BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

COAST FOUNDRY MANUFACTURING COMPANY
(Petitioner)
.

PRECEDENT
TAX DECISION
No. P-T-125
Case No. T-70-61

The petitioner has appealed from Referee's Decision No. LA-T-4050 which denied its petition for reassessment of an assessment made by the Department under the provisions of section 1127 of the Unemployment Insurance Code. The assessment was in the amount of $3,875.46 contributions plus interest as provided by law and covered the period from January 1, 1967 through December 31, 1969. Subsequent to the referee's decision the petitioner paid the full amount of the assessment. Under the provisions of section 1179.5 of the code this payment constitutes a filing of a claim for refund; the claim is deemed denied; the denial is deemed affirmed by a referee; and the appeal to us automatically becomes an appeal from a referee's decision upholding the denial of the claim for refund. The parties have filed written argument.

STATEMENT OF FACTS

There is no material dispute as to the facts which are set forth in the referee's decision as follows:

> "During the period of the assessment the petitioner has been engaged in the manufacture of plumbing parts, such as valves, pumps, toilet subassemblies, and other toilet items. The petitioner was registered with the Department as an employer under the code and reported wages paid to its acknowledged employees. The petitioner did not report payments made to various individuals who, in their homes, assembled small parts into a completed unit.
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> "The petitioner has utilized the services of approximately ten home workers. These home workers are supplied with the necessary parts for the assembly of three different types of

products. One involves the assembly of a flapper which is utilized in toilet tanks, another involves an assembly of a small piston with various washers, also utilized in plumbing equipment. The third embraces bagging of repair kits into small envelopes and stapling them as a finished assembly.

"Home workers are required by the petitioner to have a business license issued by the city in which their work is performed. There is no written contract but the home workers have been under the impression that they were self-employed. The home worker or the spouse picks up the various parts to be assembled and takes them home. The home worker completes the assembly, returning the finished product and at the same time picking up another supply to be assembled. The home workers pay the cost of the city licenses and the cost of transportation including gasoline used in their automobiles or trucks.

"No application for work is filed with the petitioner although the petitioner retains a copy of the city license together with the name and address of the worker. The amount of the work available is geared to the production of the petitioner. A few of the workers may have discontinued work with the petitioner but they have brought back their leftover parts. Workers are paid on a piece work basis. Checks are issued each Friday to the home workers based upon the work done.

"The petitioner gives a minimum of instruction to a new home worker specifying the nature of the job and what is expected as a finished product. Usually, home workers confine themselves to one of the three assembly procedures. There is no time set in which to pick up the parts or return the assembled product. The petitioner provides no tools and no supervision. A home worker may work as rapidly or as slowly as she wishes and many of them do this work on a part-time basis while engaged in either some other full-time job or in keeping house for their families. Inasmuch as the jobs are quite simple, some of the home workers do the assembly while watching television. No prior experience or training is needed. No help is normally employed by the home worker. There is some evidence that home workers have also engaged in other types of business under the license issued by the city, and in one case a rubber manufacturing plant has contracted with the petitioner to do some of the assembly work.

"The sole issue to be resolved is whether or not the home workers are employees or independent contractors."

Upon this appeal the appellant takes no exception to the referee's findings of fact but urges that the referee has misapplied the law.

In support of its view that the homeworkers are independent contractors, the appellant cites Appeals Board Decision No. P-T-2. The Department relies on the case of McComb v. Homemakers Handicraft Cooperative (4 Cir - 1949), 176 F. 2d 633, Cert. den. 338 U.S. 900, 94 L. Ed. 553, 70 S. Ct. 250, wherein the court held that workers employed under circumstances similar to the homeworkers herein involved were employees and not independent contractors.

REASONS FOR DECISION

Section 601 of the California Unemployment Insurance Code provides:

"'Employment,' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

The relationship contemplated by the act as the basis for requiring contributions to the Unemployment Insurance Fund is that of employer and employee. A principal for whom services are rendered by an independent contractor does not come within the scope of these provisions (Empire Star Mines Company, Ltd. v. California Employment Commission (1946), 28 Cal. 2d 33, 168 P.2d 686). The Supreme Court in that case summarized the rules for determining the existence of either an employer-employee or principal-independent contractor relationship as follows:

". . . In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without

> cause. [Citations omitted] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (Rest., Agency, 220; Cal. Ann. § 220.)

