terminal.

In compliance with the aforesaid agreement the petitioner during the years 1949, 1950 and 1951 maintained stocks of brake shoes in the yards of the Washington Terminal, and in compliance with the agreement, permitted the Washington Terminal Company to withdraw from such maintained stock of brake shoes the quantity that the Terminal Company needed from time to time to carry out its repair and maintenance functions. The Washington Terminal Company was not billed for the brake shoes at the time of their delivery at the Washington Terminal yards, but only as and when the brake shoes were removed from the maintained stocks and then at the price current at the time of such removal, and not at the price current at the time of delivery at the yards. During the taxable years here involved the Washington Terminal Company removed from the maintained stock of brake shoes at Washington Terminal yards brake shoes in the following amounts:

For the year 1949	- $ 308,270.17
For the year 1950	- $ 337,709.54
For the year 1951	- $ 492,217.86.

Capital Transit Company: During the calendar years 1949, 1950 and 1951 the petitioner sold brake shoes to the Capital Transit Company for use on its street railway cars. Orders for such sales were sent direct from the Capital Transit Company by mail to the petitioner at its office in New York. The evidence does not disclose how the brake shoes purchased by the Capital Transit Company were delivered nor does it disclose the exact amount of the sales, but the Assistant to the President of the Brake Shoe & Castings Division testified that "it might be about four or five hundred dollars a month".

Ramapo Ajax Division

Southern Railway Company: This division employed an agent, Ralph H.

Payne, to sell its products to railroads, mostly in the southeastern part of the United States, including the Southern Railway Company, and to the Capital Transit Company. Mr. Payne was compensated as follows: he was paid a retainer of $100 a month and a commission of 4% on the amount of the sales which he made. While he represented other companies who sell railway equipment, he represented only the Ramapo Ajax Division in respect to the line of railroad equipment manufactured and sold by that division. He could not invade the territory of other representatives of the Ramapo Ajax Division. He received a commission on all equipment of the Division sold in his territory whether he negotiated the sale or not. Such representative maintained an office in the District of Columbia and employed and paid the salaries of the salesmen and other employees in that office. He was listed in the telephone directory of the District of Columbia as "Payne, Ralph W., railroad equip." Mr. Payne had nothing to do with establishing the price of the products of the Division, with the acceptance of the orders or the approval of the purchaser's credit. He merely negotiated the sale and procured the order and transmitted the order to the office of the Division as its representative. He was not an independent agent or broker.

In the capacity as above stated Mr. Payne negotiated and procured orders for railway track equipment from the Southern Railway Company whose general offices were in the District of Columbia, and from the Capital Transit Company. The amount of such sales is not disclosed by the record although one witness testified that he thought that the amount of sales of equipment to the Southern Railway Company did not exceed $6,000 for the three taxable years involved.

Kellogg Division
Brake Block Division
American Manganese Steel Division

These three divisions sell their products to customers in the District of Columbia. Such sales are effected by salesmen with offices outside the District but who come into the District and procure orders. Such orders are accepted without the District. No evidence was introduced

as to the amount of such sales, but the Assistant to the President in Charge of Sales Coordination and Sales Policy of the petitioner estimated that during the taxable years here involved, the Kellogg Division sales amounted to between $10,000 and $12,000 a year, the Brake Block Division between $5,000 and $20,000 a year, and the American Manganese Steel Division "in the neighborhood of $23,000 a year".

In General

The income tax return of this petitioner for the calendar year 1949 reflects that in addition to the sales of brake shoes from maintained stocks within the District of Columbia, the petitioner during the calendar year of 1949 made sales to customers in the District of Columbia in the amount of $53,224.41. In its income tax returns for the calendar years 1950 and 1951 no such information is supplied. The only sales affecting the District of Columbia appearing in such income tax returns were the sales from maintained stocks in the District of Columbia as hereinbefore set forth.

