

30 Del Code
2502

TAX APPEAL BOARD OF THE STATE OF DELAWARE

LEONARD KUNKIN ASSOCIATES, INC.)
Petitioner,)

v.)

DIRECTOR OF REVENUE,)
Respondent.)

DOCKET NO. 911

Before: Joseph S. Yucht, Esquire, Chairman; John H. Cordrey, Esquire, Vice Chairman; Harry B. Roberts, David Eppes and Regina Dudziec, Members.

Owen A. Knopping, Esquire of Fox, Rothschild, O'Brien & Frankel for Petitioners.

Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

John H. Cordrey, Esquire, Vice Chairman. The parties have stipulated to the facts of the case which are contained in the stipulation attached hereto as "Exhibit A" and made a part hereof by reference. A brief summary of the facts show that the Petitioner is a Pennsylvania corporation which entered into a contract which bound it as a subcontractor to furnish all materials for and labor required to perform the fabrication and furnishing of structural steel for the construction of the Dover Mall in Dover, Delaware. Petitioner complied with its contractual obligations to provide equipment and labor necessary for the erection of the steel by subcontracting with George L. Elliot & Son, Inc. (Elliot) who performed all labor required under the contract in Delaware, except for delivery of the fabricated steel which was performed by Petitioner's employees in Petitioner's trucks.

The Petitioner raises the issue of whether the assessment of Respondent is in violation of the Fourteenth Amendment of the Constitution of the United States as it claims there is

not the "minimal connection" required between Petitioner and this State. The Board cannot rule that the applicable statute, 30 Del.C. §2502, is unconstitutional. Petitioner asks this Board to determine that the statute as applied to these particular facts is violative of the Fourteenth Amendment as the contracts were negotiated and executed outside of Delaware, the steel was fabricated outside of Delaware, and the only contact of Petitioner with the State was its employees driving the trucks which delivered the steel to the job site. Petitioner stresses that the parties to the original contract understood that Petitioner would not engage in activities in Delaware but would perform the portion of the contract requiring the erection of steel through a subcontractor (ultimately performed by the subcontractor Elliot).

The case of Gross Income Tax Division v. Fort Pitt Bridge Works, 86 N.E.2d 685 (1949) is very similar to the present case. In Fort Pitt there were two corporations, Fort Pitt and Hunter, who performed different parts of a contract to provide erected steel. Hunter would provide the labor for erection of the steel and Fort Pitt would provide the fabricated steel. As in the present case, Fort Pitt did not enter into the contracts in the taxing state nor did it perform any labor in the taxing state. The Court held that the contract was one which required both labor and material and was indivisible. It was not, therefore, a sales contract and the receipts of the contract were taxable.

Petitioner distinguishes Fort Pitt from the present case by arguing that the original contract for the delivery and erection of steel which Petitioner entered into was understood by all of the parties to that contract to call for the manufacture of steel by Petitioner and the erection of that steel by another party. Fort Pitt, Petitioner argues, involved a contract where the parties to the original contract were unaware that the identity of the erector of the steel was different than the supplier. Assuming that distinguishing fact to be true, it is a distinction without any legal significance. Unquestionably Petitioner was required under the contract to

perform labor to erect the steel under the contract. Petitioner chose to fulfill that portion of the contract by subcontracting with Elliot. The fact that the parties to the original contract knew that Elliot or some other subcontractor was to perform the labor does not affect the decision of whether the event is taxable.

Petitioner also argues that the statute in Fort Pitt was more inclusive as it taxed income derived from "activities or business or any other source within the State" while the Delaware statute only taxes a "contractor." The Fort Pitt Court distinguished the tax upon a contract for delivery of material and performance of labor from a contract for delivery of material. Even if the statutes differ in what they tax, the present case is not distinguishable from Fort Pitt.

Finally Petitioner argues that in order to be a "contractor" under 30 Del.C. §2501 both labor and materials must be supplied by the taxpayer. Petitioner argues that it did not physically perform labor in this State, only Elliot did, and therefore it is not a "contractor." Petitioner contracted to perform labor in this State under the original contract. Thereafter it performed the labor portion through subcontracting with Elliot. Petitioner is a "contractor" whether Petitioner performs the labor itself or subcontracts with another to perform its obligations.

