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MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

SOMERS LUMBER CO.,
Prosecutor-Appellee,

vs.

STATE BOARD OF TAXES AND ASSESSMENT,
Defendant-Appellant.

On Appeal from Supreme Court On Certiorari

WRIT OF CERTIORARI

State of New Jersey, to the Clerk or Secretary of the State Board of Taxes and Assessments and the State Board of Taxes and Assessments:

Greeting: We being willing, for certain reasons, to be certified of the action of the State Board of Taxes and Assessment in sustaining the franchise tax of 1929 against Somers Lumber Company and in dismissing the petition of said company for the revocation of said tax, do command you, that you certify and send, to our Justices of our Supreme Court, at Trenton, on the 29th day of September, 1930, as well the said action above referred to with all things touching and concerning the same, as fully and entirely as they remain before you together with this, our writ, that we may cause to be done thereupon what of right and according to law and justice ought to be done.

Witness, Chief Justice of our said Supreme Court, this ninth day of September, in the year of our Lord one thousand nine hundred and thirty.

F. L. Bloodgood,
Clerk.

Let this writ be sealed.
Ralph W. Donges,
Justice of Supreme Court.
Cole & Cole,
Attorneys.

New Jersey Supreme Court.

The State, Somers Lumber Co., *Prosecutor,* vs. State Board of Taxes and Assessment, *Defendant.*	On Certiorari Return to Writ

RETURN TO WRIT OF CERTIORARI

The State Board of Taxes and Assessment, pursuant to the commands of the writ of certiorari hereto attached, and for their return thereto, do certify and report that during the month of March, nineteen hundred and twenty-nine (1929), they, the said Board, caused to be mailed to the registered New Jersey agent of the Somers Lumber Company, a corporation of the State of New Jersey and the prosecutor in said writ, a blank form for a return for purposes of assessment of State franchise tax for the year 1929, under the provisions of an Act of the Legislature of New Jersey, entitled, "An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," approved April 18, 1884, and the Acts amendatory thereof and supplemental thereto.

That said corporation made the return required by law, which return was received and filed in the office of the State Board of Taxes and Assessment May 8, 1929, copy of which return is hereto attached, marked "Exhibit A."

That, upon the basis of the return so made, showing capital stock issued to the amount of $500,000, and that the corporation had, on January 1, 1929, issued capital stock to the amount of $260,000 employed in manufacturing at No. 209 North Missouri Avenue, Atlantic City, New Jersey, and issued capital stock to the amount of $240,000 employed in the business of dealing in building materials not manufactured by the corporation, the said the State Board of Taxes and Assessment proceeded to levy the annual license fee or franchise tax for the year 1929, upon the basis of $240,000, being the amount of the issued capital stock of said prosecutor not employed in manufacturing, at the rate of one-tenth of one per centum, as fixed by law, to wit, a tax of $240.00; which assessment was duly certified to the State Comptroller for collection.

That said corporation filed with the State Board of Taxes and Assessment a formal petition of appeal for review of the assessment so levied as aforesaid, praying that the tax be cancelled on the ground that at least fifty per cent of the capital stock issued was employed in manufacturing by the corporation within the State of New Jersey, which said petition was received and filed in the office of the State Board of Taxes and Assessment May 27, 1930. Copy attached, marked "Exhibit B."

That the State Board of Taxes and Assessment, after having considered the petition and return of the prosecutor, directed that the prayer of the petition be denied and the tax confirmed as originally levied, on the ground that the corporation was engaged in a dual business, with a portion of its issued capital stock employed in manu-

facturing in New Jersey and a portion in dealing with commodities not manufactured by it.

All of which is respectfully submitted.

STATE BOARD OF TAXES AND ASSESSMENT,
By CHAS. E. COOK,
Secretary.

Trenton, N. J.
September 25, 1930.

(EXHIBIT A)

STATE OF NEW JERSEY

STATE BOARD OF TAXES AND ASSESSMENT

DIVISION OF CORPORATIONS

This Report MUST be filed on or before the first Tuesday in May, and must show Existing Conditions January 1st, 1929. All of the questions MUST be answered, and wherever the proper answer is "NON" or "NOTHING" it should be so stated. Failure to make this Report will cause the Assessment to be made on the Authorized Capital Stock.

Annual Report of Somers Lumber Company.
Warren Somers, President.
Hubert Somers, Treasurer.
Herbert L. Somers, Secretary.

Date of incorporation 1894
Principal office in New Jersey:
Street and Number 209 N. Missouri Ave.
City or Town Atlantic City
Name of Agent in charge Warren Somers

Stock once issued is and remains outstanding until retired and cancelled in the manner provided by law for the retirement and cancellation of capital stock.

To effect a decrease of capital stock (whether author-

ized or issued capital stock), the procedure provided for under Section 29 of the General Corporation Act must be followed.

THE FOLLOWING QUESTIONS APPLY TO CORPORATIONS WHOSE CAPITAL STOCK HAS A STATED PAR VALUE.

1. What is the amount of capital stock authorized? $500,000.00
2. Into how many shares is it divided?.. 5,000
3. How many shares are fully paid, either in cash or by property purchased?.. 5,000
4. How many shares are partially paid? None
5. What is the amount of capital stock issued? 500,000.00

THE FOLLOWING QUESTIONS HAVE REFERENCE TO NON-PAR VALUE STOCK AND WILL BE ANSWERED ONLY BY CORPORATIONS AUTHORIZED TO ISSUE SHARES OF STOCK WITHOUT STATED PAR VALUE, UNDER CHAPTER 168, Laws of 1920.

6. What is the number of shares of "Non-par Value" stock authorized?.....
7. How many shares are issued or outstanding ("Non-par Value").....

THE FOLLOWING QUESTION APPLIES TO ALL CORPORATIONS.