On April 14, 1950, the Petitioner filed with the Assessor its corporate franchise tax return for the calendar year 1949 in which was included the statement following:

"AMERICAN BRAKE SHOE COMPANY

DISTRICT OF COLUMBIA — CORPORATION FRANCHISE TAX RETURN FOR 1949

SCHEDULE "A"

Amount of taxable net income per line 34 of Federal return for 1949		$5,672,013.19
Deduct:		
Interest	$39,549.75	
Rents	19,893.68	
Royalties	22,299.54	
Dividends	327,215.65	
Net gain from sale of assets other than capital	126,261.37	535,219.99
		$5,136,793.20
Add:		
State taxes based on income		148,741.41
Net income subject to allocation (Item A)		$5,285,534.61

Net Sales per Federal return	$87,560,166.11	
Plus other income not excluded above . .	38,427.93	
Total receipts (Item B)		$87,598,594.04
Sales of goods from stock located in the District (Item C) .		308,270.17
Percentage of Item C to Item B (Item D).		.003519
Item D multiplied by Item A (Item E)		18,599.80
Tax at 5% of Item E		929.99 "

On May 11, 1950, the petitioner filed with the Assessor a letter explaining the computation of the apportionment factor in the foregoing statement and supplying other sales information as follows:

"AMERICAN BRAKE SHOE COMPANY
230 Park Avenue
New York 17, N.Y.

May 11, 1950

Assessor of the District of Columbia
Washington, D.C.

Dear Sir:

With reference to our letter of April 14, 1950, to which was attached our 1949 Corporation Franchise Tax Return, we submit herewith "Schedule M - Sales Information" covering the calendar year 1949.

1. All sales of goods made to the United States, the District of Columbia or others, from stock located in the District (including stock located in a store, warehouse, public warehouse or consigned stock).	$ 308,270.17
2. All sales of goods shipped into the District of Columbia, to the United States, the District of Columbia or others	53,224.41
Total	$ 361,484.58
Total included in "Computation of District of Columbia Apportionment Factor"	308,270.17
Total amount of all sales of goods omitted in "Computation of District of Columbia Apportionment Factor" (Note 1)	$ 53,224.41

1. Excluded in arriving at the apportionment factor for the reason that such orders were principally secured, negotiated or effected by employees of the Company situated at offices without the District of Columbia.

Would you kindly attach this information to our 1949 return.

Very truly yours,

JM:JF

V.L. Persbacker
V.L. Persbacker
Asst. Comptroller"

In its corporate franchise tax return the petitioner reported the sum of $18,599.80 as net income properly apportioned to the District of Columbia, and on April 26, 1950, paid to the District the sum of $529.99, as a corporate franchise tax computed upon such portion of net income.

On April 16, 1951 the petitioner filed with the Assessor its corporate franchise tax return for the calendar year 1950 in which was included the statement following:

"AMERICAN BRAKE SHOE COMPANY

DISTRICT OF COLUMBIA - CORPORATION FRANCHISE TAX RETURN FOR 1950

SCHEDULE "A"

Amount of taxable net income per line 34 of Federal return for 1950		$11,560,522.15
Deduct:		
Interest	$36,631.98	
Interest-U.S. Obligations	10,025.70	
Rents	21,057.65	
Royalties	48,674.93	
Net gain from sale of assets other than capital	546,234.19	
Dividends	454,966.85	
Other income	151,538.88	1,239,130.18
		$ 10,321,391.97
Add:		
State taxes based on income		173,855.98
Net income subject to allocation (Item A)		$ 10,495,247.95
Net sales per Federal return (Item B)		102,234,301.85
Sales of goods from stock located in the District (Item C)		337,709.54
Ratio of Item B to Item C (Item D)		.003303
Item A multiplied by Item C		34,665.80
Tax at 5%		1,733.29

In its corporate franchise tax return the petitioner reported the sum of $34,665.80 as net income properly apportioned to the District of Columbia, and on April 16, 1951 paid to the District of Columbia $1,733.29, as a corporate franchise tax computed upon such portion of net income.

On April 15, 1952, the petitioner filed with the Assessor its corporation franchise tax return for the calendar year 1951, in which it also in-

cluded the statement following:

"AMERICAN BRAKE SHOE COMPANY
DISTRICT OF COLUMBIA - CORPORATION FRANCHISE TAX RETURN FOR 1951

SCHEDULE "A"

Amount of taxable net income per line 34 of federal return for 1951		$17,287,967.59
Deduct:		
Interest	$319,168.77	
Interest-U.S.Obligations.	2,400.00	
Rents.	27,706.48	
Royalties.	89,413.36	
Net gain from sale of assets other than capital	260,873.32	
Dividends..	267,539.57	
Other income.	72,151.71	1,039,253.21
		16,248,714.38
Add state income taxes and D.C. franchise tax		181,654.42
Net income subject to allocation (Item A).		16,430,368.80
Net sales per federal return (Item B)		140,978,319.04
Sales of goods from stock located in the District (Item C)		492,217.86
Ratio of Item B to Item C		.00349144
Item A multiplied by Item C		57,365.65
Tax at 5%		2,868.28

In its corporate franchise tax return the petitioner reported the sum of $57,365.65 as net income properly apportioned to the District of Columbia, and on April 15, 1952 paid to the District of Columbia $2,868.28, as a corporate franchise tax computed upon such portion of net income.

