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TAX APPEAL BOARD OF THE STATE OF DELAWARE

HERBERT M. AMES,
Petitioner,

v.

DIRECTOR OF REVENUE,
Respondent.

DOCKET NO. 861

Before: Joseph S. Yucht, Esquire, Chairman; John H. Cordrey, Esquire, Vice Chairman; Harry B. Roberts, David Eppes and Regina Dudzic, Members.

Jerome K. Grossman, Esquire, Bayard, Handelman & Murdoch, P.A., for Petitioner,

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

DECISION AND ORDER

John H. Cordrey, Esquire, Vice Chairman. The Board rendered a decision in the above-captioned case and the parties filed a joint "Motion for Reargument and to Extend the Time Within Which to File an Appeal", hereinafter "Motion". Subsequent to the filing of the Motion, the Superior Court affirmed the Board's decision in Capano Development, Inc. v. Director of Revenue, Tax Appeal Board, Docket No. 836 by its ruling in Director of Revenue v. Capano Development, Inc., Del. Super., C.A. No. 86A-JL-11, J. Poppiti (October 30, 1987).

The parties have requested that the Board render a decision regarding the issue of whether the rental payments made by Pack and Process to Petitioner are exempt as payments paid to an employee. The exemption provided in 30 Del.C Section 2301(e) states: "Any licensee functioning in an employee relationship..." is exempt from taxation under this section.

This provision does not provide for an exemption under the current facts. The petitioner's receipt of payments are not because of his functioning in an employee relationship, rather the payments are received by the owner of the building who also happens to be an employee. Therefore, the payments are not exempt pursuant to 30 Del.C. Section 2301(e).

The parties agreed in this joint Motion that the same issue controlled Capano and the present case. As the Board's decision, the Capano ruling, was affirmed, the Board denies the request for reargument and reaffirms the previous decision.

IT IS SO ORDERED this 13th day of May, 1988.

Joseph J. Gush
John H. Cordrey
Regina C. Dedjira
Paul CE
Harvey B. Kapulay

BEFORE THE TAX APPEAL BOARD OF THE STATE OF DELAWARE

HERBERT M. AMES, :
: Petitioner, :
: V. : Docket No. 861
: DIRECTOR OF REVENUE :
: Respondent. :

Before: Joseph S. Yucht, Esquire, Chairman, John H. Cordrey, Esquire, Vice-Chairman, Harry Roberts, Member, David E. Eppes, Member, and Regina C. Dudzic, Member.

Jerome K. Grossman, Esquire of Bayard, Handelman & Murdoch, P. A., for Petitioner,

Jos. Patrick Hurley, Jr., Esquire, Deputy Attorney General for Division of Revenue

DECISION AND ORDER

John H. Cordrey, Esquire, Vice Chairman. The parties have stipulated to the facts of the case which are attached hereto as Exhibit "A" and incorporated herein by reference. To summarize the relevant facts, Herbert M. Ames (hereinafter "Petitioner") owned real estate property located in Wilmington, Delaware, which was leased to Petitioner's wholly owned corporation, Pack and Process, for use as its factory and business site. Pack and Process is licensed and pays gross receipts tax, Petitioner was not licensed as a commercial lessor, nor did he pay gross receipts tax on the rental income derived from Pack and Process.

The first issue raised is whether Petitioner is required to pay the license tax imposed by 30 Del. C. Section 2301(a). That section provides that "[p]ersons engaged in the occupations listed and defined in this section shall pay annual license

tax ..." Included in that section is subpart 88 which defines "Commercial Lessor" as including "...every person who as lessor or sublessor receives rental income ..." for a commercial unit.

