

TAX APPEAL BOARD OF THE STATE OF DELAWARE

SHURE-LINE ELECTRICAL, INC.)
)
 Petitioner,)
)
 v.) Docket No. 1660
)
 DIRECTOR OF REVENUE,)
)
 Respondent.)

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice-Chairman, Joan M. Winters, CPA, and Sindy Rodriquez and Robert Slavin, Members

James J. Gallagher, Esq., and James A. Landon, Esq., of Morris James LLP, for petitioner Shure-Line Electrical, Inc.

Jennifer R. Noel, Esq., Deputy Attorney General, for respondent Director of Revenue

DECISION AND ORDER

The issue before the Board is whether petitioner Shure-Line Electrical, Inc. (“Electrical”) and non-party Shure-Line Construction, Inc. (“Construction”) comprise “an enterprise with common ownership or common direction and control” within the meaning of 30 *Del. C.* § 2502(c)(1). For the reasons set forth below, the Board determines that Electrical and Construction do not constitute an “enterprise” as that term has been defined in prior opinions of the Board. As a

result of this ruling, there is no need for the Board to determine if Electrical and Construction have common ownership or common direction and control.

STATUTORY FRAMEWORK

Title 30, Section 2502(a) of the Delaware Code provides that “[a]ny person desiring to engage in business in this State as a contractor shall obtain a license upon making application to the Division of Revenue and paying a fee of \$75.”

Section 2502(c)(1) provides, in relevant part, that “[i]n addition to the license fee required by subsection (a) of this section, every contractor shall pay a license fee of 0.6472% of the aggregate gross receipts paid to such contractor which fee shall be payable monthly on or before the twentieth day of each month with respect to the aggregate gross receipts for the immediately preceding month.” 30 *Del. C.* § 2502(c)(1). The additional license fee that is based on gross receipts is commonly referred to as the gross receipts tax.

Notably, contractors are given a “deduction” of \$100,000 when calculating the monthly gross receipts tax they owe under Section 2502(c)(1). 30 *Del. C.* § 2502(c)(1) (“In computing the fee due on such aggregate gross receipts for each month, there shall be allowed a deduction of \$100,000.”) The consequence of this deduction is that the first \$100,000 of a contractor’s monthly gross receipts is exempt from the gross receipts tax.

Of significance here, Section 2502(c)(1) further provides that “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.” *Id.*

Thus, if Electrical and Construction “compris[e] an enterprise with common ownership or common direction and control,” then they are jointly entitled to just one monthly \$100,000 deduction and they will owe more gross receipts tax than if each is entitled to its own \$100,000 monthly deduction.¹

THE NOTICES OF ASSESSMENT

Electrical is licensed as a contractor under Title 30, Chapter 25, and for the period January 1, 2013 through January 31, 2015 (the “Tax Period”), it filed gross receipts tax returns and paid the tax reflected as due thereon. When calculating the tax that was due, Electrical claimed a \$100,000 deduction for each month during the Tax Period. Construction is also licensed as a contractor under Title 30, Chapter 25, and it also claimed a \$100,000 deduction on the separate gross receipts tax returns it filed during the Tax Period.

¹ Numerous sections of the Delaware Code pertaining to taxation of receipts follow the license fee/tax structure set forth in Section 2502 and contain the same phrase, “comprising an enterprise with common ownership or common direction and control,” to limit the circumstances in which two or more entities can claim a separate deduction. 30 *Del. C.* § 2301 (service providers); 30 *Del. C.* § 2702 (manufacturers); 30 *Del. C.* § 2703 (automobile manufacturers); 30 *Del. C.* § 2902 (wholesalers); 30 *Del. C.* § 2903 (food processors); 30 *Del. C.* § 2904 (commercial feed dealers); 30 *Del. C.* § 2905 (retailers); 30 *Del. C.* § 2906 (restaurant retailers); 30 *Del. C.* § 2907 (farm machinery retailers); 30 *Del. C.* § 2908 (grocery supermarket retailers); 30 *Del. C.* § 4305 (lessors of tangible property other than motor vehicles).

On or about March 3, 2015, the Director of Revenue issued 25 Notices of Assessment to Electrical. Each of the Notices disallowed Electrical's monthly \$100,000 deduction during the Tax Period on the ground that it and Construction "compris[e] an enterprise with common ownership or common direction and control" and, therefore, they were entitled to just one monthly \$100,000 deduction. Electrical disputes this determination and has appealed the issue to the Board.

ANALYSIS

The Board has addressed the question of whether two entities comprise an enterprise with common ownership or common direction and control on several occasions. *EHM Pencader VII LLLP v. Director of Revenue*, Dkt. Nos. 1538 and 1541 (Del. Tax App. Bd. Dec. 10, 2014); *Music Service & Investment Co., LLC v. Director of Revenue*, Dkt. No. 1439 (Del. Tax App. Bd. June 13, 2007); *Bear-Seasons Pizza & Restaurant, Inc. v. Director of Revenue*, Dkt. No. 1286 (Del. Tax App. Bd. Mar. 9, 2001); *Del. Motor Sales, Inc. v. Director of Revenue*, Dkt. 1270 (Del. Tax App. Bd. Feb. 9, 2001); *Valueline Foods of Del., Inc. v. Director of Revenue*, Dkt. 850 (Del. Tax App. Bd. Dec. 10, 1993).

