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CITY OF PORTSMOUTH

APPENDIX

FRED C. GARDNER COMPANY, INC.

IN THE SUPREME COURT OF VIRGINIA

CITY OF PORTSMOUTH, VIRGINIA,

Appellant

v.

RECORD NO. 740074

FRED C. GARDNER COMPANY, INCORPORATED,

Appellee

APPENDIX TO APPELLANT'S BRIEF

William J. O'Brien, Jr.
City Attorney
Daniel R. Hagemeister
Assistant City Attorney
P. O. Box 820
Portsmouth, Virginia 23705
Counsel for Appellant

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I.

MOTION FOR JUDGMENT

Plaintiff hereby moves the Court of Hustings for the City of Portsmouth, Virginia, for a judgment and award of execution against the defendant herein for the sum of One Thousand Seven Hundred Sixty and 03/100 ($1,760.03) Dollars by reason of the following facts, to-wit:

1. During the year 1969, defendant, Fred C. Gardner Company, Inc. entered into a contract with the United States of America which contract provided for construction services to be performed within the grounds of the Norfolk Naval Shipyard, said shipyard being within the corporate limits of the City of Portsmouth, for a consideration of $758,321.00.

2. Pursuant to the said contract mentioned in paragraph (1) above, the defendant performed and completed the required construction services within the corporate limits of the City of Portsmouth.

3. Section 63 of the License Tax Ordinance of the City of Portsmouth required all contractors doing business within the corporate limits of the City of Portsmouth to pay a business license tax at a rate based on the gross receipts of the contractor on all work done within the said city.

4. Defendant has not paid the business license tax imposed by Section 63 of said License Tax Ordinance for the contract mentioned in paragraph (1).

5. The amount of tax due and properly payable to the plaintiff by the defendant is One Thousand Six Hundred and 03/100 ($1,600.03) Dollars plus a 10% penalty of One Hundred Sixty and no/100 ($160.00) Dollars for a total sum of ONE THOUSAND SEVEN HUNDRED SIXTY and 03/100 ($1,760.03) DOLLARS.

WHEREFORE, plaintiff prays for judgment against the defendant herein in the sum of ONE THOUSAND SEVEN HUNDRED SIXTY and 03/100 ($1,760.03) DOLLARS.

CITY OF PORTSMOUTH

(Filed December 28, 1970)

II.

ANSWER

Now comes the defendant, Fred C. Gardner Company, Incorporated, by counsel, and for its answer, says:

1. That it admits the allegations of Paragraph 1 of the Motion for Judgment except that the Norfolk Naval Shipyard is a shipyard within the corporate limits of the City of Portsmouth, which statement is neither admitted nor denied, and the defendant calls for strict proof thereof.

2. That the defendant neither admits nor denies the allegations in Paragraph 2 of the Motion for Judgment and calls for strict proof thereof.

3. That it admits the allegations in Paragraph 3 of the Motion for Judgment.

4. That the defendant neither admits nor denies the allegations set forth in Paragraph 4 of the Motion for Judgment.

5. That the defendant specifically denies that there is any tax due and payable to the plaintiff by the defendant.

FRED C. GARDNER COMPANY, INCORPORATED

(Filed January 19, 1971)

III.

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To: WALTON G. BONDURANT, JR.
Moody, McMurran and Miller
Post Office Box 1138
Portsmouth, Virginia
23705

PLEASE TAKE NOTICE that on the 30th day of October, 1973, at 9:30 A.M., or as soon thereafter as counsel may be heard, the plaintiff, City of Portsmouth, Virginia, will move the Court of Hustings for the City of Portsmouth, Virginia, for summary judgment against the defendant in the above-styled action on the following grounds, to-wit:

1. The United States Congress has granted local governments the authority to impose income taxes upon contractors operating on military reservations of exclusive federal legislative jurisdiction, such authority being set forth in U.S.C.A. §§ 105-110 (the Buck Act.

2. Any tax measured by gross receipts is an income tax within the meaning of the Buck Act.

3. The Business License Tax Ordinance of the City of Portsmouth imposes a license tax on all contractors operating within the City of Portsmouth, which tax is measured by the contractor's gross receipts.

4. Defendant, in its pleadings and interrogatories, has admitted the performance of a contract at the Norfolk Naval Shipyard and the receipt of payment of $787,103 pursuant thereto for the year 1969.

5. Accordingly, defendant is liable to plaintiff for the payment of a business license tax of $1,760.03, which sum includes a penalty of $160.00.

CITY OF PORTSMOUTH

(Filed October 17, 1972)

IV.

PLAINTIFF'S INTERROGATORIES

PLEASE TAKE NOTICE that the plaintiff, City of Portsmouth, demands that the defendant render separate and complete written answers to the following interrogatories, under oath, in accordance with Rules of Court 4:1(b) and 4:8 within the time prescribed by law.