8. What is the nature of the business of the corporation? Manufacturers of Millwork and dealers in building materials.

IF THE CORPORATION CLAIMS EXEMPTION UNDER THE LAW, THE FOLLOWING QUESTIONS MUST BE ANSWERED.

9. Is the corporation engaged in manufacturing, or mining, or agriculture, or horticulture? YES

10. If so, state where
A. In New Jersey,.....YES
City or Town,.....Atlantic City
Street and number, 209 N. Missouri Ave.
B. If in other places, state where,.....
City or Town,.....
Street and number,.....NO

11. What is the total amount of capital stock invested in MANUFACTURING, OR MINING, OR AGRICULTURE, OR HORTICULTURE?...$260,000.00

12. What is the amount of capital stock actually employed in MANUFACTURING, OR MINING, OR AGRICULTURE, OR HORTICULTURE IN NEW JERSEY? 260,000.00

13. What is the local assessed valuation for 1928 of the corporation's real and personal estate used in MANUFACTURING, OR MINING, OR AGRICULTURE OR HORTICULTURE IN NEW JERSEY? Real Estate,.... 81,200.00) 1928
Personal, ... 10,000.00)

14. Was the above named Corporation actually and of itself engaged in MANUFACTURING, OR MINING, OR AGRICULTURE, OR HORTICULTURE IN NEW JERSEY ON THE FIRST DAY OF JANUARY, 1929?...YES

Signature of Officer: HUBERT SOMERS (L. S.)
Address of Company: 209 N. Missouri Ave.,
Atlantic City, New Jersey.

STATE OF NEW JERSEY
ATLANTIC COUNTY } ss. Hubert Somers

being duly sworn according to law, on his oath says that he is Treasurer of the Somers Lumber Co., and that the foregoing report and statements are correct and true, to the best of his knowledge and belief.

HUBERT SOMERS.

Sworn and subscribed before me
this 7th day of May, A. D. 1929.
E. W. Boehm,
Notary Public of N. J.

(EXHIBIT B)

PETITION FOR REVIEW OF ASSESSMENT

To the State Board of Taxes and Assessment, Trenton, New Jersey:

GENTLEMEN:

Your petitioner, the Somers Lumber Co., a corporation duly organized and existing under the laws of the State of New Jersey, hereby respectfully appeals from the assessment of State franchise tax, amounting to the sum of $240.00 levied by your honorable Board for the year 1929 against your petitioner, and submits the following reasons why said tax is considered exces-

sive and unjust. It is a corporation organized under the Laws of the State of New Jersey with its principal office in Atlantic City, said State. It is a manufacturing corporation and at least 50% of its capital stock issued and outstanding is invested in manufacturing pursuits carried on within this State.

Wherefore your petitioner prays your honorable Board to review the assessment as aforesaid, and to adjust and amend the same in conformity with the facts herewith submitted.

IN WITNESS WHEREOF, the said Somers Lumber Co. hath, by its Treasurer hereunto set its hand and seal this 24th day of May, 1930.

Hubert Somers (L. S.)

Theresa W. Spoth
Notary Public of N. J.

STATE OF NEW JERSEY
ATLANTIC COUNTY } ss.

Hubert Somers being duly sworn according to law, on his oath deposes and says that he is Treasurer of the Somers Lumber Co. and that the contents of the foregoing petition are correct and true, to the best of his knowledge and belief.

Hubert Somers.

Sworn and subscribed before me
this 24th day of May, 1930.
Theresa W. Spoth
Notary Public of N. J.

NEW JERSEY SUPREME COURT.

SOMERS LUMBER CO.,
Prosecutor,

vs.

STATE BOARD OF TAXES AND ASSESSMENT,
Defendant.

On Certiorari
Reasons

REASONS

Prosecutor assigns the following reasons why the judgment of the defendant is erroneous and why prosecutor should be exempt from taxation:

1. Prosecutor is a corporation incorporated under the laws of the State of New Jersey, and is engaged in the business of manufacturing lumber and millwork, and more than fifty per cent of its capital stock issued and outstanding is invested in such business.

2. By reason of the fact that prosecutor being a corporation of the State of New Jersey and that more than fifty per cent of its capital stock issued and outstanding is invested in the manufacturing business in this State, it is exempt from taxation under the express language of the statute.

COLE & COLE,
Attorneys for Prosecutor.

NEW JERSEY SUPREME COURT.

SOMERS LUMBER CO., *Prosecutor,*	
vs.	On Certiorari Rule for Judgment
STATE BOARD OF TAXES, AND ASSESSMENT, *Defendant.*	

RULE FOR JUDGMENT

Entered February 6, 1931

This cause was argued at the January Term, 1931 in the presence of C. L. Cole, of counsel with the prosecutor, and John Solan, of counsel with the State Board of Taxes and Assessment, and the court having read and considered the records and the briefs of respective parties and being of the opinion that the tax imposed against the prosecutor and under review was illegally assessed and should be vacated and set aside;

It is on this sixth day of February, 1931, on motion of Cole & Cole, attorneys of prosecutor, ORDERED that the tax under review by the writ be, and the same is vacated and set aside.

Entered February 6, 1931, on motion of

COLE & COLE,
Attorneys of Prosecutor.

A true copy

FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT.

SOMERS LUMBER CO., *Prosecutor-Appellee,* vs. STATE BOARD OF TAXES, AND ASSESSMENT, *Defendant-Appellant.*	On Certiorari Notice of Appeal and Grounds of Appeal

10

NOTICE AND GROUNDS OF APPEAL

Filed February 18, 1931.

To Messrs. Cole and Cole, Attorneys for Prosecutor-Appellee:

Sirs:

Please Take Notice that the State Board of Taxes and Assessment, defendant in the above-entitled cause, appeals to the Court of Errors and Appeals in the last 20 resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground:

(1) Because the Supreme Court erred in rendering judgment in the above-entitled cause for the prosecutor, Somers Lumber Company, and not for the defendant, State Board of Taxes and Assessment.