United States Government Business

The petitioner's business with the United States Government represents approximately 6% of its entire business. It is conducted as reflected by the following testimony of the Assistant to the President in Charge of Sales Coordination and Sales Policy of the petitioner:

"Q Do you have any government business here, sir: And when I say that, I mean business with the United States or District Governments.

A Yes, sir, we do.

Q I presume you have a great deal more with the federal government than you do with the District of Columbia Government, if you have any with the District of Columbia Government.

A That is right.

Q Do you have anyone here who represents you on your governmental business?

A No, sir.

Q How is that handled, sir:

A It is handled by direct contact by the divisions making the product which have one that the government is seeking suppliers for. We are registered with most of the agencies on the products we make.

Q You come in then as a bidder in the natural course of things along with other bidders?

A Most of it happens to be with the arsenals —Ordnance Department — out of thisarea; but the original solicitation sometimes starts here.

Q In other words, you would work through — in the event that you had something to do with one of the Armed Services — perhaps through the Pentagon building?

A Yes, sir. I used to do that.

Q That is what you have in mind when you say that.

A Yes, sir."

On August 5, 1952, the petitioner filed with the District of Columbia three claims for refund, namely: (a) claim for refund of the corporate franchise tax for the year 1949 in the amount of $929.99 paid on April 26, 1950; (b) claim for refund of the corporate franchise tax for the year 1950 in the amount of $1,733.29 paid on April 16, 1951; and (c) claim for refund of the corporate franchise tax for the year 1951 in the amount of $2,868.28 paid on April 15, 1952. On October 8, 1952, the Assessor disallowed such claims for refund. This proceeding was filed on January 5, 1953.

Opinion

The petitioner does not contest the amount of the tax, nor does it claim that the Assessor has used any formula not permitted under District of Columbia Income and Franchise Tax Act of 1947 and the regulations pertaining thereto, or has misapplied any such formula. It does not claim that any of the sales to customers in the District of Columbia were not secured, negotiated or effected by the owners, employees, agents, officers or branches of the petitioner located in the District of Columbia. It pitches its case entirely on the proposition that during the taxable years involved it was not engaged in nor did it carry on any trade or business in the District of Columbia, because it did not physically have or maintain any office, warehouse, or other place of business, or representative having an office or other place of business in the District.

The sole assignment of error is as follows:

> "4. The denial of the claims for refund is based upon the following error: The Office of the Assessor erroneously contends that petitioner's activities within the District of Columbia are sufficient to render it liable for franchise taxes levied under Section 47-1571a of the District of Columbia Income and Franchise Act of 1947 despite the exceptions contained in subsection (h) of Section 47-1551c of said Act."

The facts alleged relate solely to the assignment of error and apply to no other issue.

The exceptions referred to in the assignment of error are found in Section 1 of the Act of May 3, 1948, and in Section 47-1551c (h), D.C. Code, 1951 Edition, which read as follows:

> "(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; and include the performance of the functions of a public office: 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 office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

" For purposes of this proviso, the words 'agent' or 'representative' shall not include any independent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such."

The District of Columbia Tax Court was created along the lines of the United States Tax Court and its rules are identical, except as to the necessary variations. The decisions relating to procedure and practice before the United States Tax Court are applicable to the procedure and practice before this Court. Judge Hamel in Practice and Evidence before the United States Board of Tax Appeals (1938) observes that "Both the Board and the courts have held in numerous cases that the Board's jurisdiction is limited to the issues raised by the pleadings before it, and evidence will not be consid ' which is produced at the trial on matters not raised by the pleadings". (citing many cases).

