

TAX APPEAL BOARD OF THE STATE OF DELAWARE

MUSIC SERVICE & INVESTMENT CO., LLC,)	
)	
Petitioner,)	
)	
v.)	Docket No. 1439
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

BEFORE: Todd C. Schiltz, Esq. Chairman, Steven R. Director, Esq., Vice-Chairman,
Cynthia L. Hughes and Joan M. Winters, CPA, Members

Dwight V. Lanning, for Petitioner.

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

DECISION AND ORDER

This petition relates to the availability of a gross receipts tax deduction under 30 Del. C. § 2301(d) ("Section 2301(d)"). Specifically, petitioner Music Service & Investment Co., LLC ("Musico") filed the present petition seeking to set aside the decision of the Director of Revenue that Musico and non-party Lanco Realty Company, Inc. ("Lanco") constitute a single enterprise with common ownership, direction and/or control under Section 2301(d) and, as a result, that these two entities are entitled to only one monthly gross receipts tax deduction. Musico contends that it and Lanco are distinct entities which are not under common ownership, direction or control for purposes of Section 2301(d).

For the reasons set forth below, we conclude that Musico and Lanco comprise a common enterprise with common ownership for purposes of Section 2301(d). As a result, Musico's petition must be denied.

FACTS¹

Musico is a Delaware limited liability company that originally was formed in 1977 as a partnership by Van Lier Lanning ("Van Lier") and Dwight V. Lanning ("Dwight"), Van Lier's son. The purpose of the enterprise was to develop a parcel of commercial real estate located at 5303 Concord Pike in Wilmington, Delaware. Subsequent to the formation of the partnership, Van Lier and Dwight made their wives partners of Musico and each of the four held a 25% ownership interest in the partnership. Later, the partnership purchased the adjoining commercial property located at 5321 Concord Pike.

In the years before his death, Van Lier and his wife gave their children, Dwight and his sisters Elaine DeLones and Bette deCourcelle, and their grandchildren ownership interests in Musico as gifts. After Van Lier's death, Dwight and his sisters purchased from their mother the remaining ownership interest she held in Musico.

In 1998, the Musico partnership was converted into a limited liability company. The Musico limited liability company agreement ("LLC Agreement") states that the purpose of the enterprise is "to invest in, develop and manage real estate or other property for profit." The LLC Agreement names Dwight as the manager of Musico and as manager he has the right to and actually does manage the affairs of this company. Musico is a landlord and it leases the commercial properties it owns at 5303 and 5321 Concord Pike. Dwight's management includes managing, leasing and maintaining the commercial properties owned by Musico.

All of the owners of Musico are related to Van Lier and his wife. The family members each own the following percentages in the company: Dwight Lanning, son of Van Lier, owns 36%; Deborah Lanning, Dwight's wife, owns 25%; Adrian Lanning, son of Dwight, owns 5%;

¹ The following facts are derived from the stipulation of facts the parties filed with the Board and the factual hearing that supplemented that stipulation.

Kimberly Lanning, daughter of Dwight, owns 5%; Elaine DeLones, daughter of Van Lier, owns 8%; Bette deCourcelle, daughter of Van Lier, owns 9%; Louis Mauro, son of Bette, owns 4%; Dean Mauro, son of Bette, owns 4%; and Joy Dingler, daughter of Bette, owns 4%.

Lanco is a Delaware S-corporation founded in approximately 1967. Its sole asset is a parcel of real property located at 2302 Concord Pike, Wilmington, Delaware. This property consists of the building that housed the Lanning Music Company until approximately 1980. Since then, the building has been leased to various other tenants.

Lanco presently is owned by Dwight (40%) and his sisters Elaine (30%) and Bette (30%). The three came to own their shares by purchase and inheritance from their parents. While Dwight is Lanco's president, he has no active role in the management or affairs of this company. Lanco is a landlord and it leases the real property and building that it owns at 2302 Concord Pike. Elaine manages the leasing of the premises and all other matters that arise in connection with Lanco.

The following chart details the family members' ownership interest in Musico and Lanco:

	Musico	Lanco
Dwight Lanning	36%	40%
Deborah Lanning	25%	
Adrian Lanning	5%	
Kimberly Lanning	5%	
Elaine DeLones	8%	30%
Bette deCourcelle	9%	30%
Louis Mauro	4%	
Dean Mauro	4%	
Joy Dingler	4%	

The Delaware tax code requires a commercial lessor to obtain a commercial lessor license and pay a gross receipts tax to the extent the lessor's income exceeds \$80,000 per month. While the commercial lessor license requirement and gross receipts tax have been part of the Delaware tax code since 1976, neither Musico nor Lanco held a license until 2005 when they were made aware of the requirement by their new accountant. The entities then self-disclosed their prior non-compliance and the Respondent issued assessments for tax years 1997, 1998 and 2002 through 2005. The assessment allowed only one monthly deduction of \$80,000 per month because the Respondent determined that Musico and Lanco constituted a single enterprise with common ownership, direction or control. Musico protested the assessments arguing that the two companies should be viewed independently and that each was entitled to its own \$80,000 per month deduction from the gross receipts tax. The parties were unable to resolve their dispute and this proceeding ensued.

