

THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

KMC FOODS, INC., a Virginia corporation)
)
 Petitioner,)
)
 v.) Docket No. 1249
)
 DIRECTOR OF REVENUE,)
)
 Respondent.)

BEFORE: Donald Gregory, Esq., Chairman, Todd C. Schiltz, Esq., Regina Dudzic, Cynthia
L. Hughes and Joan Winters, Members
John A. Ciccarone, Esq. for Petitioner
Jos. Patrick Hurley, Esq., Deputy Attorney General for Respondent

DECISION AND ORDER

The issue before the Board is whether goods petitioner places on a common carrier and ships outside the State are subject to gross receipts tax under 30 Del C. Section 2903. For the reasons set forth herein, we determine that such sales are not subject to the gross receipts tax and, thus, we grant judgment in favor of petitioner.

Petitioner operated a food processing facility in Clayton, Delaware from 1988 to 1991. Petitioner purchased the facility in 1988 from the Joseph Campbell Company ("Campbell's"), a New Jersey corporation. Prior to the sale of the Clayton facility to petitioner, the Clayton facility produced processed vegetables and meat products, all of which were used by Campbell's in its prepared soups and frozen entrees.

Simultaneous with petitioner's purchase of the Clayton facility, petitioner entered into a Processed Ingredients Purchase Agreement with Campbell's pursuant to which Campbell's agreed to purchase substantially all of the Clayton facility's product. The parties agree that in operating the Clayton facility the petitioner was a "wholesaler" as that term is defined 30 Del. C. Section 2901(7)(a)(2). At all times material to this proceeding, petitioner sold all of the product produced at the Clayton facility to Campbell's. This product was delivered to Campbell's by placing the product in the hands of common or contract carriers for delivery to locations outside the State of Delaware.

In 1989, the Division of Revenue responded to an inquiry by the petitioner regarding compliance with the Delaware gross receipts tax. By letter dated July 13, 1989, a special investigator for the Division of Revenue advised petitioner that it was exempt from the gross receipts tax as a wholesaler/food processor under 30 Del. C. 2903 because petitioner sold no goods in the State of Delaware.

On November 1, 1991, petitioner sold the Clayton facility to a third party. Thereafter, petitioner had no Delaware operations.

On July 19, 1995, the Division of Revenue sent petitioner a Notice of Assessment advising petitioner that the Division had determined that petitioner had failed to pay gross receipts tax for the tax years 1989 through 1991. The Division sought payment in excess of \$330,000 in taxes, penalties and interest. Relying on 30 Del. C. Section 2903(c)(1), the Division argued that goods placed on common carrier for delivery outside the State are subject to gross receipts tax and that petitioner had to pay a tax of 2/10 of 1 percent of the aggregate of

petitioner's monthly sales in excess of \$13,000. Petitioner filed a timely appeal from the Division's assessment and the matter was presented to this Board.

The parties agree that petitioner's gross receipts tax must be calculated in accordance with Title 30, Section 2903 of the Delaware Code. That section, in pertinent part, provides that the gross receipts tax assessed to a food processor is calculated ". . . at the rate of 2/10 of 1 percent of the aggregate gross receipts attributable to all goods sold by the food processor within this State, . . . In computing the fees due on each aggregate gross receipts for each month, there shall be allowed a deduction of \$13,000 . . ." (emphasis added).

Focusing on the language underlined above, the Division asserts that any sales of petitioner's product, regardless of whether the goods are shipped out of the State on a common carrier, are subject to the gross receipts tax. The Division also contends its interpretation of the statute is consistent with the decision in Franklin Fibre-Lamitex v. Director of Revenue, Del. Super., 505 A.2d 1296, aff'd, 511 A.2d 385 (1986), wherein the Court held that this Board had properly concluded that sales by a wholesaler involving the shipment of goods outside the State on a common carrier are "sales within this State" and subject to gross receipts taxation.

The petitioner disagrees, arguing that its sales, all of which involve product shipped by common carrier to Campbell's locations outside the State of Delaware, are not subject to gross receipts tax. Petitioner relies on 30 Del. C. Section 2901(2)(b)(i) which provides that "In the case of a wholesaler, 'gross receipts' includes total consideration received from the sales of tangible personal property physically delivered within the State . . . but shall not include: (i)

Delivery . . . to a common or contract carrier for shipment to a place outside this State."¹

Petitioner also contends that the special investigator's July 13, 1989 letter estopps the Division from assessing gross receipts tax against the petitioner.²

After considering both parties arguments, we have determined that petitioner's interpretation of the statute is proper. The Division's analysis focuses just on the language of Section 2903(c)(1) and ignores the pertinent definition of gross receipts found in Section 2901. This analysis violates one of the cardinal principals of statutory construction: statutes must be interpreted in such a manner to harmonize all of their provisions. Newtowne Village Service Corp. v. Newtowne Road Dev. Co., Del. Supr., 772 A.2d 172, 175-76 (2000).

In comparison, the petitioner's interpretation harmonizes all of the pertinent statutory provisions. Section 2903(c)(1) provides that a food processor must pay a tax on the "aggregate gross receipts attributable to all goods sold by the food processor within this State" 30 Del. C. Section 2903(c)(1). Petitioner's gross receipts, in turn, are defined to exclude the sale of any product that is placed on a common carrier and shipped outside the State. 30 Del. C. Section 2901(2)(b)(i). As the sales the Division seeks to tax do not even fall within the definition of petitioner's "gross receipts" which are subject to taxation, we conclude that the Division cannot levy a gross receipts tax on these sales.

¹ The parties stipulated that petitioner is a wholesaler for purposes of this statute. The Board agrees that petitioner is a wholesaler under Section 2903(7)(a)(2), which provides that wholesaler includes "every person engaged in the processing of food or foodstuffs."

² The parties agree that this issue requires a factual hearing and is not before the Board for consideration at this time.

Our conclusion is not inconsistent with the Franklin Fibre decision. Although that case involved the interpretation of language similar to that found in Section 2903(c)(1), the Court did not address whether Section 2901(2)(b)(i) excludes from gross receipts tax those goods shipped on common carriers outside the State. Indeed, the Section 2901(2)(b)(i) language we rely on was adopted after the tax in Franklin Fibre was imposed but before the issue had been finally resolved by the courts. Speaking to this amendment, the Superior Court stated "Subsequent to the decision of the Tax Appeal Board, 30 Del. C. Chapter 29 has been amended to provide [an exception for goods placed on common carriers and transported for sale outside the State] from its definition of gross receipts. Therefore, the decision of the Court is limited to the pre-amendment period." Franklin Fibre, 505 A.2d at 1298 n.3. As the Franklin Fibre Court expressly limited its opinion to the pre-amendment statute and as we rely on the statutory language the Court expressly declined to address, our conclusion is not inconsistent with Franklin Fibre.

For the foregoing reasons we conclude that judgment must be entered in favor of petitioner.