In Samuel J. Rigsman, 6 T.C. 1105, 1118, the Tax Court there held:

" * * * * . Even if we should assume that the proof at the hearing shows that the cost to petitioner of his stock in Cornelia Corporation was in excess of the figure which he claimed in his petition, we would be without authority to allow it, because petitioner did not ask or receive permission to amend his petition to conform to the proof. Issues must be raised by the pleadings and not on brief. North American Coal Corporation, 28 B.T.A. 307; General Utilities & Operating Co. v. Helvering, 296 U.S. 200. * * * * ."

See also: Southport Mill, Limited v. Commissioner, 26 F. 2d 17, 18; Steele-Wedeles Co. v. Commissioner, 63 F. 2d 541, 543; and C.C.H. Tax Court-Rules of Practice, Paragraphs 1658-17, 1658-171, 1658-174, and 1658-177, and cases cited thereunder.

The rulings 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, and in Owens-Illinois Glass Co. v. District of Columbia, Order dated March 26, 1953, are not of pertinency or application here. In those cases the issues raised were sufficient to require a finding by this Court as to what portion, if any, of the gross receipts were "secured, negotiated or effected

by owners, employees, agents, officers and branches of the corporation * * * * located in the District" within the meaning of section 10-2(d)(1)a of the regulations pertaining to the Income and Franchise Tax Act, and to enter its decision thereon. No issue similar or of the same effect as in those two cases is raised in this case.

As the Court sees it, it now becomes necessary to determine one issue and one only, namely, did the petitioner engage in or carry on a trade or business within the meaning of the Income and Franchise Tax Act during the taxable years involved? In other words, did it carry on or engage in any commercial activity? Did it have or maintain any one of the following: "an office, warehouse or other place of business in the District * * * * officer, agent or representative having an office or other place of business in the District"?

The record discloses that Ralph W. Payne maintained an office in the District of Columbia wherein he employed several agents or salesmen, the expenses of which, which included the salaries of such salesmen, were borne by Mr. Payne. He was engaged in the selling of railroad equipment and held himself out as such. The telephone directory for Washington carried his name in the directory as "Payne, Ralph W., railroad equip." He sold the products of several manufacturers including the petitioner. Most of such sales were to railroads and street railway companies. As far as the petitioner is concerned he had the right to sell its products in the area generally comprising the southeastern part of the United States. One of the companies to whom he sold products was the Southern Railway System, which had its general offices in the District of Columbia and the negotiations leading up to orders for equipment purchased from the petitioner took place in the District of Columbia. The petitioner exercised no control over Mr. Payne or any of his employees as to the method of sale. It was interested merely in the result. It supplied Mr. Payne with order blanks generally used by it in the sale of its products. The method of selling employed by Mr. Payne and his agents insofar as the District of

Columbia was concerned was to call upon the purchasing officials of the Southern Railway Company and discuss and negotiate an order for the purchase of material. If that company desired to purchase the equipment there would be filled out an order blank on the form supplied by petitioner and sent to the main office of the Ramapo Ajax Division in Chicago. If the order was accepted the material would be shipped to such point on the Southern Railway System as was indicated. Mr. Payne had nothing to do with the approval of orders or the collection of the money due by the Railway Company. His compensation was largely a commission of 4% of the amount of the sale, but he received a retainer of $100 per month from the petitioner. Products that were sold by Mr. Payne were manufactured by the Ramapo Ajax Division of the petitioner. Mr. Payne considered himself bound insofar as the line of equipment manufactured by the Ramapo Ajax Division was concerned not to sell products of any manufacturer other than the petitioner. The other manufacturers for whom Mr. Payne sold material were not competitors of petitioner, in that, while the articles of material were kindred, that is to say, related to the maintenance and operation of railroads, they were not the same. He had nothing to do with the brake shoes that were stored in the Washington terminal or any other products manufactured by the petitioner. If the petitioner sold any of the products of the Ramapo Ajax Division to any customer in the territory assigned to Mr. Payne, he received the agreed commission on the sales price, regardless of whether he or someone else procured the order or whether it was procured by anyone, that is to say, originated with the purchaser or not. In other words, he received the commission on all business done by that Division in his territory.

It must be held that the petitioner had an agent having an office or place of business in the District of Columbia, unless as meant in the Act of May 3, 1948, Ralph W. Payne was an "independent broker engaged independently in regularly soliciting orders in the District for sellers

and who holds himself out as such".