WILLIAM A. STEVENS,
Attorney-General, 30
Attorney for Defendant-Appellant.

Dated February 13, 1931.

Service of the above Notice of Appeal and Grounds of Appeal is hereby acknowledged this 14th day of February, 1931.

COLE & COLE,
Attorneys for Prosecutor-Appellee.

OPINION

NEW JERSEY SUPREME COURT

No. 206, January Term, 1931

SOMERS LUMBER CO.,
Prosecutor,

vs.

STATE BOARD OF TAXES,
AND ASSESSMENT,
Respondent.

On Certiorari

Argued January 21, 1931; before Justices Parker, Campbell and Bodine.

For Prosecutor, Cole and Cole.

For Respondent, William A. Stevens, Attorney General, and John Solan.

PER CURIAM

Prosecutor is a corporation organized under the laws of New Jersey, with its principal office in Atlantic City. Its total capital is $500,000, all issued and outstanding, of which $260,000 is invested in manufacturing and the remaining $240,000 is invested in the business of dealing in building materials.

Upon such a return being made to the respondent for the year 1929, that body assessed the prosecutor upon $240,000 of its capital stock, not employed in manufacturing, claiming authority for so doing under "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884 (P. L. 1884, p. 232, amended P. L. 1891, p. 150 and P. L. 1892, p. 136 [4 Comp. St. p. 5286, § 501 et seq.]).

The controversy is limited to this, that the respondent insists that under the statute the assessment is justified and the prosecutor, with equal assurance, asserts that,

inasmuch as more than 50 per cent. of its capital stock is invested in a manufacturing enterprise carried on within this State, its entire capital stock is exempt from tax under such statutes.

The history of the legislation relied upon to support the assessment is as follows:

P. L. 1884, p. 232, entitled "An Act to provide for the imposition of State taxes upon certain corporations and for the collection thereof," by its fourth section, after providing for the taxing of certain specified classes of corporations provided "that all other corporations incorporated under the laws of this State, and not hereinbefore provided for, shall pay a yearly license fee * * * on the amount of the capital stock of such corporations; provided, that this act shall not apply to * * * manufacturing companies or mining companies carrying on business in this State."

This act was construed, in this court, in *Evening Journal Association and Jersey City Printing Company* v. *State Board of Assessment, et al.*, 47 N. J. Law, 36. It was there said: "It is true that the act of 1884 imposes the tax by way of a license for exercising corporate franchises, but the tax is laid with respect to the capital stock of such corporations and for the privilege of doing business in this State, and in the classification of corporations in the statute, with a view of taxation or exemption from taxation, the business to which the capital of a corporation is applied must be regarded."

The Evening Journal Association stated its object in its certificate of incorporation to be the printing and publishing of a newspaper, and jobbing, printing, and publishing, but prior to the levying of the tax then in question had limited its business entirely to printing and publishing a newspaper, so that at the time of the levy its entire capital was employed in that particular business. It was held that printing and publishing a newspaper was not manufacturing, and therefore the assessment and tax were affirmed.

In the case of the Jersey City Printing Company its certificate of incorporation stated the object of its incorporation to be to conduct and prosecute the business of book printing and job printing, engraving, electrotyping, and lithographing, and, from the facts, the court found that it was so engaged at the time of the imposition of the tax, and, holding that such a pursuit was manufacturing, the corporation was exempt under the statute, and the tax and levy were set aside.

This case, decided in 1885, was followed in 1888, the statute remaining the same, by *Press Printing Company* v. *State Board,* 51 N. J. Law, 75, 16 A. 173, 174, the same justice delivering the opinion as in the prior cited case. Here the objects for which the Press Printing Company was formed, as set forth in its certificate of incorporation, were, the printing and publishing of a newspaper or newspapers, and the business of printing, publishing, and selling books, blank books, and stationery and the general business of job printing. After reference to the former case, *Evening Journal Association* v. *State Board, supra,* the court held that "the prosecutor is a manufacturing company within the exemption, so far as concerns its business of printing and publishing books and general job printing; but it is not such a company, within the meaning of the statute with respect to its business of printing and publishing a newspaper. In one sense, the prosecutor is a manufacturing company; in another sense, it is not; and it cannot claim exemption under the statute on business which is not within the proviso, on the ground that part of its capital is employed in a business which falls within the proviso."

The court then found, from the facts before it, "that the two branches of the Prosecutor's business are kept intact and that of its capital" a certain definite amount was invested and used in the newspaper department, and another fixed amount in the other department, and thereupon held that the portion of its capital invested and employed outside of the printing and publishing of a newspaper was exempt under the statute, and the assessment and tax to that extent was reduced.

In 1891 (P. L. 1891, p. 150) the act of 1884, supra, was amended. We are here concerned only with the proviso contained in section 4, which, by the amendment, was then made to read as follows: "provided, that this act shall not apply to * * * manufacturing or mining corporations at least fifty per centum of whose capital stock * * * invested in mining or manufacturing carried on within this State; if any manufacturing or mining company carrying on business in this State shall have less than fifty per centum of its capital stock * * * invested in business carried on within this State, such company shall pay the tax herein provided for companies not carrying on business in this State, but shall be entitled, in the computation of such tax, to a deduction from the amount of its capital stock of the assessed value of its real and personal estate so used in manufacturing or mining."

In view of the construction placed upon the original act of 1884, supra, by this court, in the cases referred to, the legislative purpose intended to be expressed by this amendment seems perfectly plain, and to us that purpose is that, whenever a corporation of this State has one-half or more of its issued and outstanding capital actually invested and employed in manufacturing carried on in this State, its whole capital stock (and not that alone employed in manufacturing) is exempt from tax under the statute. And this seems to be given added force from what was said to be the purpose of the exemption in *Press Printing Company* v. *Board, supra*: "In this scheme of taxation the obvious purpose was to exempt, from this species of tax, capital invested in the manufacturing or mining business in this State."

