

TAX APPEAL BOARD OF THE STATE OF DELAWARE

AMERICAN PAVING COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 553  
 )  
 DIRECTOR OF REVENUE, )  
 )  
 Respondent. )

BEFORE: Maurice A. Hartnett, III, Esquire, Chairman;  
Joseph S. Yucht, Esquire, Vice-Chairman; Cyric  
W. Cain, Jr.; Rhett McGriff; and Nettie C.  
Reilly, Board Members.

John A. Sergovic, Jr., Esquire of Tunnel & Raysor for  
Petitioner.

John P. Fedele, Esquire, Assistant Attorney General for  
Respondent.

DECISION AND ORDER

Joseph S. Yucht, Esquire, Vice-Chairman:

Petitioner is a non-resident contractor which did business in the State of Delaware, inter alia, during the calender years 1969 through 1973. During that period of time, the provisions of 30 Del. Code, Chapter 25 required one such as Petitioner to obtain a license and to pay a fee before it could conduct the business of contracting as defined in said chapter. Respondent contended that Petitioner did not comply with the applicable law for fifty-one (51) contracts during the period of time in question and sent Petitioner a Notice of Deficiency, assessing the sum of \$3,213.90 to

EXHIBIT "E"

be due for license taxes, interest and penalties.

The provisions of 30 Del. Code, Chapter 25 were changed by the Legislature for the period of time in question. Petitioner contended that as a result of said change in the law, it was not required to pay a Thirty Dollar (\$30.00) license fee for each contract it performed for One Thousand Dollars or more. In addition, Petitioner contended (1) that the provision of 30 Del. Code §2502, which requires a non-resident contractor to pay a larger license fee than a resident contractor, is unconstitutional and (2) that 30 Del. Code §2103 (e) prevents the Respondent from assessing the Petitioner for alleged unpaid license taxes, penalties, and interest allegedly incurred more than three (3) years prior to the assessment. The Board considered all three arguments and will discuss each one separately.

I Whether or not the provisions of 30 Del. Code §2502 are unconstitutional?

Petitioner contended that an interpretation of 30 Del. Code §2502 which would require a non-resident contractor to pay a thirty dollar license fee for each contract it enters in Delaware while requiring a resident contractor to pay a thirty dollar license fee once in a given year on the same contract in excess of one thousand

dollars constitutes an unconstitutional, invidious discrimination against the non-resident contractor. Accordingly, Petitioner urged the Tax Appeal Board to declare said statute to be unconstitutional as being violative of the equal protection clause of the Fourteenth Amendment and Article IV, Section 2 of the United States Constitution.

The aforesaid argument raises the issue as to whether or not a quasi judicial body such as the Tax Appeal Board has the authority to rule on the constitutionality of a statute? It is well-settled that the jurisdiction to pass on the constitutionality of an act of the legislature is inherent in the courts. 16 C.J.S., Constitutional Law §92. In Delaware, it has been held that if an act of the legislature is repugnant to the Constitution, the courts have the power, and it is their duty, so to declare it. Bailey v. Philadelphia W. & B.R. Co., 4 Har. 389, 44 Am. Dec. 593, (emphasis added). Since the courts not only have the power but the duty to rule on the constitutionality of the statutes, then it goes without saying that the Tax Appeal Board is without authority to make such a determination. See U.S v. Butler, Mass., 56 S. Ct. 312, 297 U.S. 1, 80 L.Ed. 477, 102 ALR 914; Central Ohio Co-op Milk Producers v. Glander, B.T.A. 92 NE2nd 834; S.S. Kresge Co. v. Bowers, 166 NE2nd 139, 170 Ohio St. 405, app. disp. 81 S. Ct. 712, 365 U.S. 466, 5 L.Ed.2nd 704;

State ex rel Park Inc. Co. v. Board of Tax Appeals, 289 NE2d 579, 32 Ohio St. 2d 28. Therefore, since the Tax Appeal Board has no authority to declare the provisions of 30 Del. Code §2502 unconstitutional, said statute is deemed to be valid for it is clothed by a presumption of constitutionality. Downs v. Jacobs, 272 A2d 706; Kreisher v. State, 303 A2d 651.

II Whether or not the Provisions of 30 Del. Code §2502 (b) require the payment of a \$30.00 license fee by a non-resident contractor for each and every contract in excess of \$1,000.00?

Between June 24, 1969 and October 16, 1973, Petitioner performed 51 contracts in Delaware upon which Respondent has assessed delinquent taxes and license fees, penalties and interest totaling \$3,213.90. Respondent contends that the applicable provisions of 30 Del. Code §2502 (b) required Petitioner to obtain a license for each job and to pay a \$30.00 fee for each said job. Petitioner contends that as a result of an amendment to said section in 1971, the legislature changed the license fee requirement by only requiring a non-resident contractor to pay, inter alia, an annual license fee of \$30.00.

Both parties agree that from July 1, 1969 to July 2, 1971 the provisions of 30 Del. Code §2502 (b) were as follows:

"Any non-resident person desiring to engage in the business in this state as a contractor shall be subject to the same requirements as a resident contractor except that a non-resident shall be required to obtain a license for each single project and pay the tax required by this chapter for each single project and shall, as a condition to obtaining a license for each such project, post a bond equal to double the amount of the gross payment under the contract for such project multiplied by the rate set forth in subsection (c) of this section. The bond required by this section shall be entered upon such terms and conditions as shall be set forth in the regulations promulgated by the Secretary of Finance."