There is, perhaps, no subject of the law concerning which there is more divergence of judicial opinion than that of independent contractors. See Words and Phrases. Given a state of facts there is about an even division as to whether the person in question is an "employee" or an "independent contractor". The divergence does not lessen as the subject is narrowed to the field of salesmen and solicitors. It is increased where as here the selling individual sells the products of two or more manufacturers. Under a state of facts similar to those found herein there are two well considered, and what might be called leading cases which point up the difference of judicial opinion. In Maltz v. Jackoway- Katz Cap Co., 336 No. 1000, 83 S.W. 2d 909, it was held by a unanimous court that the selling individual was not independent, but was an employee of the manufacturer. On the other side of the picture is seen Stover Bedding Co. v. Industrial Commission, 99 Utah 423, 107 P. 2d 1027, 134 A.L.R.1006, where the majority opinion was exactly opposite from therule in Maltz v. Jackoway-Katz Cap Co., supra. It should be noted in passing that the dissenting opinion is an extended treatise on the law of the subject and relies strongly on the Maltz case.

The great weight of authority is that the test is whether the manufacturer exercises direction and control of the selling individual in the manner in which the services are to be performed. If it does such person is an employee. If not, then such person is an independent salesman or contractor. Restatement of the Law, Agency, Vol. 1, Section 14, pp. 47 and 48, and Section 220, pp. 483, 484 and 485. Such seems to be the test in the District of Columbia. Swart v. Justh, 24 App. D.C. 596,600. Some recognition of that test is found in Lever Brothers Company v. District of Columbia, _____U.S. App. D.C. _____, _____F. 2d_____, decided March 26, 1953. After consideration of the many cases bearing on facts quite similar to those of this case the Court believes that the better ruling is to hold that Ralph W. Payne was an independent contractor.

Smith v. State, 169 Md. 489, 182 A. 286; Mason v. Royal Indemnity Co., 35 F. Supp. 477; Frank v. Tru-Vue, Inc., 65 F. Supp. 220; Griffith v. Electrolux Corporation, 176 Va. 378; 11 S.E. 2d 644; Stover Bedding Co. v. Industrial Commission, supra; In the Matter of Electrolux Corporation, 262 App. Div. 642, 3 N.Y.S. 2d 972; Still v. Union Circulation Co., 101 F. 2d 13.

To say that Ralph W. Payne can be considered as an independent contractor does not, however, ahswer the question presented, which is: was he an "independent broker"? While brokers have been held to be independent contractors,(1) all independent contractors are not brokers.(2) The exclusive relationship of Mr. Payne to the petitioner and to the territory assigned to him negatives his claim to the position of broker. Were he a broker he could procure orders for any manufacturer of equipment, even if competing with the petitioner. Were he a broker within the commonly accepted meaning of that term he would have no claim to commissions on orders which he does not obtain, nor would he be paid a retainer of $100 a month. In Lever Brothers Company v. District of Columbia, supra, the exclusion was narrowly confined to "independent brokers" on the principle of expressio unius, exclusio alterius, and it was held that factors came within the meaning of the term "agent". On the authority of the Lever Brothers Company case the Court holds that the petitioner during the taxable year involved did have an agent having an office in the District of Columbia.

The Court holds, moreover, that during the taxable years involved the petitioner maintained a "warehouse" in the District of Columbia as that term is meant in the Act of May 3, 1948 (47-1551c(a) D.C. Code, 1953 Ed.).

The facts as found disclose that the petitioner shipped to the District of Columbia quantities of brake shoes from time to time. When

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(1) Restatement of the Law, Agency, Vol. 1, Section 2(b), p. 12; Stiles v. Edwards, 79 Ga. 353, 53 S.E. 2d 697.

(2) "Independent brokers" seems redundant. All genuine or real brokers are independent.

they reached the District of Columbia they were the property of petitioner. They were stored at various points in the railway yard of the Washington Terminal Company and remained the property of petitioner until they were removed from such storage for use by that Company. The price charged for the brake shoes was not that in force at the time they were shipped and delivered to the Washington Terminal yards, but at the price in force at the time they were removed from storage and used. The agreement between petitioner and the Pennsylvania Railroad Company under which the brake shoes were sold to the Washington Terminal Company required petitioner to maintain stocks of brake shoes at the Washington Terminal Company. There is further such language as "upon the execution of this agreement, the Brake Shoe Company will maintain a stock of its Locomotive Driver Brake Shoes * * * * at such of the Purchaser's Shops as agreed upon * * * *". In its income tax returns it reports the sale of brake shoes at the Washington Terminal Company as "sales of goods from stock located in the District". The fact that, if and when the agreement just mentioned is terminated, the Pennsylvania Railroad Company is to purchase the brake shoes then in storage at the Washington Terminal yards seems to the Court to be immaterial.