The respondent argues that the mischief in the original act of 1884 sought to be remedied by the amendment of 1891 was "that manufacturing corporations were likely to gain exemption from the tax merely because they carried on business in this State, although the great portion of their manufacturing was done outside the State."

The cases in this court already referred to, and they are the only ones brought to our attention, do not go in this direction. In the one case, one of the corporations had none of its capital employed in manufacturing in this State, and its whole capital was held subject to taxation, and the other company had all of its capital invested in manufacturing enterprises, and it was held to be entirely exempt.

In the other case a portion of the capital of the company, more than 50 per cent., was devoted to a nonmanufacturing purpose, and the remainder in such a pursuit, and that portion so used alone was held exempt from the tax. It seems to us the legislative intent was to encourage the employment of capital of corporations of the State in manufacturing and mining carried on in this State, and the purpose of the amendment of 1891 was to make this plain, and fully exempt the whole capital of such a corporation where 50 per cent. or more was actually so employed.

The act of 1884, supra, was further amended in 1892 (P. L. 1892, pp. 136, 139), but the proviso in section 4, except for a slight variation in language, in no wise controlling or useful in its construction upon the point here involved, remains the same as in the amendment of 1891, supra.

We conclude that the entire capital stock of the prosecutor is exempt from taxation under the statute, and therefore the assessment and tax are set aside.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

SOMERS LUMBER CO.,
Prosecutor-Appellee,

vs.

STATE BOARD OF TAXES AND ASSESSMENT,
Defendant-Appellant.

On Appeal from Supreme Court On Certiorari.

BRIEF OF APPELLANT

This is an appeal from a judgment of the Supreme Court, on certiorari, setting aside a corporation franchise tax for the year 1929, in the sum of $240.00, assessed against the appellee by the State Board of Taxes and Assessment.

The assessment in question was imposed under an act entitled "An act to provide for the imposition of State taxes upon certain corporations and for the collection thereof", and its amendments and supplements (P. L. 1884, p. 232; C. S. of N. J., 1910, Vol. 4, p. 5286; Cum. Supp. to C. S. of N. J. 1924, p. 3565).

Appellee is a corporation of this State located in Atlantic City. In the year 1929, its issued capital stock totaled $500,000. Of this amount, $260,000 thereof was invested in the business of manufacturing millwork in this State, and the remainder, $240,000, was invested in the business of dealing in building materials; that is, in the buying, selling and exchanging of lumber, paints, hardware, bricks, millwork, sand, mortar and other things necessary in the construction of buildings. The

State Tax Board found that, within the meaning of Section 4 of the Franchise Tax Act, supra, the appellee was engaged in a dual business and that, to the extent of its capital stock invested in the manufacturing of millwork, it was a "manufacturing company" and, in that respect, it was not subject to taxation under said act but that, on the other hand, inasmuch as the other business in which the company was engaged (the buying and selling of building materials), was a non-manufacturing enterprise, appellee was legally subject to a tax based upon the amount of capital stock invested in such non-manufacturing enterprise, namely, $240,000, and accordingly the Board assessed a tax against the company in the sum of $240.00, representing one-tenth of one per centum (the legal rate) of $240,000.

The court below set aside this assessment, holding that, notwithstanding the facts of the case showed that the appellee was a "manufacturing company" to a limited extent only, it was in no respect whatsoever subject to taxation under the act, due to the fact that one of its lines of business was that of manufacturing and that it had invested the major portion of its issued capital stock in such business. Appellant contends that this determination of the Supreme Court is without warrant in the law, hence, this appeal.

In the proceedings below, no evidence was submitted on the part of the appellee that in any way tends to controvert the findings of the Tax Board with respect to the status of this company, and with respect to the business in which its issued capital stock was invested.

In determining that appellee was subject to this assessment, the State Board followed a construction given to this tax statute by the Supreme Court in the case of *Press Printing Co.* vs. *Assessors,* 51 N. J. L. 75, decided in 1888, four years after the enactment of the tax law. In this Press Printing Co. case, the facts showed that of the company's issued capital stock of $75,000.00, the sum of $41,102.21 thereof was invested and used in the business of printing and publishing a newspaper, which

the court held was not an investment in manufacturing, and that the remainder of said issued capital stock, $33,897.79, was invested in the business of printing and publishing books and in general job printing, which business the court found to be manufacturing. In its opinion in this case, the court says:

> "In this scheme of taxation, the obvious purpose was to exempt from this species of tax capital invested in the manufacturing or mining business *in this State*. The exemption must be restricted to such corporations as are in fact manufacturing or mining companies (*Evening Journal Association* vs. *State Board, supra; People* vs. *Knickerbocker Ice Co.*, 99 N. Y. 181; *Nassau Gas Light Co.* vs. *Brooklyn*, 89 Id. 409), AND SHOULD BE LIMITED TO THAT PART OF THE COMPANY'S CAPITAL STOCK WHICH IS INVESTED AND USED IN SUCH BUSINESS.
>
> The prosecutor is a manufacturing company within the exemption so far as concerns its business of printing and publishing books and general job printing, but it is not such a company, within the meaning of the statute, with respect to its business of printing and publishing a newspaper. In one sense, the prosecutor is a manufacturing company; in another sense, it is not; *and it cannot claim exemption under the statute on business which is not within the proviso on the ground that part of its capital is employed in a business which falls within the proviso.*" (Italics ours.)

Accordingly, the court adjudged that the company was subject to a tax on the basis of a stock issue of $41,102.21, representing that part of its issued capital stock invested in the non-manufacturing enterprise. In so construing this act, the court followed the case of *Evening Journal Association* vs. *State Board of Assessors*, 47 N. J. L. 36, decided the year in which the tax act was adopted. In the last cited case, the court said:

> " * * * in the classification of corporations in the statute, with a view of taxation or exemption from taxation, the business to which the capital of a corporation is applied must be regarded * * * "

This was an adjudication that, within the meaning of this statute, a single entity may be a "manufacturing company" or a "mining company" as to the investment of a part of its issued capital stock, and, to that extent, not subject to taxation under the act and also may be a non-manufacturing or a non-mining company as to the remainder of its issued capital stock and, to that extent, subject to taxation under the act.