For the foregoing reasons the Director's assessment is affirmed.

IT IS SO ORDERED.

September 14, 1990

Joseph Yurk
Maury Roberts

John W. Cordrey
Regina C. Hedger
Conall

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v.

Docket No. 911

Director of Revenue,
Respondent

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof, subject to the right of either party to object to the admission of such facts in evidence on the grounds of materiality and relevancy; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Leonard Kunkin Associates, Inc., (hereinafter referred to as the "petitioner"), is a Pennsylvania corporation engaged in the business of steel fabrication with its sole place of business being located in Line Lexington, Pennsylvania. As part of its business, petitioner bids for and enters into contracts of the type referred below.

2. In 1981 and 1982, petitioner entered into four separate Contract Agreements with Shaffer-Gordon Associates, Inc. of Oreland, Pennsylvania (hereinafter referred to as the "Contractor") regarding the construction of anchor stores at the Dover Mall, Dover, Delaware. Copies of the Contract Agreements are attached and marked Exhibits A, B, C, and D, respectively.

3. The Contract Agreements were negotiated and executed in Pennsylvania by the petitioner and the contractor.

4. Under the Contract Agreements referred to in paragraph (2), petitioner was required to fabricate and furnish structural steel, bar joists and metal roof deck in accordance with specifications supplied by the Contractor.

5. The steel was fabricated at petitioner's plant in Pennsylvania while the bar joists and metal roof decks, which were not made by Petitioner, came from sources outside of Delaware.

6. Petitioner, in addition, was required under the Contract Agreements to furnish the labor and erect the fabricated structural steel, bar joists and metal roof deck.

7. Since petitioner is not an erector, it was mutually understood between the Contractor and petitioner that the erection would be sub-contracted out by petitioner.

8. Pursuant to the requirement to provide labor and erect under the Contract Agreements, petitioner entered into a sub-contract with George L. Elliott and Son, Inc. (hereinafter referred to as "Elliott") of Salisbury, Maryland, a copy of which is attached and marked Exhibit E. Petitioner's sub-contract with Elliott was executed outside of Delaware.

9. Under the sub-contract with Elliott, Elliott was required to erect and did erect the fabricated structural steel, tube columns and bar joists and in connection therewith, provide all manpower and equipment necessary to perform the contract.

10. None of petitioner's employees were involved in the construction, alteration, repairing, dismantling, demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains, and/or involved with any other type of structure as an improvement, alteration or development of real property. in the State of Delaware.

11. Petitioner's employees delivered the fabricated steel in petitioner's trucks to the job site in Delaware. Aside from driving the truck into Delaware, petitioner's employees performed no services in connection with unloading the fabricated steel.

12. Since Elliott performed the activities referred to in Paragraph 10 in connection with the erection, Elliott did apply for a license and has complied with the requirements of the tax.

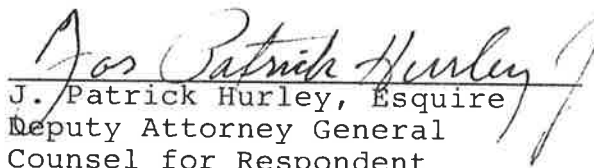
13. The specific union relating to workers engaged in steel erection is different than the union relating to workers engaged in steel fabrication.

14. Petitioner did not send its employees into Delaware for the solicitation of the Contract Agreements with Shaffer-Gordon nor has it sent its employees into Delaware for the solicitation of business generally.

15. By Notice of Assessment, respondent determined that petitioner is liable for the Contractor's Tax in the amount of \$16,758.72 plus interest and penalty.

16. By Notice of Determination dated December 9, 1986, respondent advised petitioner that the assessment of penalty will be abated.


Owen A. Knopping, Esquire
Counsel for Petitioner


J. Patrick Hurley, Esquire
Deputy Attorney General
Counsel for Respondent