Petitioner argues while he receives rental income from a commercial unit, he should not be subject to the license tax as he is not "engaged in the occupation" of a commercial lessor. Petitioner points to the preface language contained in Section 2301 (a) for the requirement that he be "engaged in the occupation." Petitioner further argues that the "... subject case [was] an isolated transaction requiring virtually none of the Petitioner's time and energies ... Petitioner did not hold himself out to third parties as being involved in the leasing of this commercial unit." Petitioner's Opening Brief page 10. Unfortunately, no such facts appear in the Stipulation of Facts from which this Board must rule.

Assuming for the moment that the factual assertions of Petitioner are in fact correct, there is a lease between Petitioner and Pack and Process which calls for payments to be made by Pack and Process. The payments received make Petitioner a "... person who as lessor ... receives rental income pursuant to any agreement transferring a title interest or possessory interest in real property under a lease of a commercial unit for any term." This Board holds that an isolated incident of leasing commercial property brings the lessor within 30 Del. C. Section 2301(a) (88). Further, in this case, Petitioner has apparently been receiving substantial income (on at least a quarterly basis) from the lease and the lease has apparently been renegotiated at least once during the three years involved

here. To say Petitioner's main "occupation" is not a commercial lessor may be entirely accurate, but it is not accurate to state Petitioner is not engaged in the occupation of a commercial lessor as that is defined in 30 Del. C. Section 2301(a) (88).

Petitioner next argues that if it is determined that he is a commercial lessor there should be an exemption provided by 30 Del. C. Section 2114(b) to the gross receipts tax.

This case is almost identical with Capano Development, Inc., v. Director of Revenue, Tax Appeal Board Docket No. 836 (1986) recently decided by this Board. In Capano, as in this case, the Director stipulated that there was common direction and control between the two entities. The issue is thereby limited to whether there is a common purpose between Petitioner and Pack and Process.

Respondent failed to give any basis for distinguishing the present case factually from that of Capano. The Board finds that there is a "common purpose" between Petitioner and Pack and Process. Therefore, Petitioner is not obligated to pay the gross receipts tax upon the rental income received from Pack and Process.

Petitioner argues that there is an exemption from the gross receipts tax provided by 30 Del. C. Section 2301(d) as Petitioner is a "license functioning in an 'employee' relationship." This argument is moot because of the Board's prior rulings.

Finally, Petitioner argues that there should be no penalties assessed as the failure to timely file was shown to be due to reasonable cause. The Board finds that Petitioner has failed to demonstrate reasonable cause, factually or legally, which would enable this Board to abate the penalties.

The Director's determination that Petitioner was required to purchase a license as a commercial lessor is therefore affirmed. The Director's determination that Petitioner must pay quarterly gross receipts tax on the lease income from Pack and Process is reversed and abated and Counsel are directed to provide an order in accordance with this opinion (including statutory interest) within twenty days.

IT IS SO ORDERED.

John H. Cordrey
Joseph S. Yurchak
Henry B. Schaefer
Clarence
Regina A. Anderson

Exhibit A
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TAX APPEAL BOARD

BEFORE THE TAX APPEAL BOARD OF
THE STATE OF DELAWARE

HERBERT M. AMES,)	
)	
Petitioner,)	
)	
v.)	DOCKET NO. 861
)	
DIRECTOR OF REVENUE,)	
)	
Respondent.)	

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties as follows:

1. Petitioner owns the building and real property known as 1400 B Street, Wilmington, Delaware (the "Property").

2. At all times, Petitioner has leased the Property to Pack and Process, a corporation engaged in the business of contract packaging. Pack and Process uses the property as its factory and business site.

3. At all times, Petitioner has been the President, an employee, Chairman of the Board of Directors, and owner, directly or indirectly, of 100% of the outstanding stock of Pack and Process. Petitioner was not contractually required to lease his building to Pack and Process in order to continue his employment, although, as a practical matter, since the property was an integral and essential part of the business generating Pack and Process's gross receipts, the lease was required in order to provide funds for compensation purposes.

4. Pack and Process is licensed and pays gross receipts taxes to the Respondent.

5. The Property is an integral and essential part of the business generating the gross receipts on which Pack and Process has paid taxes.