So far as appears from the opinion rendered by the court below, the construction given to Section 4 of the Franchise Tax Act in this *Press Printing Co.* case, *supra,* is not questioned by that court, but, on the other hand, the judgment of the court below is predicated solely upon a determination that by an amendment (known as Chapter 93 of the Laws of 1891) of the *proviso* of the fourth section of this Franchise Tax Act (P. L. 1884, p. 232) the Legislature changed the law with the intent to render the construction given to the act applied by the court in said *Press Printing Co.* vs. *Assessors, supra,* no longer applicable to a corporation which is, in part, a "manufacturing corporation" and, in part, a non-manufacturing corporation.

The Court Below Erred in its Determination that Chapter 93 of the Laws of 1891 Changed the Law as Applied in Press Printing Co. vs. Assessors, 51 N. J. L. 75.

It is our view that neither the language of this 1891 amendment nor the apparent purpose of its enactment shows an intent to change the ruling of the *Press Printing Co.* case. A proper presentation of our contentions calls for a discussion of the history of this tax legislation and a consideration of the circumstances which we feel led to the Amendment of 1891.

As *originally* enacted, this Franchise Tax Act, after providing for the imposition of franchise taxes upon such corporations as telegraph, telephone, cable and express companies, gas and electric light companies, oil and pipe line companies, sleeping car companies and insurance companies, by designation according to the nature of their business, and on all other corporations of this State (under a clause reading "all other corporations incorporated under the laws of this State and not hereinbefore provided for"), contained a proviso which read as follows:

> "*provided,* that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this State."

It will be noted from the above that this act excluded from its provisions (a) those corporations which upon well-established grounds of public policy have always been exempted from taxation in this State; (b) railway, canal and banking corporations, which corporations were otherwise taxed, and (c) manufacturing and mining companies. Speaking of the latter class, the Supreme Court in *Phonograph Co.* vs. *Board,* 54 N. J. L. 430, at 434, says:

> "Manufacturing companies and mining companies require a large expenditure in erection and maintenance of buildings and machinery, and give employment to many; hence, they are classed among those which are to be fostered and favored by the State * * * "

An examination of the above-quoted proviso will show that, if read literally, the act was not to be applicable to such corporations as were:

(a) "manufacturing companies or mining companies"
(b) "carrying on *business* in this State" (Italics ours.)

As a result of this phrasing of the act, it was frequently found that manufacturing companies repeatedly set up the claim that this tax act did not apply to them, in that they were "manufacturing companies" and in that they were "carrying on business in this State", and hence were within the exemption proviso, although, upon examination of such claims, the facts would show that their manufacturing was carried on *outside* of the State of New Jersey, and that the *business* which they carried on in this State *was other than that of manufacturing.*

An extreme example of this class of claims was presented in the case of *American Glucose Company* vs. *New Jersey,* 43 N. J. E. 280, wherein exemption from taxation under this act was claimed under the language of the above-quoted proviso, although the facts showed that, while the company was a "manufacturing company", it did all of its manufacturing outside of New Jersey and merely retained an office here for preserving a record of its transactions, sold its products here and purchased materials here for its business. The court denied the claim and thereby protected the purpose of the legislation to the extent of the facts in that case, but, as is shown in the opinion of the Vice-Chancellor, the proviso of the act was open to evasion and conceivably a manufacturing corporation might escape the tax without complying with the obvious ground for the exemption, namely, the carrying on of a substantial amount of its *manufacturing* within this State.

A similar claim for exemption was made in the case of *Standard Underground Cable Co.* vs. *Attorney General,* 46 N. J. E. 270, *decided in* 1890, *but a year prior to the* 1891 *Amendment here in question.* In that

case, the facts showed that the claimant for exemption was a "manufacturing company"; that it had an office in this State and procured from other manufacturing corporations in the State much of the material used by it, but the manufacture of its special product, into which these materials entered, was carried on in Pennsylvania. The court held that the company was not transacting its business in this State within the meaning of this law.

That the State Board of Assessors was likewise compelled to deal with claims such as the foregoing is shown by the Report submitted by that body to the Legislature in the year 1889 (published by MacCrellish & Quigley, Trenton, and on file in the State Library). On page 15 of this report we find the following:

> "* * * At every meeting of the Board petitions are received for cancellation of tax and arguments heard as to liability; *and more especially is this the case with manufacturing corporations whose plants are not located entirely within the State, or whose capital is not entirely used in manufacturing within the State.* Learned counsel with ingenious argument seek to gain exemption for their corporate clients, but the Board has, in addition to their own conclusions and rulings, many decisions emanating from the law and equity courts of the State to guide them, for during the six years of the Board's existence many suits have been brought by the State and by this class of corporations and the various decisions cover almost every point from the constitutionality of the act to the liability of all the various classes of corporations mentioned therein. One of the most important decisions was that rendered by Justice Depue in the November Term, 1888, of the New Jersey Supreme Court in the case of *Press Printing Company* vs. *State Board of Assessors,* on certiorari, which was very ably argued by Gilbert Collins for the com-

> pany, and William T. Hoffman for the State. The Board considers this decision to be of sufficient interest to this class of corporations to include it in this report. It will be found in full in the appendix and marked Exhibit C. Still another decision has been handed down from the Court of Errors and Appeals which is of great interest to certain classes of corporations. The opinion was rendered by Justice Knapp in the case of *Standard Underground Cable Company, Appellant, and the Attorney General, Respondent.* It was argued at the November Term, 1889, of the Court of Errors and Appeals and filed February 18, 1890. A. Q. Keasby and Sons for Appellant, William Y. Johnson for Respondent. The text of the decision will be found in the appendix to this report, and marked Exhibit D * * * " (Italics ours).

