

BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

THE GREAT ATLANTIC & PACIFIC )  
TEA COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) Docket Nos. 534, 535, 536, 547,  
 ) 567, 572, 581, 588,  
DIRECTOR OF REVENUE, ) 593  
 )  
Respondent. )

Before: Maurice A. Hartnett, III, Esquire, Cyric W. Cain, Jr.,  
Joseph J. Longobardi, Jr., Esquire, Rhett McGriff,  
Nettie C. Reilly, Board Members.

Thomas P. Sweeney, Esquire and Richard G. Bacon, Esquire for  
Petitioner.

Stephen R. Spiller, Esquire, Special Counsel for Respondent.

DECISION

Maurice A. Hartnett, III: Petitioner, a Maryland corporation, filed several petitions for a Claim for a Refund for retail merchant license fees paid. All of the petitions are similar and will be treated herein as one petition. A Stipulation of Agreed Facts was entered into by petitioner and respondent. No material fact is in dispute. The Claim for Refund is predicated on petitioner's claim that each of its branch stores in Delaware is entitled to a \$20,000.00 quarterly exclusion from the retail and merchants' license fee imposed by 30 Del. C. §2905(b). During the time in question petitioner operated between 19 and 22 branch stores in Delaware.

30 Del. C. 2905(b) imposes a license fee on retailers. This fee is computed on the aggregate purchase price of goods purchased by a retailer for resale. A \$20,000 per quarter reduction or exclusion

from purchases is allowed in computing the fee due.

"Retailer" is defined in 30 Del. C. 2901(5).

Petitioner claims that each of its branch stores is a separate retailer within the meaning of that section and is consequently entitled to a \$20,000 reduction or exclusion from aggregate purchases in computing the license fee required by 30 Del. C. 2905(b).

In deciding this issue it is necessary to read both 30 Del. C. 2901(5) which defines "retailer" and 30 Del. C. 2905(b) which imposes the license fee and which grants the \$20,000 quarterly reduction sometimes referred to as an "exclusion".

The sole question presented is whether each branch store of petitioner is a separate retailer within the meaning of the statute and whether each store is therefore entitled to a \$20,000 reduction each quarter from purchases in computing the amount of the fee, or whether petitioner is but one retailer, as defined in the Statute, and is therefore entitled to but one \$20,000 reduction per quarter from its aggregate purchases for all its stores for the quarter.

30 Del. C. 2905(b), if read alone, would seem to pose no problem of interpretation. Petitioner would be considered to be a retailer within the Statute and entitled to but one \$20,000 reduction per quarter regardless of how many stores it operates in Delaware.

30 Del. C. 2901(5), however, defines retailer. The question, therefore is, does the definition of retailer in 30 Del. C. 2901(5) necessarily imply that each branch store of petitioner is a separate retailer and each branch store is therefore entitled to a \$20,000 per quarter reduction or exclusion from purchases in computing the license fee. The draftsmanship of 30 Del. C. 2901(5) leaves much to be desired.

The Legislative history of the two sections is of little help.

57 Del. Laws Chapter 136 (H.B. 296 125th General Assembly) enacted on June 12, 1969, was a general revision of the state business license fee law.

Section 16 of H.B. 296 enacted 30 Del. C. 2901(e) as follows:

"(e) 'Retailer,' for purposes of this Part, except as provided in the definition of 'Wholesaler,' includes every person engaged as owner or agent in the business of selling or exchanging goods for cash or barter or any consideration on the assumption that the purchaser of such goods has acquired the same for ultimate consumption or use and not resale; and where engaged in the foregoing business, includes trading stamp redemption stores, and catalog stores; and includes branch stores, warehouses and distributing depots of persons whose principal place of business is located inside or outside the State to the extent that goods are sold or exchanged for ultimate consumption or use and not resale."

This section was later codified in the Del. Code as 30 Del. C. 2901(5).

This was the first legislative act to define "retailer" in connection with business license fees and taxes.

This act also repealed 30 Del. C. §2921 which formerly imposed separate license fee requirements on individual branch stores.