These opinions hold that "two or more entities comprise an enterprise if the entities are pursuing a profit in the same line of business." *EHM Pencader* at 7. Whether or not two entities are pursuing a profit in the same line of business is a factual issue that requires an examination of all of the pertinent facts. *See Bear-*

Seasons Pizza (stating that the decision should not be read “to suggest that all restaurants are engaged in the same line of business just because all restaurants engage in the sale of food and beverages. While two taxpayers could be categorized within one broad industry, e.g., restaurateurs, the nature of the goods and/or services provided by one taxpayer may be sufficiently different from the goods and/or services provided by another taxpayer such that the two would not be in the same line of business.”)

In his briefing, the Director of Revenue has focused on just one fact – that both Electrical and Construction are licensed as contractors under Title 30, Chapter 25 – to support his argument that Electrical and Construction are pursuing a profit in the same line of business. Director of Revenue’s Answering Brief at 10 (“Any determination of [Electrical and Construction’s] lines of business should be determined by reference to the provisions of the applicable statutory framework, which defines a Contractor . . . Both Entities are contractors as that term is set forth in the statute” and, therefore, “they pursue a profit in the same line of business, to wit, as contractors.”)

This analysis is flawed. If the General Assembly had meant to equate the term “enterprise” with the manner in which two or more entities are licensed, it easily could have drafted Section 2502(c)(1) to provide as follows: “For purposes of this subsection all branches or entities licensed as contractors ~~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.” It did not and we cannot interpret the statute in a manner that effectively rewrites it. *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 671 A.2d 874, 879 (Del. Ch. 1994) (rejecting argument that would “rewrite clear statutory provisions under the guise of ‘interpretation.’”), *aff’d*, 676 A.2d 907 (Del. 1996).

More fundamentally, when all the undisputed and stipulated facts are taken into consideration, it becomes clear that Electrical and Construction are not pursuing a profit in the same line of business:

- Electrical provides electrical wiring and installation services while Construction provides mechanical process piping fabrication and installation and structural steel fabrication and erection.
- All of Electrical’s skilled employees are electricians while Construction’s skilled employees consist of mechanics, pipefitters, welders and iron workers. There are, at most, de minimis tasks performed by the employees of Electrical or Construction that could be performed safely and professionally by the employees of the other corporation.
- Electrical and Construction have somewhat different customer bases. Construction provides services exclusively for commercial customers,

including general contractors, and for industrial customers, such as chemical and pharmaceutical plants, energy terminals, industrial plants, food and beverage plants and wastewater treatment plants. Construction provides no services to residential customers. Electrical, in comparison, provides services to commercial, industrial and residential customers, with at least 40 percent of its business arising from residential activities, including service calls.

In addition to providing different services, by different employees to somewhat different customers, the parties have stipulated that Electrical and Construction “do not operate as if the corporations are consolidated or are otherwise a single enterprise.” (SOF ¶ 15) Thus, for example:

- Each entity typically submits its own independent bid proposals to potential customers. They only submit joint bids when the project needs both construction and electrical related services and the potential customer asks them to submit a joint bid. Construction routinely works on projects in which the electrical work is contracted out separately by the customer and is performed by a contractor other than Electrical.
- Electrical does provide subcontracting work to Construction in some instances, but this work generates very little of Electrical’s total

revenue: 2.4% for fiscal year ending June 30, 2013; 5.5% for fiscal year ending June 30, 2014, and 1.2% for fiscal year ending June 30, 2015.²

- When Electrical and Construction pursue financing, they act independently and each entity borrows only the amount it needs to fund its operations. The resulting debt is never guaranteed by the other corporation or cross-collateralized with the other corporation's assets or accounts.
- Electrical and Construction have separate corporate headquarters that are located at separate addresses.
- Construction does provide some back office management and administrative services to Electrical, but these services are provided pursuant to a management agreement.

Collectively, these facts demonstrate that Electrical and Construction are not pursuing a profit in the same line of business and, therefore, that they are not an enterprise under Section 2502(c)(1).

² In his Answering Brief, the Director of Revenue expresses concern that taxpayers that integrate vertically or horizontally may incorporate multiple entities and attempt to claim multiple gross receipts tax deductions even though the entities are effectively operating as a single enterprise in the same line of business by providing a larger set of services to clients. The Board shares this concern and in the appropriate case, *e.g.*, where a significant amount of one taxpayer's revenue is derived from work done with or for another taxpayer with common ownership or common direction and control or there are other facts indicating that the entities work together as a single enterprise, the result may be different. The facts matter in each case and the facts here do not demonstrate that Electrical and Construction, although legally separate entities, are a single enterprise in the same line of business. To the contrary, one is an electrical contractor and the other is steel and pipe fabricator, erector and installer.

CONCLUSION

For the foregoing reasons, the Board rules in favor of the petitioner. The assessments previously issued by the Director of Revenue in the Notices of Assessment are set aside and shall not be enforced.



Robert Slaw



SO ORDERED this 12th day of April, 2017.