The litigation of the character referred to in the foregoing cases and the claims alluded to by the State Board of Assessors in the above report indicated a defect for which the original law had not provided, and made clear the fact that the remedy called for was to frame the statute in such form as to clearly restrict the grant of exemption from taxation to those *manufacturing and mining corporations* only who carried on a substantial portion of their manufacturing or mining *within this State.*

Accordingly, in 1891 (by Chapter 93 of the laws for that year), the Legislature amended the proviso to Section 4 of the Franchise Tax Act of 1884, so that same would thereafter read as follows:

> "*provided,* that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or to purely charitable or educational associations, or *manufacturing* or *mining* corporations at least fifty per centum of whose capital stock issued and outstand-

> ing is invested in mining or manufacturing carried on within this State; if any manufacturing or mining company carrying on business in this State shall have less than fifty per centum of its capital stock issued and outstanding invested in business carried on within this State, such company shall pay the tax herein provided for companies not carrying on business in this State, but shall be entitled, in the computation of such tax, to a deduction from the amount of its capital stock of the assessed value of its real and personal estate *so used in manufacturing or mining.*" (Italics ours.)

The issue presented by this appeal is the extent of the application of this Amendment to the facts in the case at bar.

A comparison of the proviso, as amended, with the same as originally enacted, will show that the words "carrying on business in this State", after the words "mining companies", are omitted, and that the expression reading "at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State" is added to the act. The omission of the word "business" in the above-quoted clause was to overcome the evasions of the act with which the Court and the Tax Board had had to contend, and it will be seen that the amendment remedied the deficiency in the existing law by requiring, as a condition precedent to exemption, that the manufacturing companies must have at least fifty per centum of their capital stock invested in manufacturing *within the State of New Jersey.* In short, under the statute as amended the exempted corporations were restricted to *manufacturing* and to *mining* corporations, as heretofore, with the additional requirement that any such company must have at least fifty per centum of its capital stock invested in property located in this State and used in manufacturing or in mining, thereby furnishing employment to labor here. As thus amended, the evil of the existing

law was fully remedied and no extension of the exemption feature to that part of a corporation's business which was *non-manufacturing* or *non-mining* in character was intended or necessary.

An examination of the concluding part of this 1891 Amendment, above quoted, the so-called "partial exemption clause", shows that the legislative intent was to limit the proviso to "manufacturing" and "mining" corporations. The Legislature is there dealing with such manufacturing or mining corporations who do most of their manufacturing or mining outside of New Jersey, and the effect of the provision is to enable such corporations to get a deduction from the sum on which the tax is to be based, which deduction is to be equal to the assessed value of the company's real and personal estate in this State *so used in manufacturing or mining.*

The language used by the Legislature in said 1891 Amendment indicates an intent to grant exemption from the act to *manufacturing* and to *mining* corporations having fifty per centum of their issued capital stock invested in manufacturing or mining carried on within this State and not to *all* corporations of this State who may have said amount of their issued stock so invested.

The opinion of the Supreme Court in the case at bar seems to indicate that that tribunal determined that by the language used in the 1891 Amendment the Legislature intended to exempt from this tax act *any* and *all* domestic corporations having fifty per centum of their issued capital stock invested in manufacturing or in mining in New Jersey. The language of the Legislature is:

> "provided, that this act shall not apply to * * * *manufacturing* or *mining* corporations at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State; * * *" (Italics ours.)

It will be observed that the language used above does not refer to *any* corporation or to *all* corporations, but refers to manufacturing or mining corporations. We submit that no reason exists, in this instance, why these words "manufacturing" and "mining" cannot be given their full force and effect. It is not permissible for the court, in applying this amendment, to eliminate language used by the Legislature where, as in this case, the words used are plain and unambiguous and appear to appropriately express the intention of the Legislature. *Bogert* vs. *Hackensack Water Co.*, 101 N. J. L. 518, at 520.

Further, it is submitted that inasmuch as the phrase "manufacturing corporations", within the meaning of this act, had been judicially defined in the case of the *Press Printing Co.* vs. *Assessors, supra,* the Legislature of 1891 is presumed to have known of such definition, and to have used the phrase in question in the sense in which it had been judicially defined. In said case, the court held, in effect, that when a corporation had a part of its issued capital stock invested in a manufacturing enterprise and the remaining part thereof invested in a non-manufacturing enterprise, such a corporation was a "manufacturing corporation" with respect only to that part of its capital so invested in manufacturing, and was a non-manufacturing corporation with respect to its other business and subject to the act to that extent, and therefore taxable to that extent.

It is respectfully urged that, when the obvious object of the Legislature in passing this 1891 Amendment is considered and when the language used in said Amendment is examined, it is apparent that the contention that the Legislature intended to change the rule applied in the case of *Press Printing Co.* v. *Assessors, supra,* with respect to corporations that are not wholly manufacturing or mining companies, is without merit.

As indicative of the fact that the Legislature itself understood that this 1891 Amendment dealt only with *manufacturing* and *mining* corporations, we desire to

direct attention to the provisions of a supplement to this Tax Act enacted in 1901 (P. L. 1901, p. 31). The circumstances which led to the passage of this supplement were as follows: In the cases entitled *Newark Brass Works* vs. *State Board,* 63 N. J. L. 500, and *New Jersey Zinc Co.* vs. *Hancock,* 63 N. J. L. 506, the Supreme Court held that the force and effect of the words of the proviso reading " * * * provided, *that this act shall not apply to* * * * manufacturing or mining corporations * * * ", were such that the corporations prosecuting the Writs in the cited cases (being, in fact, manufacturing companies) were under no duty to submit an annual return to the Tax Board, as was required in the case of corporations to whom the act did apply.