In Appeals Board Decision No. P-T-2 we discussed these factors and we pointed out from abundant judicial authority that the most important factor to consider is the extent to which a principal has retained the right to control a workman's manner, mode, method and means of performing the details of his work. We stated at page 11 of that decision that to be indicative of an employment relationship, the right to control must be of that type and degree which the courts have characterized as "complete" and "authoritative." The test involves the existence of such a right as distinguished from its exercise although, of course, its exercise may provide an indication of the right's existence.

We further pointed out at pages 13 - 15 of that decision that in evaluating a working relationship due consideration must also be given to the secondary factors relating to the background under which the services were rendered, and that we must reach our determination of status from the overall integrated picture of the relationship that is found by considering its overall component parts. This is the standard set down by section 220 of the Restatement of Agency, cited by the court in Empire Star Mines.

The present case is concerned with the application of the California Unemployment Insurance Code to persons performing industrial work in their own homes for others. On the question of whether such home-workers are to be regarded as employees or as independent contractors, the courts have been somewhat divided, principally because of a difference of opinion as to whether the terms "employer," "employee" and "employment" as defined and used in the various statutes are to be given the same construction that they

are given by the common law in cases involving the relationship of master and servant.

In the McComb case relied upon by the Department, the defendant, a cooperative paid by bag manufacturers and composed of homeworkers, distributed to these home-workers bags owned by the manufacturers for insertion of draw strings. The homeworkers were paid on a piece work basis. In holding that the homeworkers therein involved were employees under the Fair Labor Standards Act the court stated:

> "As to the status of the homeworkers, we think it perfectly clear that, under common law concepts, they are employees and not independent contractors. . . . the law of independent contractors has an important place in the law, but surely it was never intended to apply to humble employees of this sort."

However, the court went on and stated:

> "Whether or not the homeworkers are employees within the meaning of the Fair Labor Standards Act, however, is to be determined, not by common law concepts, but by a consideration of the purpose which Congress had in mind in the passage of the act, which defines 'employ' as including 'to suffer or permit to work'. 52 Stat. 1060, 29 U.S.C.A. § 201, sec. 3. This definition of employment has been called by Senator, now Mr. Justice, Black the 'broadest definition that has ever been included in any one act'. 81 Cong. Rec. 7659; United States v. Rosenwasser, 323 U.S. 360, 362, 65 S.Ct. 295, 89 L.Ed. 301. 'The motive and purpose' of the legislation, as said by the Supreme Court in United States v. Darby, 312 U.S. 100, 115, 61 S.Ct. 451, 457, 85 L.Ed. 609, 132 A.L.R. 1430, are 'plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *'. As pointed out in a later case, 'The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To

> accomplish this purpose standards of minimum wages and maximum hours were provided.' Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 706-707, 65 S.Ct. 895, 902, 89 L.Ed. 1296. Such being the purpose of the statute, common law rules as to distinctions between servants and independent contractors throw but little light on who are to be deemed employees within its meaning. This was clearly stated by the Supreme Court in National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 855, 88 L.Ed. 1170, brought under the National Labor Relations Act, 29 U.S. C.A. § 151 et seq., a companion piece of legislation . . . ." (Emphasis added)

The McComb case cited with approval the following language appearing in the case of Walling v. Portland Terminal Co., 330 U.S. 148, 67 S.Ct. 639, 640, 91 L.Ed. 809:

> '". . . This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category. * * * The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this.'" (Emphasis added)

In view of the above quoted portions of the McComb case, we are not persuaded by the dicta of the court to the effect that the homeworkers were employees under the common law concept. It is clear that the court in that case was concerned only with coverage provisions of the Fair Labor Standards Act with respect to the homeworkers therein involved, and concluded that the controlling factor in deciding the issue was the broad statutory definition of "employ" under that Act. ("Employ" includes to suffer or permit to work--29 U.S.C.A. Section 203(g)) In our opinion the McComb case merely reflects that in the court's opinion it was the intention of Congress for the purposes of the Fair Labor Standards Act to treat homeworkers as any other type of employee, regardless of their common law status.

