TAX APPEAL BOARD OF THE STATE OF DELAWARE

DELAWARE MOTOR SALES, INC. and DELAWARE IMPORT VEHICLES, INC. Petitioners,	)	
v.	)	DOCKET NO. 1270
DIRECTOR OF REVENUE, Respondent.	)	

BEFORE: John H. Cordrey, Esquire, Chairman; Regina Dudziec and Cynthia L. Hughes; Members.

Douglas M. Hershman, Esq. and David N. WIlliams, Esq. Attorneys for Petitioners.

Jos. Patrick Hurley, Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

JOHN H. CORDREY, ESQUIRE, CHAIRMAN.

Petitioner, Delaware Motor Sales, Inc. (hereinafter at times referred to as "DMS"), and Petitioner, Delaware Import Vehicles, Inc. (hereinafter at times referred to as "DIV"), are corporations which engage in the business of selling, leasing and servicing of automobile products. Petitioners filed the present petition seeking to set aside the Notices of Determination of Respondent. The taxes in controversy are gross receipt taxes and the contention of Petitioners is that each of the corporations are separate entities and therefore each is entitled to use a separate deduction in the computation of the gross receipt taxes. Respondent contends that the entities comprise an enterprise with common ownership or common direction and control under 30 Del.C. §§2301 (d)(1), 2902 (c)(1) and 2905 (b)(1) thereby entitling Petitioners to only one deduction for each of the licensing activities.

Respondent filed the present motion for judgment on the pleadings or for summary judgment. Petitioners argue, and this Board agrees, that as there have been affidavits filed in this matter upon

which Respondent and Petitioners rely, the motion is not for judgment on the pleadings, but rather a motion for summary judgment. This is the Board's decision on that motion.

FACTS

Petitioner filed a Petition which alleged certain facts which were admitted by the Respondent. Respondent attached as Exhibit 1 to his opening brief "Important Information..." regarding licenses. Petitioners filed an affidavit of Michael S. Uffner with their response to Respondent's motion. Respondent filed an affidavit of William M. Remington with their reply brief.

The first issue is whether there is any material issue of fact which would preclude the consideration of the motion for summary judgment. Petitioners argue in their brief that "[t]here are material facts in dispute.." but only identify one factual issue of "whether these two companies... constitute an enterprise." Thereafter, during oral argument, Petitioners apparently abandoned this argument, for they agreed that the Board should consider the matter as cross motions for summary judgment. The Board does not find that the factual allegations of the petition, as admitted, the attachment to Respondent's opening brief and the affidavits are in conflict. The issue of whether these two companies constitute an enterprise is a legal determination which can be made with reference to the facts as presented to the Board. Therefore the matter is properly before the Board as a motion for summary judgment.

As stated, the facts are found within the admitted allegations of the pleadings, the exhibit and the affidavits. The Board adopts these facts for purposes of this motion. A synopsis of the facts are that DMS and DIV are two corporations engaged in selling, leasing and servicing automobiles. Both entities are owned by Michael and Marilyn Uffner. The two corporations have separate leases, at separate locations (1606 Pennsylvania Ave. and 1610 Pennsylvania Ave., Wilmington, DE), but in both leases the landlord is beneficially owned by the Uffners. DMS sells, leases and services Cadillac automobiles and DIV sells, leases and services Mitsubishi automobiles. Both DMS and DIV have their own separate: sales manager, sales staff, service manager, service staff, parts manager, parts staff, bank accounts, unemployment account, and financial statement. DMS must comply with the

requirements of a General Motors Corporation Dealer Agreement with regard to the capitalization, ownership, accounting and operation. DIV must comply with the requirements of a Mitsubishi Motor Sales of America, Inc. Dealer Sales and Service Agreement with regard to the capitalization, ownership, accounting and operation. Both DMS and DIV are managed by the Uffners and DIV pays a management and accounting fee to DMS.

ARGUMENTS

As stated above, in the event that Petitioners are pursuing the argument that there is a material issue of fact, thereby making summary judgment inappropriate, the Board finds that there are no material issues of fact. The sole issue is whether the Petitioners constitute "...entities comprising an enterprise with common ownership or common direction and control.." which should be treated as one and therefore allowed only one monthly deduction from the aggregate gross receipts of the entire enterprise. This issue is a legal issue, not a factual issue.

Respondent contends that the Board's decision in Valueline Foods of Delaware, Inc. v. Director of Revenue, Del.T.A.B., Dkt No. 850 (December 10, 1993) controls this matter. In Valueline, as in the case *sub judice*, the two companies were separately licensed, separately incorporated, had separate Federal Employer Identification numbers, filed separate books of account, were operated independently through separate store managers, and were owned together by a husband and wife. Respondent contends that the only difference between the two cases is that the present case involves selling automobiles and Valueline involved selling groceries.

Petitioners agree that there is common ownership of the entities. Petitioners argue that because DMS and DIV are each involved exclusively with different products supplied by different manufacturers under separate and distinct franchise agreements and were organized as separate businesses more than ten years apart they can not be considered to constitute an "enterprise." Petitioners point out that an "enterprise" must be shown as the statutes provide: "...all branches or entities comprising an enterprise with common ownership or common direction and control shall be treated as one, and shall be allowed only one monthly deduction..." Had the statute provided that "all

entities with common ownership" are entitled to only one monthly deduction, there would be no question. As the statute contains the additional language it must have meaning.

When this Board reviewed this statute in Valueline we concluded that "enterprise" meant an undertaking for profit. Petitioners argue that the Board was too broad in its interpretation in Valueline and request that we revisit our ruling. The Board agrees that we may have interpreted "enterprise" a little too broadly in Valueline.

Under our Valueline definition of "an undertaking for profit" it is hard to envisage two or more entities which would not be an enterprise. That is not what the Board intended to hold. The issue of whether a grocery store and a car dealership under common ownership would constitute an "enterprise" was not before the Board in Valueline nor is it before the Board today. The Board believes that a better definition of "enterprise" is an undertaking for profit in a particular line of business. As modified the Board affirms our decision in Valueline.

Perhaps this definition does not provide a means of determining when two businesses are an enterprise, but we do not believe that any definition envisioned by the Legislature would result in Petitioners receiving two monthly deductions. We think that DMS and DIV are engaged in the enterprise of selling automobiles under common ownership, therefore they are entitled to only one monthly deduction.

Accordingly, the Petition is denied.

IT IS SO ORDERED this 9th day of February, 2001.

John N. Cooley

Regina C. Rodgers

Cynthia L. Hughes