1. State whether the contract admitted by defendant in Paragraph one of its answer was performed by defendant during 1969.

2. State whether the United States of America has made payments to the defendant for contractual work performed at the Norfolk Naval Shipyard during 1969, and if so, the total amount of such payments.

3. State whether defendant has made any payments to the City of Portsmouth which defendant intended as payment of a business license tax for 1969.

4. If Interrogatory No. 3 is answered affirmatively, state dates and amounts of all such payments.

5. State whether defendant has ever received a business license from the City of Portsmouth which purports to apply to performance of contractual work performed on the grounds of the Norfolk Naval Shipyard.

CITY OF PORTSMOUTH

(Filed August 17, 1972)

V.

DEFENDANT'S ANSWERS TO INTERROGATORIES

Now comes the defendant, Fred C. Gardner Company, Incorporated, and its answers to interrogatories, and says:

1. Yes.

2. Yes; $787,103.00

3. No.

4. Not applicable.

5. No.

FRED C. GARDNER COMPANY, INCORPORATED

(Filed October 6, 1972)

VI.

JUDGE'S OPINION

August 30, 1973

Mr. Daniel R. Hagemeister
Assistant City Attorney
Municipal Building
P. O. Box 820
Portsmouth, Virginia 23705

Mr. Walter G. Bondurant, Jr.
C/o Moody, McMurran, Miller
Attorneys at Law
Central Building
Court and County Streets
P. O. Box 1138
Portsmouth, Virginia 23705

Re: City of Portsmouth vs. Fred C. Gardner Company, Incorporated
Law No. 6425

Gentlemen:

Having reviewed your respective briefs and letters pertaining to the above styled matter, I am of the opinion that Section 54-141(3) of the Code of Virginia of 1950, as amended, is binding upon the City of Portsmouth.

Section 54-128 of the Code pertains to the necessity for license and certificate of registration for general contracting in this State. Section 54-141 of the Code provides that the provisions of this chapter shall not apply to:

> (3) "Work bid upon or undertaken for the United States government on land under the exclusive jurisdiction of the federal government either by statute or deed of cession;"

In my judgment there is no merit to the position taken by the City of Portsmouth that Section 58-298 takes precedence over Section 54-141. In fact, Ralph Sollitt & Sons Construction Company vs. Commonwealth, 161 Va. 854, 172 S.E. 290 (1934), which appears in the annotations to Section 58-298, upheld the license tax imposed because the contract was not performed solely upon government property.

The work undertaken in this instance was executed wholly within the confines of the Norfolk Naval Shipyard which is under the exclusive jurisdiction of the Federal Government. Therefore, motion for summary judgment is denied and judgment entered for the defendant.

Counsel for the defendant is directed to prepare the proper Order.

With kindest personal regards, I remain,

Sincerely,

/s/ R. Winston Bain

VII.

ORDER

This day came the parties, by counsel, and after reviewing the briefs of counsel and all argument of counsel, the Court being of the opinion that the plaintiff's Motion for Judgment should be dismissed, it is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment is denied and judgment is entered for the defendant.

Entered this 24th day of
September, 1973

/s/ R. Winston Bain
Judge

I ask for this:

/s/ Walton G. Bondurant, Jr., p.d.

Seen and objected to:

/s/ Daniel R. Hagemeister, p.q.

VIII.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Comes now the City of Portsmouth, Virginia, plaintiff herein, by counsel, and gives Notice of Appeal to the Supreme Court of Virginia, from the final order entered on the 24th day of September, 1973, and sets forth the following Assignments of Error:

1. The Court erred in holding that Section 54-141(3), Code of Virginia (1950) precluded the City of Portsmouth from requiring the defendant, Fred C. Gardner Company, Incorporated, to obtain a business license and pay the tax therefor.

2. The Court erred in holding that Virginia case law which antedates Title 4, Section 106 et seq. of the United States Code (the Buck Act) effectually bars the assertion of the business license tax against a defendant performing its contract solely upon government property of exclusive federal jurisdiction.

3. The Court erred in failing to hold that Congress has expressly granted statutory authority to state and local governments to levy, assess and collect the kind of tax here in question, such authority being contained in Title 4, §106 et seq., of the United States Code (the Buck Act).

4. The Court erred in failing to hold that the defendant was liable to the plaintiff for the full amount of taxes claimed as a matter of law.

A statement of facts will hereafter be submitted for approval of the Court in accordance with Rules 5:6 and 5:9 of the Rules of the Supreme Court of Virginia.

CITY OF PORTSMOUTH, VIRGINIA

(Filed October 24, 1973)