

TAX APPEAL BOARD OF THE STATE OF DELAWARE

VALUELINE FOODS OF)	
DELAWARE, INC.,)	
)	
Petitioner,)	
)	
v.)	Docket No. 856
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

Francis J. Trzuskowski, Esquire, of Trzuskowski, Kipp, Kelleher & Pearce, P.A. for Petitioner

Joseph Patrick Hurley, Jr., Esquire, Deputy Attorney General for Respondent.

DECISION AND ORDER

Joseph S. Yucht, Esquire, Chairman. The facts in this case are not in dispute and have been stipulated as follows:

"(1) Valueline Foods of Delaware, Inc. is a Delaware corporation with its principal place of business at 714 S. Maryland Avenue, Wilmington, Delaware 19804.

(2) Polly Drummond Thriftway, Inc. is a Delaware corporation with its principal place of business at Polly Drummond and Linden Hill Roads, Pike Creek Valley, Wilmington, Delaware, 19808.

(3) Valueline Foods of Delaware, Inc. and Polly Drummond Thriftway, Inc. are and were at all times material hereto licensed separately under the Delaware retail and wholesale merchants licensing law as retailers, and both are and at all time material hereto were engaged in the retail sale of food and food products.

(4) The stock of Valueline Foods of Delaware, Inc. is owned 50% by Michael Zingo and 50% by his wife, Alexandria Zingo.

(5) The stock of Polly Drummond Thriftway, Inc. is owned 100% by Michael Zingo.

(6) Michael Zingo is the President of Valueline Foods of Delaware, Inc. and Polly Drummond Thriftway, Inc.

(7) Each of the aforementioned corporations have separate Federal Employer Identification numbers, file separate Federal and State of Delaware corporate income tax returns, have separate payroll accounts, separate bank accounts, and maintain separate accounts payable and separate purchasing accounts, and each is operated, functions, and is managed separately and independently for its own business purposes.

(8) Each of the aforementioned corporations operate independently through separate Managers who answer to the President of the corporation.

(9) At all times material, Valueline Foods of Delaware, Inc. and Polly Drummond Thriftway, Inc. each claimed the \$10,000.00 monthly exclusion provided by subsection (b) of 30 Del. C. §2905 in filing and paying the gross receipts required by Title 30, Chapter 29, of the Delaware Code.

(10) The Director of Revenue determined that Valueline Foods of Delaware, Inc. and Polly Drummond Thriftway, Inc. were not each entitled to a \$10,000.00 exclusion but together were entitled to only one exclusion because they were "branches or entities comprising an enterprise with common ownership or common direction and control."

(11) The Director of Revenue disallowed the \$10,000.00 exclusion to Valueline Foods of Delaware, Inc. recomputed the tax, issued notice of assessment thereof, and this appeal followed."

The dispute arises over the interpretation of 30 Del. C. §2905. Petitioner contends that the above facts should not be construed to conclude that the two entities comprise an enterprise. Respondent contends that the facts show that the two entities do comprise an enterprise. The distinction is important for if the two entities do comprise an enterprise, then both entities were then only entitled to one deduction of \$10,000.00 per month from the aggregate gross receipts for purpose of determining the amount of gross receipts tax due.

30 Del. C. §2905(b)(1) in pertinent part then provided:

"In computing the fee due on such aggregate gross receipts for each month there shall be allowed a

deduction of \$10,000.00. For purpose of this subsection, 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 from the aggregate gross receipts of the entire enterprise." (The Board notes that this Section has been changed by the Legislature to now provide a \$35,000.00 monthly deduction.)

The issue for the Board is whether or not the facts as stated above comprise an enterprise with common ownership or common direction and control pursuant to 30 Del. C. §2905. The statute requires us to first of all determine if there is (1) common ownership or (2) common direction and control. This is an either/or case and does not require a finding of both.

The two entities do have common direction and control because the same individual manages both and they are engaged in the retail sale of food and food products. We find the statute to be clear and unambiguous and there is no need for judicial or other statutory interpretation as to this point. Therefore, since it is an either/or situation, and the or part has been resolved, there is no need for us to decide whether or not there was common ownership.

The question now is whether or not these two entities comprise an enterprise. Since the Delaware Code does not define "enterprise", the Board must determine the intent of the legislature in the use of that word. We interpret the word to mean as the Respondent contends to be an undertaking for profit. We think the legislature intended to treat any two or more entities that have (1) common ownership or (2) common direction and control and to be producing gross receipts for profit to be only entitled to one \$10,000.00 deduction per month. We don't think it matters that the two entities are licensed separately nor that the two

entities have exactly the same ownership. We think the controlling factor is the common direction and control for that is what mostly affects the production of the gross receipts.

Based on the foregoing, the Notice of Determination is affirmed.

SO ORDERED this 10th day of December, 1993.

Joseph S. Yucke
John H. Cooney
Regina C. Andzija
Paul H.

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