6. Petitioner and Pack and Process are entities with common direction and control.

7. The rent paid by Pack and Process to Petitioner is, in reality, merely a shifting of funds between Pack and Process and its 100% shareholder/owner. This results in potential income and estate tax benefits to the parties.

8. The entire amount of gross receipts of Pack and Process has been subject to license fees and gross receipts taxes. The imposition of such fees and taxes on the rental payments involved in the shifting of funds would result in double taxation as to those rent payments.

9. By letter dated March 26, 1985, (a copy of which is attached as Exhibit "A" to the Petition), Brian D. Bailey, Revenue Officer, Special Investigations Bureau, Division of Revenue, demanded that Petitioner pay commercial lessor license fees and gross receipts taxes, plus interest and penalties, in the total amount of \$2,872.95.

10. On April 8, 1985, Petitioner paid the amounts demanded in Revenue Officer Bailey's letter of March 26, 1985 (a copy of the April 8, 1985 letter from Jerome K. Grossman, Esquire, Attorney for Petitioner, to which is appended a copy

of a check for \$2,872.95, payable to the Division of Revenue, is attached as Exhibit "B" to the Petition).

11. On May 6, 1985, Petitioner filed with the Division of Revenue a total of sixteen Forms 1048, Claims for Revision, seeking the refund of taxes, fees, interest and penalties illegally, erroneously and excessively collected (a copy of May 6, 1985 letter from Jerome K. Grossman, Esquire, and the sixteen Claims for Revision are attached as Exhibit "C" to the Petition).

12. The Division of Revenue failed to act on Petitioner's claim for Revision within ninety days from the date said Claims were filed, which, pursuant to 30 Del. C. §2108(b), constitutes a disallowance of Petitioner's claims from which an appeal may be taken to the Tax Appeal Board.

13. The amounts in controversy, as set forth in Revenue Officer Bailey's letter of March 26, 1985, are:

A. Commercial lessor license fees, penalties and interest, totalling \$290.50 for the years 1982, 1983, 1984, as follows:

(a) 1982: \$50 license fee, \$50 penalty and \$19.50 interest;

(b) 1983: \$50 license fee, \$25 penalty and \$13.50 interest; and

(c) 1984: \$50 license fee, \$25 penalty and \$7.50 interest;

B. Quarterly gross receipts taxes, penalties and interest, totalling \$2,523.45, as follows:

(a) Quarter ending March, 1982: \$120.45 tax, \$120.45 penalty and \$43.36 interest;

(b) Quarter ending June, 1982: \$120.45 tax, \$60.22 penalty and \$39.74 interest;

(c) Quarter ending September, 1982: \$120.45 tax, \$60.22 penalty, and \$36.13 interest;

(d) Quarter ending December, 1982: \$120.45 tax, \$60.22 penalty, \$32.52 interest;

(e) Quarter ending March, 1983: \$120.45 tax, \$60.22 penalty and \$28.90 interest;

(f) Quarter ending June, 1983: \$120.45 tax, \$60.22 penalty and \$25.29 interest;

(g) Quarter ending September, 1983: \$120.45 tax, \$60.22 penalty and \$21.68 interest;

(h) Quarter ending December, 1983: \$120.45 tax, \$60.22 penalty and \$18.06 interest;

(i) Quarter ending March, 1984: \$120.45 tax, \$60.22 penalty and \$14.45 interest;

(j) Quarter ending June, 1984: \$136.45 tax, \$61.45 penalty and \$12.28 interest;

(k) Quarter ending September, 1984: \$144.45 tax, \$43.33 penalty and \$8.66 interest; and

(l) Quarter ending December, 1984: \$144.45 tax, \$21.66 penalty and \$4.33 interest; and

C. Statutory interest due Petitioner (if successful) since the payment on April 8, 1985.

BAYARD, HANDELMAN & MURDOCH, P.A.

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