Referring to these decisions in its Annual Report to the Legislature of 1900, the State Tax Board, on page 11, said:

> " * * * While acknowledging that this is undoubtedly a true interpretation of the law, the Board respectfully submits that inasmuch as this Return is the only method which the Board has of ascertaining whether a company is a bona fide mining or manufacturing corporation and *where* its capital stock is invested, all companies should be required, by express provisions, to make such return; and the Board therefore respectfully advises that an amendment directing all corporations to make such return be adopted by the Legislature * * * " (Italics ours.)

Thereupon, the said Supplement of 1901 was enacted and by its provisions exacted, as a condition precedent to obtaining exemption from the act, that manufacturing and mining corporations must file an annual report with the Tax Board and therein show:

> (a) where their mines or manufacturing establishments are located, and the character of the ores mined or the goods manufactured;

(b) the total amount of capital stock embarked in the business of mining or manufacturing, and

(c) the amount of capital stock actually employed in New Jersey in carrying on such mining or manufacturing business.

It will be observed that the information required to be shown in this Report does not call for a return of the *total* amount of issued stock but calls only for a statement of the total amount of capital stock *embarked in the business of mining or manufacturing.* This fact indicates that the Legislature of 1901 assumed that it was therein dealing with corporations that were wholly manufacturing or wholly mining in character, and hence concluded that the only information required was such as to enable the Board to ascertain the proportion of such stock so wholly employed in manufacturing or mining that was employed in manufacturing or in mining within this State.

If, as our adversary contends, the legal requirement of the 1891 Amendment to this Proviso is that the act shall not apply to *any* corporation of this State having at least fifty per centum of its issued capital stock invested in manufacturing or mining within this State, we submit that in framing the 1901 Supplement, just referred to, the Legislature would have included therein a provision requiring a corporation seeking exemption from taxation to report the *total* amount of its issued capital stock, both that amount invested in manufacturing or mining and that amount invested in non-manufacturing or non-mining pursuits; otherwise, the Board would not have the information to enable it to determine whether or not the corporation had fifty per centum of its *total* amount of issued stock invested in manufacturing or mining carried on here.

Continuously, since the decision in *Press Printing Co.* vs. *Assessors, supra,* a period of about forty-three years, and notwithstanding the enactment of the 1891 Amend-

ment (P. L. 1891, p. 150), the State Board of Taxes and Assessment has followed, without challenge, the rule laid down in said case with respect to corporations whose issued capital stock is invested as in the case of this appellee. Such a course of conduct on the part of the Board amounts to a practical construction to the effect that the said ~~1901~~ 1891 Amendment did not change the rule enunciated in the *Press Printing Co.* case. In the event the court entertains any doubt as to the legality of this practical construction, we submit that, in resolving such doubt, persuasive force should be given to this practice of the Board. Referring to such a practical contemporaneous construction of a statute, the present Chief Justice, speaking for this court in *Commonwealth Roofing Co.* vs. *Ricco,* 81 N. J. E. 486, at page 488, says:

> " * * * For whenever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the courts as the true one. (Citing cases) * * * "

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

JOHN SOLAN,
WILLIAM A. STEVENS,
Attorney General,
Attorneys of Defendant-Appellant.

THE TAX BOARD'S METHOD OF APPLYING THE STATUTE

When *all* of a corporation's issued capital stock is invested in manufacturing or mining and fifty per centum or more of said capital is invested *within New Jersey* the *whole* of such corporation's capital is exempted from taxation under the act.

In the case of a dual corporation (as in the case at bar), it is held that the *proviso* of the act deals with *that part only* of the corporation's *capital* invested in manufacturing or mining, with the result that if fifty per centum or more of said corporation's *capital* invested in *manufacturing or mining* is invested in manufacturing or mining *within New Jersey,* the whole of such corporation's capital *invested in manufacturing or mining* is exempted from taxation under the act, even though the remainder of such corporation's manufacturing or mining capital is invested *outside* of New Jersey.

That portion of said dual corporation's *capital* which is invested in *non-manufacturing* or *non-mining* pursuits is not dealt with by the exempting proviso of the act at all, but such capital is dealt with by the other provisions of the statute and is subject to tax thereunder.

William A. Stevens
Attorney General
John Solan

THE TAX BOARD'S METHOD OF APPLYING THE STATUTE

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MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

SOMERS LUMBER CO., *Prosecutor-Respondent,* *vs.* STATE BOARD OF TAXES AND ASSESSMENT, *Defendant-Appellant.*	On Certiorari On Appeal from Supreme Court

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BRIEF FOR RESPONDENT

STATEMENT

The question involved is the legality of the tax assessed against the prosecutor, a corporation of the State of New Jersey, by the State Board of Taxes and Assessment. The tax assessed is for the year 1929 on $240,000 of the issued and outstanding capital stock of the company, the total issue being $500,000. The return made by the prosecutor to the State Board of Taxes and Assessment was on the form submitted by and pursuant to request of said Board. The 12th question submitted by the Board is "What is the amount of capital stock actually employed in manufacturing, or mining, or agriculture, or horticulture in New Jersey?"

The answer is "$260,000." The State Board recognized by assessing the remaining $240,000 of outstanding capital that the return was correct, having been duly verified by the treasurer of the prosecutor, and assessed on only $240,000 of the $500,000 capital issued and outstanding.

ARGUMENT

The Prosecutor is Wholly Exempt from Payment of Taxes on its Issued and Outstanding Capital Stock

In view of the foregoing statement, the return made by the prosecutor to the State Board as having assessed on only $240,000 of issued and outstanding capital stock out of an issue of $500,000 is a clear recognition that prosecutor has invested in manufacturing in the State of New Jersey $260,000 of its issued and outstanding capital stock.