In North Lubec Manufacturing and Canning Co. v. District of Columbia, Docket No. 1238, and Atlantis Sales Corp. v. District of Columbia, Docket No. 1233, it is held that the expression "have or maintained a warehouse" is not restricted to the meaning of a freehold title to such warehouse. The Court in these two cases considered 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. Because of their bearing upon the issue submitted in this proceeding the Court will quote at length from those cases because it believes the reasons given therein are applicable here.

In 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.)

"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 lawmaker; 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 Atlantic 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."

It may be that the doctrine announced in North Lubec Manufacturing and Canning Co. v. District of Columbia and Atlantis Sales Corp. v. District of Columbia cases should not be extended to cover a situation where the space is in the open with no definite limits and for which no charge is made, and there is some question about the propriety of such extension, but keeping in mind the purpose of the amendment of May 3, 1948, it would seem that the petitioner maintains "a warehouse" where it stores brake shoes which it still owns, and from which it does not remove or permit to be removed such equipment until sold to its customers, the Court holds that the petitioner maintained "a warehouse" in the District of Columbia during the taxable year involved within the meaning of the Act of May 3, 1948. The Court is of the opinion that the activities of Ralph W. Payne in "negotiating and effecting" orders in the District of Columbia amounted to "engaging in or carrying on a trade or business" in the District of Columbia.

As observed above no question is raised by the petitioner as to the measure or the amount of the taxes, but even if such issue had been

raised in this proceeding it is doubtful if any finding or conclusion could be made thereon because of lack of proof. It is true that the Court has found that sales of brake shoes at the Washington Terminal Company in definite amounts were made by the petitioner during the taxable years here involved. Such finding, however, was based upon what might be termed a declaration against interest found in the income tax returns of the petitioner. No evidence as to such sales were introduced either as to amount or to what extent agents of the petitioner participated in effecting such sales. The evidence of other transactions in the District of Columbia, that is to say, sales made to the Capital Transit Company by the Brake Shoe Division, to the Southern Railway by the Ramapo Ajax Division, and to customers by the Kellogg, Brake Block, and the American Manganese Steel Divisions, was actually no more than a guess by the witnesses as to the amount of such sales. There was no evidence as to the manner of the sales except, perhaps, that relating to the sales to the Southern Railway System effected by Ralph W. Payne. All of this testimony was peculiarly within the knowledge and control of the petitioner. The petitioner was given ample opportunity to produce such evidence, but it failed to do so.

For the reasons above stated the Court affirms the action of the Assessor in disallowing the claims of refund of a franchise tax in the amount of $929.99 for the calendar year 1949, in the amount of $1,733.29 for the calendar year 1950, and in the amount of $2,868.23 for the calendar year 1951.

Decision will be entered for the respondent.

Jo. V. Morgan
Judge

FILED

JUN 10 1953

District of Columbia
Tax Court

DISTRICT OF COLUMBIA TAX COURT

AMERICAN BRAKE SHOE COMPANY, Petitioner	)	
vs.	)	Docket No. 1361
DISTRICT OF COLUMBIA, Respondent	)	

D E C I S I O N

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is, by the Court this 10th day of June, 1953,

ADJUDGED AND DETERMINED, That the action of the Assessor in denying claims for refund filed by the petitioner American Brake Shoe Company, for refund of a franchise tax for the calendar year 1949 in the amount of $929.99, refund of a franchise tax for the calendar year 1950 in the amount of $1,733.29, and refund of a franchise tax for the calendar year 1951 in the amount of $2,868.28 be, and it is hereby affirmed, and that the petitioner is not entitled to a refund of such franchise taxes.

Jo. V. Morgan
Judge

Findings of Fact and Opinion and Decision
Served as follows:

Mr. A. H. Munkenbeck, Jr.
Assistant Secretary,
American Brake Shoe Company
230 Park Avenue
New York 17, N.Y. (Mailed 6/10/53)

Assessor, D.C. (Personally 6/10/53)

Corporation Counsel, D.C. (Personally 6/10/53).

Phyllis R. Liberti,
Clerk