ANALYSIS

Section 2301 of the Delaware tax code provides, in pertinent part, as follows:

(a) "Persons" . . . engaged in the occupations listed and defined in this section shall pay annual license taxes at the rates specified below.

* * *

(6) Commercial lessor, \$75. "Commercial lessor" includes every person who, as lessor or sublessor, receives rental income pursuant to any agreement transferring a title interest or possessory interest in real property located in this State under a lease of a commercial unit for any term.

* * *

(d)(1) In addition to the license fee required by subsections (a) and (b) of this section, every person shall also pay a license fee at the rate of 0.307% of the aggregate gross receipts paid to such person attributable to activities licensable under this chapter, which fee shall be payable monthly on or before the 20th day of each month with respect to the aggregate gross receipts for the immediately preceding month. In computing the fee due on such aggregate gross receipts for each month, there shall be allowed a deduction of \$80,000. *For purposes of this subsection, all branches or entities comprising an enterprise with common ownership or common direction and control shall be allowed only 1 monthly deduction from the aggregate gross receipts of the entire enterprise.*

30 Del. C. § 2301 (emphasis added).

Prior decisions of this Board interpreting language identical to the above state that, in order for two or more entities to be limited to just one monthly gross receipts deduction, the two entities: (1) must be part of a single enterprise, and (2) must be under common ownership or common direction and control. *Bear-Season's Pizza & Restaurant, Inc. v. Director of Revenue*, Dkt. No. 1286 (Del. Tax App. Bd. March 9, 2001); *Del. Motor Sales, Inc. v. Director of Revenue*, Dkt. No. 1270 (Del. Tax App. Bd. Feb. 9, 2001); *Valueline Foods of Delaware, Inc. v. Director of Revenue*, Dkt. No. 850 (Del. Tax App. Bd. Dec. 10, 1993).

Our prior decisions also hold that two or more entities are part of a single enterprise if the entities are pursuing a profit in the same line of business. *Bear-Season's Pizza & Restaurant, Inc. v. Director of Revenue*, Dkt. No. 1286 (Del. Tax App. Bd. March 9, 2001); *Del. Motor Sales, Inc. v. Director of Revenue*, Dkt. No. 1270 (Del. Tax App. Bd. Feb. 9, 2001); *Valueline Foods of Delaware, Inc. v. Director of Revenue*, Dkt. No. 850 (Del. Tax App. Bd. Dec. 10, 1993). As Musico and Lanco are both landlords who lease commercial property for a profit, we conclude that they properly are viewed as a single enterprise.

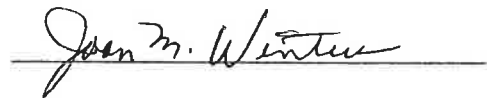
We also conclude that Musico and Lanco are under common ownership. It is undisputed that Dwight and his sisters own 100% of Lanco and 53% of Musico and that a small number of their immediate relatives hold the remainder of the interests in Musico. Under Section 2301(d), common ownership does not mean identical ownership. The facts of this case make clear that there is common ownership of Musico and Lanco.²

² In their submissions, the parties have raised the issue of whether or not the ownership interests of Dwight's wife and children and Bette's children should be attributed to Dwight and Bette respectively for purposes of determining whether common ownership exists. Dwight, Elaine and Bette alone establish common ownership and thus we need not address the application of any attribution rules. We do note, however, that the

In its submissions to the Board, Musico focused on the fact that it is managed entirely by Dwight and Lanco is managed entirely by Elaine. While this fact bears on the question of whether the two entities are under common direction and control, Section 2301(d)(1) is in the alternative: "common ownership or common direction and control." 30 Del. C. § 2301(d)(1) (emphasis added). Here, we have found common ownership and need not address or find common direction and control in order to resolve the issue before the Board. Who manages the entities and whether management of the entities overlaps has no bearing on the issue of common ownership.

CONCLUSION

For the reasons stated, we hold that Musico and Lanco are a single enterprise under common ownership for purposes of Section 2301(d)(1) and, thus, that they are allowed only one monthly gross receipts tax deduction per month.



Date: June 13, 2007

Delaware General Assembly has recognized the propriety of attribution in other, related contexts. 30 Del. C. § 2124(b)(1) and 2125(a)(1).