Section 16 of H.B. 296 also enacted 30 Del. C. 2905(b) as follows:

"(b) In addition to the license fee required by subsection (a) of this section every retailer shall pay an annual license fee at the rate of one-half of one percent (1/2%) of the aggregate purchase price attributable to all goods purchased amounting to one hundred thousand dollars (\$100,000.00) or less for sale within this State; plus one percent (1%) of the aggregate purchase price attributable to all goods purchased by the retailer in excess of one hundred thousand dollars (\$100,000.00) and up to and including one million dollars (\$1,000,000.00) for sale within this State; plus one and one-half percent (1-1/2%) of the aggregate purchase price attributable to all goods purchased by the retailer in excess of one million dollars (\$1,000,000.00) for sale within this State. The aggregate purchase price attributable to all goods

purchased upon which the license fee is computed shall be reduced by eight thousand dollars (\$8,000.00) annually."

H.B. 296, as introduced, was passed without amendments.

Later in the same year the 125th General Assembly enacted 57 Del. Laws Chapter 188 (H.B. 426) which by Section 15 amended 30 Del. C. §2901(e) (codified as §2901(5) as follows:

"Section 15. Section 2901(e), Title 30, Delaware Code, is amended by adding the words "includes automatic merchandising machine operators regardless of the product dispensed or vended, hucksters, peddlers and also" immediately after the words "foregoing business," as they appear therein."

Section 15 of 57 Del. Laws Chapter 136 (H.B. 296) as previously quoted also enacted 30 Del. C. 2905(b) which imposed increased retailer license fees.

Later the same year the same 125th General Assembly amended 30 Del. C. 2905(b) by enacting Section 33, 57 Del. Laws Chapter 188 (H.B. 426 as amended by H.A. 3, 5, 6, 7, 9, 12, 13 and 14) as follows:

"Section 33. Section 2905, Chapter 29, Title 30, Delaware Code, is amended by repealing all of subsection (b) thereof and substituting in lieu thereof a new subsection (b) to read as follows:

"(b) In addition to the license fee required by subsection (a) of this section every retailer shall pay an annual license fee at the rate of four-fifths of one percent (4/5%) of the aggregate purchase price attributable to all goods purchased for sale within this State. The aggregate purchase price attributable to all goods purchased upon which the license fee is computed shall be reduced by twenty-five thousand dollars (\$25,000) annually."

H. B. No. 426 as originally introduced contained a different version of this section as follows:

"(1) Every retailer subject to the provisions of Section 2905(b) shall pay an annual license fee at the rate of one and one-

eight percent (1-1/8%) of the aggregate purchase price attributable to all goods purchased for sale within the State. The aggregate purchase price upon which this tax is computed shall be reduced by \$50,000 annually."

H.A. No. 13 to H.B. 426 became the final version of Section 33, H.B. 426 as quoted above.

In 1970 the 125th General Assembly again amended 30 Del. C. 2905(b). In that year, Section 1, 57 Del. Laws 389 was enacted to read:

"Section 1. Title 30, Delaware Code, Section 2905 is amended by striking the words "twenty-five thousand dollars (\$25,000.00) annually," as they appear in subsection (b) thereof and inserting in lieu thereof the following:

twenty thousand dollars (\$20,000.00) each quarter. Said twenty thousand dollars (\$20,000.00) reduction is not to be accumulated, but is applicable for each quarterly installment due pursuant to section 2905(c) of this Title.

Thus the annual exclusion became a quarterly exclusion. About the only thing which is apparent from the legislative history is that the 125th General Assembly had ample opportunity to correct the ambiguities in 30 Del. C. 2901(e) and 2905(b), but chose not to do so.

Petitioner maintains that the clear meaning of the statute defining retailer (30 Del. C. 2901(5)) is that each branch store of a retailer is a separate "retailer" for the purpose of computing the quarterly exclusion or reduction.

Respondent maintains that the statute does not so provide.

None of the cases cited by petitioner deal with the precise question before the Board. Respondent did not submit any authorities.

The meaning of 30 Del. C. 2901(5) might be clearer if the surplus language is deleted.

If we delete the surplus language it reads:

"(e) 'Retailer,' for purposes of this Part,... includes every person engaged as owner or agent in the business of selling or exchanging goods for cash...on the assumption that the purchaser of such goods has acquired the same for ultimate consumption or use and not resale; and where engaged in the foregoing business, includes...hucksters, and also includes trading stamp redemption stores,...and includes branch stores, warehouses, and distributing depots of persons whose principal place of business is located inside or outside the State to the extent that goods are sold or exchanged for ultimate consumption or use and not resale."