This being so, the question is, was the State Board justified in making any assessment against the prosecutor. The controlling statute is Pamphlet Laws 1892, page 137, Compiled Statutes, Section 504, page 5288. After stating what corporations must pay, the proviso at page 5289 reads:

> "Provided that this Act shall not apply to railway * * * or manufacturing or mining corporations, at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this State; if any manufacturing or mining company carrying on business in this State shall have less than fifty per centum of its capital stock, issued and outstanding, invested in business carried on within this State, such company shall pay the annual license fee or franchise tax herein provided for companies not carrying on business in this State, but shall be

> entitled, in the computation of such tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining."

To us the language of the Act is so plain that we wonder upon what theory the assessment was made. More than fifty per centum of the capital stock of the prosecutor, issued and outstanding, is invested in manufacturing carried on within this State (State of Case, pages 6 and 7), and was on the first day of January, 1929. This being so, the statute, in perfectly clear and apt language, exempts the corporation from the payment of any tax. By clear and express language in the Act the prosecutor would be subject to tax only in the event that less than fifty per centum of its capital stock, issued and outstanding, is invested "in business carried on within this State" with a proviso that in this latter event it "shall be entitled, in the computation of such tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining." This latter provision is entirely ignored by the State Board, which, as already stated, has recognized that only $240,000 of its capital stock is assessable. The return made by the State Board indicates that the assessment is to be justified "on the ground that the corporation was engaged in a dual business with a portion of its issued capital stock employed in manufacturing in New Jersey, and a portion in dealing with commodities not manufactured."

Prosecutor is a single corporation. The conclusion stated in the return is unwarranted by the verified return made by the corporation. It does not there appear that it was doing a dual business. This was a pure assumption on the part of the State Board. The return made by the prosecutor shows that is has $500,000 of capital stock issued and outstanding, of which $260,000

is invested in manufacturing in New Jersey; the return being silent as to how the remaining $240,000 is invested, unless it can be deduced from the question "What is the nature of the business of the corporation," to which the answer is, "Manufacturing of millwork and dealers in building materials."

But it is submitted that it is of no consequence to the State Board how any of the capital of the prosecutor is invested if at least fifty per centum of its capital stock issued and outstanding, is invested in manufacturing within this State. To support the contention of the State Board you must interpolate words into the statute. It is manifest that the purpose of the Legislature was to encourage manufacturing in New Jersey and to relieve from taxation so far as its capital stock is concerned, if at least one-half of it is invested in manufacturing within this State. The correspondence which has passed between counsel for the prosecutor and the Attorney General, which, however, is no part of the record, suggests that the State Board has fallen into error due to the decision in *Press Printing Company* v. *Assessors,* 51 Law 75, and *Evening Journal Association* v. *Assessors,* 47 Law 36. These decisions were provoked under the Act of 1884, P. L. page 234, which was amended by P. L. 1891, page 150 and P. L. 1892, page 137. In the case at 47 Law, page 36, two independent corporations were involved; in the one, Evening Journal Association, it was determined that it was not a manufacturing corporation; in the other, it was determined it was, and the assessment in the latter case was set aside. In the case at 51 Law, page 75, it was determined that the Press Printing Company, which printed and published a newspaper, and also printed and published books, and did a general job printing business, "is a manufacturing company with respect to its business of printing books and job printing, and is exempt from taxation on so much of its capital as is invested in that branch of business; but with respect to its business of

printing and publishing a newspaper, it is not a manufacturing company, and is taxable on that part of its capital which is invested in the latter branch of business."

Quoting from the opinion at page 76, which is a recital of the pertinent provision in the Act of 1884, it is said:

> "With a proviso that the Act should not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations, or manufacturing or mining companies carrying on business in this State."

It seems obvious that the amendment of 1891 and 1892 was provoked by reason of the cited cases. In the cited case the Court determined that as to so much of its capital invested in manufacturing it was entitled to an exemption and that which was not so employed it was not entitled to an exemption. But the language used in the Act under consideration is manifestly different. The language whose clarity cannot well be denied says that the Act providing for tax is not to apply if at least fifty per centum of capital stock issued and outstanding is invested in manufacturing carried on within the State. Any doubt as to the meaning of this is instantly removed by the language which follows and provides for a tax where less than fifty per centum of its capital stock is employed in manufacturing within this State, with the further provision that in that event there is to be a deduction from the amount of the capital stock issued and outstanding of the assessed value of the real and personal estate so used in manufacturing. It seems difficult to perceive what language could be conceived or employed to relieve a corporation entirely from tax where more than fifty per centum of its capital stock is used in manufacturing within the State than that employed in the Act under consideration. The Act clearly contemplates the possibility of a corporation doing a dual business. But it does not suggest that because of that the corporation must pay a tax if at least fifty per

centum of its capital stock issued and outstanding is invested in manufacturing within the State.

In *Printing Co.* v. *Assessors, supra,* it was determined that:

> "The business in which the capital of a corporation is invested and not the objects for which the company was incorporated as expressed in the certificate of incorporation determines its liability to taxation under the tax law of April 18, 1884."

The State cannot escape the effect of its own return in the instant case which expressly says that so much of respondent's capital stock is invested in manufacturing carried on in this State. The attempt of the State to interpret the 1891 amendment to oblige the respondent to pay a tax on its capital not employed in manufacturing in this State is too refined and highly strained. Apparently the State would exclude from the operation of the amended act all corporations that are not manufacturing or mining corporations regardless of how the capital may be invested and where its business may be carried on.

But the Act nowhere says that a corporation must by its act of incorporation be a manufacturing corporation. The test is whether its capital is so invested and the business is carried on in this State. Such is the conclusion in the cited case and from the quoted language. That case has not been challenged since 1884. The State cannot escape the return and cannot now question if the respondent is a manufacturing corporation. In answer to the question submitted in the State's own exhibit:

> "Is the corporation engaged in manufacturing, or mining, or agriculture, or horticulture?"

The answer is, Yes.

The opinion of the Supreme Court vindicates itself and its reasoning is unanswerable.

The judgment should be affirmed.

COLE & COLE,
Attorneys of Respondent.