

BEFORE THE TAX APPEAL BOARD
OF THE STATE OF DELAWARE

SCHLUDERBERG-KURDLE CO., : Docket No. 668
INC., :
 :
Petitioner, :
 :
v. :
 :
DIRECTOR OF REVENUE, :
 :
Respondent. :

BEFORE: Joseph S. Yucht, Esquire, Chairman; James C. Eberly, Sr., Esquire, Vice-Chairman; Cyric W. Cain, Jr., Harry B. Roberts, Jr. and Nettie C. Reilly, members.

Michael J. Abromaitis, Esquire, Attorney for Petitioner.

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

DECISION AND ORDER

James C. Eberly, Sr., Esquire, Vice-Chairman: From the briefs and other documents filed by the parties to this action, it would appear that there is no dispute as to the facts in this instant case. The facts, which are pertinent to this decision and order that have been agreed by the parties conclude, among others, the following:

1. Petitioner does not own or lease any offices, warehouses, garages or other real or personal property in Delaware.

2. Petitioner employed between July 1, 1969 and December 31, 1977, three (3) full-time salesmen who lived and worked in Delaware.

3. Petitioner's salesmen above referred to called upon Delaware businesses to sell the products of the Petitioner, took orders for said products of the Petitioner and transmitted the orders to Petitioner in its Maryland offices.

4. Between September 30, 1969 and October 31, 1977, the Petitioner sold and delivered to Delaware customers a total of \$19,603,409.00 worth of merchandise.

5. The Petitioner filed the necessary documentation to qualify as a foreign corporation and to do business in the State of Delaware on February 23, 1968.

The issues that have been presented in this instant case are as follows:

1. Whether the Petitioner is liable under Delaware law to pay the Delaware Business License and Gross Receipts Tax for the period beginning July 1, 1969 through December 31, 1977.

2. If the Petitioner is so liable under Delaware Law for the Delaware Business License and Gross Receipts Tax, whether the imposition of such tax violates the commerce clause of any other applicable provision of the United States Constitution.

We will deal with these issues in reverse order.

As to the second issue regarding the constitutionality of the imposition of any tax by the State of Delaware, the Delaware Tax Appeal Board does not have jurisdiction to determine the constitutionality of the taxing statutes, and therefore will not rule on this issue and for the purposes of this opinion will treat the statutes as constitutional and enforceable. See in this regard, Delaware Bankers Association v. Division of Revenue, 298 A. 2d 352 (Delaware Chancery, 1972).

As to the first issue, of whether or not the Petitioner is liable for payment to the State of Delaware of the Business License and Gross Receipts Tax for the period beginning July 1, 1969 through December 31, 1977, the Board has taken considerable care reviewing the statutes and the applicable law and has done extensive research on the issue itself.

The issue as to the liability of the Petitioner for Business License and Gross Receipts Taxes may be more narrowly defined as to whether or not there is sufficient nexus between the Petitioner and the State of Delaware that would permit the imposition of Delaware taxing statutes upon the Petitioner, or in other words, whether or not the Petitioner may be seen as "doing business" within the State of Delaware

for the purposes of the Delaware taxing statutes under Chapter 29, Title 30, Delaware Code.

The Petitioner goes to great length to equate "doing business" in the State of Delaware for the purposes of taxation, with the "doing business" provisions of the Delaware Code for purposes of registration of a foreign corporation.

While decisions relating to what constitutes "doing business" within the contemplation of the Corporation Laws of the State of Delaware may be helpful in determining what constitutes "doing business" within the meaning of the taxing statutes, the statutes describing "doing business" within the State of Delaware for purposes of registration as a foreign corporation are not controlling. See in this regard, Common Wealth of Pennsylvania v. Andrews, 42 PA. Dist. and CO. 505. Further, it should be noted that other jurisdictions have held that the statutes defining "doing business" for purposes of taxation and the statutes defining "doing business" for purposes of registration of a foreign corporation in a state have entirely different meanings. In this regard see, Jeter v. Austin Trailer Equipment Co., 265 P. 2d 130, 122 C.A. 2d 376.

In this regard, however, it is interesting to note that the Petitioner itself has seen fit to file the necessary documentation to be registered as a foreign corporation to do business in the State of Delaware. It should also be noted that the Petitioner employed, during the period of time in question in this instant case, three (3) Delaware residents to call upon its Delaware customers, among others. It should also be noted that the Petitioner did in fact make deliveries to its Delaware customers during the period of time in question in this instant case of merchandise totaling in value \$19,603,409.00.

The agreed upon facts in this instant case indicate a continuing relationship with retailers in the State of Delaware to whom the Petitioner marketed its products. This continuing relationship, and income generated by sales in Delaware create, in the Board's opinion, a sufficient nexus for the imposition of the taxing statutes upon the Petitioner.

THEREFORE, after considerable deliberation and independent research and discussion of the issues presented before the Board, and for the reasons above stated, the Board holds as follows:

1. Sufficient nexus exists between the Petitioner's activities in the State of Delaware that would demand and

require the imposition of the Delaware taxing statutes upon the Petitioner.

2. That this decision should be and hereby is entered for the Respondent on this instant appeal.

IT IS SO ORDERED, on this 11th day of December, A.D. 1981.

Joseph S. Yucht
Joseph S. Yucht, Esquire
Chairman

James C. Eberly, Sr.
James C. Eberly, Sr., Esquire
Vice-Chairman

Cyril W. Cain, Jr.
Cyril W. Cain, Jr., Member

Harry B. Roberts, Jr.
Harry B. Roberts, Jr., Member

Nettie C. Reilly
Nettie C. Reilly, Member

SYNOPSIS

DOCKET NO. 668

TAX SEGMENT: LICENSE (RETAIL WHOLESALE)

ISSUE: Whether or not there is sufficient nexus defined between the Petitioner, a Maryland corporation, and the State of Delaware that would permit the imposition of Delaware taxing statutes, or in other words, whether or not the Petitioner may be seen as "doing business" within the State of Delaware and is taxable for the purposes of Delaware taxing statutes under Chapter 29, 30 Del. C.

TAB DECISION: The Tax Appeal Board held that (1) Sufficient nexus exists between the Petitioner's activities in the State of Delaware that would demand and require the imposition of Delaware taxing statutes upon the Petitioner and (2) That this decision should be and is hereby entered for the Respondent on this instant Appeal.

DECISION: For Respondent

DECISION DATE: December 11, 1981