It seems to us that the words "and includes branch stores, warehouses,..." in 30 Del. C. 2901(e) merely makes clear that a retailer located without the State cannot escape the tax merely because he operates in Delaware through branch stores.

It would have been very easy for the General Assembly to have added the words "Each branch store shall be considered as a separate retailer" or similar language but it did not do so.

It would also have improved the clarity of the section if the section had been divided into two or more sentences.

Nowhere do we find in the section, however, an intention by the General Assembly that each branch store is to be considered to be a separate retailer or that each branch store is entitled to a separate reduction or exclusion from the license fees.

The General Assembly, if it had intended such a result, could easily have said so. It chose on three separate occasions not to say so.

We, therefore, hold that petitioner is entitled to but one quarterly exclusion or reduction of \$20,000, no matter how many branch stores it operates in Delaware.

In reaching this result we did not have to rely on 30 Del. C. 2114(b) which states:

"(b) For purposes of determining the amount of license fees due as provided in this Part, for the privilege of carrying on any separate business or occupation, all entities comprising an enterprise with common direction, control and purpose shall be considered as one."

However, the provisions of that section reinforces our finding herein.

In the instant case petitioner paid the fees alleged to be due by the Respondent. Petitioner therefore paid the fees without any reduction or exclusion except for the one reduction or exclusion each retailer is entitled to.

Petitioner, therefore, cannot be assessed any penalties for lack of timely paying the fees due.

For the guidance of the Director of Revenue, however, in other similar cases which may be before the Director, we take notice of the fact, as appears in the Stipulation of Facts, that the Director sent separate quarterly license tax return forms to each branch store of petitioner for a period of time. The forms provided for a \$20,000 quarterly exclusion, at least by implication, for each branch store. While we do not think the Director of Revenue is estopped or prohibited from collecting the tax due without allowing a separate \$20,000 exclusion or reduction for each branch store operated by a retailer, we do believe the Director may have misled some retailers with branch stores.

We, therefore, do not believe it would be fair or equitable for the Director to assess any penalty for any deficiency which resulted from a retailer excluding \$20,000 or purchases from

the purchases of each branch store operated by the retailer, if the retailer promptly pays the additional fees due as a result of this opinion.

SO ORDERED.

James H. Carter

Cyril W. Cain

Keith McGriff

Nettie C. Reilly

Date 3/12/75



SYNOPSIS

DOCKET NOS. 534, 535, 536, 547, 567, 572, 581, 588, 593

TAX SEGMENT:           LICENSE TAX (Retail-Wholesale)

ISSUE:                    The question is whether Petitioner is entitled to a \$20,000 quarterly exclusion for the retail and merchants' license fee imposed by 30 Del. C. § 2905 (b) for each of the branch stores in Delaware.

The fee is computed on the aggregate purchase price of goods purchased by a retailer for resale. A \$20,000 per quarter reduction or exclusion from purchases is allowed in computing the fee due.

Petitioner claimed that each of its branch stores is a separate retailer within the meaning of 30 Del. C. § 2901 (5) and consequently entitled to a \$20,000 exclusion or reduction from aggregate purchases in computing the license fee required by 30 Del. C. § 2905 (b).

TAB DECISION:           The Tax Appeal Board held that under 30 Del. C. § 2901 (e) (codified as 2905 (b)) a retailer located within the State cannot escape the tax merely because he operated in Delaware through branch stores. It was found that nowhere in the statute did the General Assembly state an intention that each branch store is to be considered to be a separate retailer or that each branch store is entitled to a separate reduction or exclusion from the license fee.

The Tax Appeal Board did not have to rely on 30 Del. C. § 2114 (b) which states:

"(b) For purposes of determining the amount of license fees due as provided in this Part, for the privilege of carrying on any separate business or occupation, all entities comprising an enterprise with common direction, control and purpose shall be considered as one."

- (1) NOTE:   Petitioner cannot be assessed any penalties for lack of timely paying the fee due. This is due to the fact that separate notices were sent to each of the branch stores.
- (2) NOTE:   Chapter 24, Laws 1975 replaced \$20,000 quarterly exclusion with \$10,000 monthly exclusion.

SYNOPSIS (continued)

DOCKET NOS. 534, 535, 536, 547, 567, 572, 581, 588, 593

DECISION: For Respondent

DECISION DATE: March 12, 1975

INFORMATION NOTE:

The Tax Appeal Board decision was upheld by  
Superior Court 5091 CA 1975, 9/8/75.