In our opinion the case of Glenn v. Beard (6 Cir - 1944), 141 F. 2d 376, Cert. den. by U.S. S.Ct. on October 9, 1944, 323 U.S. 724, 89 L.Ed. 582, 65

S.Ct. 57, is the leading and controlling case concerning the status of homeworkers under common law. In the Glenn case the question presented was whether the workers in question were independent contractors exempt from the provisions of the Social Security Act or whether they were employees subject to the Act. The alleged employer engaged women to make comforters, quilts and similar articles. The women did their work at home on farms. The homeworkers were supplied material stamped with designs and specifications for the work. The material and thread, together with instructions, were delivered to the worker at the time of the signing of the contract. The contract provided that the homeworker will work the material according to the specifications; that the work may be done at such times--within a designated period--and at such places as are agreeable to the workers; and, that further, the worker may do the work personally or by agents of her selection. The contract also provided that upon completion of the specified work and its delivery to the alleged employer, a certain price will be paid to the worker. There was no supervision of the work and no calls were made by the employer at the homes of the workers to inspect the work. The homeworkers worked when they wanted to and at such times in the year as their farm duties permitted them. In that case the court stated as follows in holding that the homeworkers were independent contractors and not employees:

> ". . . Employment under this statute is to be understood in its ordinary sense, as meaning the legal relationship of employer and employee; and this conclusion is fortified by the applicable regulations of the Commissioner of Internal Revenue, which sets forth that 'the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. * * * The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. * * * Individuals performing services as independent contractors are not employees.' Treasury Regulation No. 90, Art. 205, promulgated under Title IX of the Social Security Act."

In the present case the homeworkers were engaged in assembling small parts utilized by the petitioner in its manufacturing processes. There was no supervision of the manner and means of performing the work, and no calls were made at the homes of the workers to inspect the work. There were no deadlines to meet, and the workers could do the assembly work at their own convenience. Upon completion of a group of assemblies, they would be returned to the petitioner's plant by the homeworker at her own expense. The

homeworker was paid only for the completed work on a piecework basis. At the same time another group of parts to be assembled would be picked up, if the homeworker so desired. The homeworkers were licensed by the local authorities to work in their own homes, and there is evidence that at least one worker engaged in other types of businesses under her license. The parties believed that the workers were independent contractors and conducted their business affairs accordingly.

There is no evidence of any demands made by the petitioner upon these workers. We believe that under these facts the overall picture which emerges indicates that the homeworkers in this case were independent contractors and not employees. In light of the above facts we are not convinced that the simplicity of the work is a sufficient element to overcome the other indications of independence on the part of the workers.

We would point out that our decision in this case is in harmony with Revenue Ruling 64-280, 1964-2 Cum. Bul. 384, and with the holding of the court in the Glenn case. Although this board is not bound by a federal agency ruling in matters similar to that under discussion, it is our opinion that such a ruling must be accorded great weight in reaching a status determination. (Appeals Board Decision No. P-T-104) The above cited ruling reads in part as follows:

> "An individual, since 1953, has done typing in her home under an oral agreement with a corporation. She is contacted when work is available and furnished with materials and specifications. She is paid on a piecework basis upon completion of the assignment. Each assignment is a separate transaction and the individual is not guaranteed a minimum quota of work or compensation. The corporation does not restrict her from hiring helpers. The individual's services are not subject to the State licensing requirements. Held, the individual is not an employee of the corporation under the usual common law rules. Liability under the Federal Unemployment Tax Act and for the Collection of Income Tax at Source on Wages is not incurred. Held further, the individual is an employee of the corporation under section 3121(d)(3)(C) of the Federal Insurance Contributions Act as regards services performed after 1954 and liability under that Act is incurred with respect to the 'wages' for those services." (Emphasis added)

It should be noted that subsequent to the Glenn case, Congress (in 1948) enacted what is known as the "status quo" resolution, which confirmed the correctness of the Glenn case in applying the usual rules of common law status determination. Two years later Congress amended the Federal Insurance Contributions Act to embrace homeworkers by special statute within the coverage provisions of the Act, regardless of their status as independent contractors. At this time Congress also extended coverage, beyond the usual rules of common law, to three other categories of workers.

In 1970 Congress amended the Federal Unemployment Tax Act, similarly extending it to two of the four classes of workers to which it had extended coverage under the 1950 amendment of the Federal Insurance Contributions Act. It is most significant to us that at this time, when Congress clearly had before it the example of the four special classes to which it had extended coverage beyond the usual rules of common law in 1950 under the Federal Insurance Contributions Act, it deliberately limited such extension of coverage to only two of those four classes under the Federal Unemployment Insurance Act. Homeworkers were not one of the two classes under which such extended coverage was given in 1970. It is clear therefore that the status of homeworkers is still determined by the usual rules of common law as exemplified in Glenn v. Beard.

DECISION

The petition for review of claim for refund is granted under code section 1179.5.

Sacramento, California, January 27, 1972.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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