Then, starting on July 3, 1971, said 30 Del. Code §2502

(b) was amended to read:

"Any non-resident person desiring to engage in business in this state as a contractor shall be subject to the same requirements as a resident contractor except that, in addition, a non-resident shall obtain a license for each single contract in which the gross amount of that contract is in excess of \$1,000.00. The license must be obtained and proof of license compliance must be made prior to or in conjunction with the execution of each single contract to which he has been named; and such person shall, as a condition to obtaining a license for each such contract, post a bond equal to double the amount of the gross payment under the contract for such contract multiplied by the rate set forth in subsection (c) of this section. The bond required by this section shall be entered upon such terms and conditions as shall be set forth in the regulations promulgated by the Director of the Division of Revenue."

The Board must construe the effect of the amendment as it related to the license fees imposed upon Petitioner.

The Board finds that said amendment, as it

related to Petitioner, did require it to pay a \$30.00 license fee for each contract in excess of \$1,000.00. To hold otherwise would cause said section to read as though the words "in addition" and "each" were not included in the first sentence of said amended §2502 (b). The legislature, we concluded, wanted a non-resident contractor to not only obtain a license and pay a fee of \$30.00 before it executed a contract, as required by 30 Del. Code §2502 (a), but "in addition" said contractor must also obtain a license (and pay a fee of \$30.00) for "each" contract in excess of \$1,000.00. The net effect of the change in the first sentence of 30 Del. Code §2502 (b) would therefore be to require a non-resident contractor to only obtain a license and pay a \$30.00 fee for contracts in excess of \$1,000.00.

(Respondent's brief indicated that for contracts dated 5/15/69, 6/3/69, 6/3/69, 6/8/69, 6/8/69, 6/11/69, 6/22/69 and 6/24/69 the applicable licensing statute was 30 Del. Code §2503, while the remaining 43 contracts were governed by the provisions of 30 Del. Code §2502 (b) as aforesaid. An appropriate assessment shall be made, if it is other than as originally set out by Respondent for said 8 contracts. The assessment for the other 43 contracts as made by Respondent shall be affirmed.)

III Whether or not the provisions of 30 Del. Code §2103 (e) permit the Respondent to assess the Petitioner for license taxes, penalties and interest incurred more than three (3) years prior to the assessment?

Petitioner's last argument is that 30 Del. Code §2103 (e) limits the period for which an assessment can be made to 3 years prior to the date of the assessment. Since the date of the assessment was October 16, 1973, Petitioner contends Respondent is precluded from reassessing Petitioner for any unpaid license fees, penalties, and/or taxes allegedly incurred before October 16, 1970. Respondent contends that since Petitioner did not obtain the required license, the three (3) year statute of limitations does not apply.

The last sentence of 30 Del. Code §2103 (e) provides:

"The limitation of 3 years to the assessment of such additional amount due shall not apply to the assessment of additional amounts due upon returns, license applications or statements which are fraudulent, or where no such returns, license applications or statements have been filed or where the amounts shown on said returns, license applications or statements are grossly understated."

The important factor here for causing the three (3) year statute to be applicable is the filing of the license application. The failure to file a license application

is a basis for denying the 3 year limitation for said statute specifically so states. The mere fact that Petitioner did not think it had to file or obtain a license will not cause said 3 year limitation to be applicable, for that interpretation would "reward" those contractors who did not obtain a license and pay the fees as required. Accordingly, we hold that the Respondent properly assessed Petitioner for unpaid licenses.

IT IS SO ORDERED.

*James A. [unclear]*  
*Joseph J. [unclear]*  
*Robert M. Griff*  
*Thomas E. Rully*  
*Christopher W. [unclear]*

Date: Oct 13, 1976



SYNOPSIS

DOCKET NO. 553

TAX SEGMENT: LICENSE TAX (Contractors' License)

ISSUE: (1) Petitioner's (nonresident contractor) failure to obtain and pay license fees as required by statute (30 Del. C. § 2502 (b) for contracts in excess of \$1,000 entered into during calendar years 1969 through 1973.

(2) Petitioner's claim that statute is unconstitutional as it discriminates against the nonresident contractor on the ground that resident contractors pay a single fee regardless of the number of contracts entered into during the calendar year.

(3) Petitioner's claim that the three-year statute of limitations (30 Del. C. § 2103 (e) precludes period in which assessments can be made.

TAB DECISION: The Tax Appeal Board concluded that the statute (30 Del. C. § 2502 (b) as amended) was applicable to the Petitioner and affirmed the assessments made by the Respondent.

Furthermore it was held that it was without the jurisdictional authority for the Tax Appeal Board to review a claim of the unconstitutionality of the statute.

On the issue of the statute of limitations, the Board held that the failure of Petitioner to obtain and pay the business license fees as required by statute does not preclude assessments to be made of said unpaid taxes as specifically contained within the language of the statute (30 Del. C. § 2103 (e)).

DECISION: For Respondent

DECISION DATE: October 13, 1976