

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

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CANADA DRY POTOMAC CORPORATION
Petitioner

v.

DISTRICT OF COLUMBIA
OFFICE OF TAX AND REVENUE
Respondent

Case No.: 2010-OTR-00053

FINAL ORDER

I. Introduction

On November 10, 2010, Respondent Office of Tax and Revenue (OTR) issued a Notice of Proposed Assessment of Tax Deficiency to Petitioner Canada Dry Potomac Corporation (Canada Dry) alleging Canada Dry has a \$151,582.40 tax deficiency for failure to pay Business Franchise Taxes from Tax Years 2000-2009 and a \$96,500 tax deficiency for failure to pay Ball Park Fees from Tax Years 2005-2010. On December 8, 2010, Canada Dry filed a Protest of the Proposed Tax Deficiency issued by OTR with this administrative court.

A status conference was held in this matter on May 25, 2011. Christian McBurney, Esquire, appeared for Canada Dry and Edward A. Blick, Esquire, appeared for OTR.

On June 27, 2011, the parties filed Stipulated Statements of Fact. Canada Dry filed a Motion for Summary Adjudication on August 5, 2011, arguing it is not liable for the business franchise tax or the ball park fees because it did not have or maintain any offices, places of

business, or warehouses in the District of Columbia (the District). OTR filed a Cross Motion for Summary Judgment and Opposition to Petitioner's Motion for Summary Judgment on August 18, 2011, alleging Canada Dry's refrigerators, vending machines, and warehouses constituted offices, places of business, and warehouses within the District. On August 26, 2011, Canada Dry filed a Reply Brief in Support of Its Motion for Summary Adjudication and In Opposition of Respondent's Cross Motion for Summary Judgment, reiterating its position that it did not maintain an office, place of business, or warehouse in the District.

Based on the evidence and arguments presented, this administrative court finds that Canada Dry is not liable for the proposed tax deficiencies because Canada Dry did not maintain any offices, places of business, or warehouses in the District. Therefore, Canada Dry's Motion for Summary Adjudication is granted and OTR's Cross Motion for Summary Adjudication is denied.

II. Stipulated Facts

1. Canada Dry is a corporation organized in Pennsylvania with its principal headquarters located at Landover, Maryland.
2. OTR is the government tax authority for the District of Columbia.
3. Canada Dry is and has been engaged in the business of soft drink distribution, with its principal place of business in Landover, Maryland (Landover Headquarters).
4. Canada Dry sold and distributed its products to independent retailers (its customers) located in the District of Columbia (District) as well as in Maryland and Virginia.
5. Canada Dry does not have nor has it ever had or maintained any office or warehouse in the District or any other place of business in the District, except that the parties do not agree that its vending machines constituted an office, warehouse, or other place of business in the District.

6. Canada Dry does not have nor has it ever had any agents, officers, or representatives having an office or other place of business in the District, except to the extent provided in paragraph 8 below.
7. For all applicable years, Canada Dry was registered to conduct business in the District.
8. Canada Dry has and had, as required by District law, a registered agent in the District for the limited purpose of accepting service of process served upon it within the District. Its registered corporate agent in this respect was CT Corporation which performs the same service for many other businesses. CT Corporation forwarded notices for lawsuits, garnishments, and communications from the District Corporations Division to Canada Dry. CT Corporation performed no other work for Canada Dry in the District.
9. Canada Dry distributed soft drinks to third-party independent retailers in the District. Such retailers purchased and took title to such soft drinks upon the delivery of the soft drinks by Canada Dry. Such retailers, in turn, paid Canada Dry for soft drinks that were delivered. Canada Dry used its own employee truck drivers and trucks from its Maryland headquarters to deliver the soft drinks to such retailers in the District; such truck drivers and trucks were stationed outside the District.
10. Canada Dry's only property permanently situated within the District consisted of refrigerators and vending machines that were sometimes provided to retailers in the District. A retailer with such a refrigerator used it for no charge to store and display Canada Dry soft drinks that had been sold to such retailers. Such refrigerators typically were about two to three feet tall and two feet wide, with a glass door, and had an average cost of approximately \$750 each. Customers visiting the retailer's outlet could open the glass door, reach in, take a soft drink from the refrigerator, and then purchase the soft drink from the retailer.
11. A retailer in the District with a vending machine from Canada Dry used it for no charge to sell Canada Dry soft drinks that had been sold to such retailers. Customer's visiting the retailer's outlet could purchase a soft drink by putting cash in the vending machine, which would then dispense the desired soft drink. The retailer operated the vending machine and kept all of the cash in the vending machine. None of the cash in the vending machine was paid to Canada Dry.
12. Canada Dry had vending permits from the District of Columbia Department of Consumer and Regulatory Affairs. Canada Dry placed its vending machines at multiple physical locations in the District.

13. Canada Dry employees from Landover Headquarters made or provided repair and maintenance services to its owned tangible property physically located in the District.
14. Canada Dry employees from the Landover Headquarters picked up damaged or returned items in the District.
15. Canada Dry's employees from the Landover Headquarters physically collected payments (checks or cash) from customers in the District.
16. Canada Dry's employees from the Landover Headquarters delivered products and solicited sales in the District on a regular basis.
17. Canada Dry has, on average, ten employee-drivers and six employee-salesmen that work in the District, 4-7 hours a day, on average.
18. Canada Dry had a refrigerator repair employee in the District approximately 20 hours a week.
19. Canada Dry's employee truck drivers from the Landover Headquarters solicited sales of its products in the District.
20. To create a market for its product, Canada Dry's employees from the Landover Headquarters provided samples to retail stores in the District.

III. Discussions and Conclusions of Law

This case arises under D.C. Official Code § 47-4312(a), and the Office of Administrative Hearings Establishment Act, D.C. Official Code § 2-1831.03(b)(4). D.C. Official Code § 47-4312 provides that a taxpayer may file a protest of a proposed tax deficiency with this administrative within 30 days of the issuance of the proposed tax deficiency. OTR issued the deficiency on November 10, 2010. Canada Dry filed its protest with this administrative court on December 8, 2010, therefore jurisdiction is established.

A. Summary Judgment Standard of Review

OAH Rule 2828 states “[m]otions for summary adjudication or comparable relief may be filed in accordance with Rule 2812.” OAH Rule 2812 sets forth the procedures for filing

motions, but does not speak specifically to motions for summary judgment. OAH Rule 2801.2 provides that “[w]here a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court may rely upon District of Columbia Superior Court Rules of Civil Procedure as persuasive authority.” Accordingly, the Rules of the Superior Court of the District of Columbia pertaining to motions for summary judgments are afforded authoritative status in this matter, particularly Super. Ct. Civ. R. 56 and 12-I.

Upon a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law. *Behradrezaee v. Dashtara*, 910 A.2d 349, 364 (D.C. 2006). The movant may discharge his burden by demonstrating that, if the case proceeded, his opponent could produce no competent evidence to support a contrary position. *Nader v. De Toledano*, 408 A.2d 31 (D.C. 1979). Once the required showing has been made by the moving party, the burden shifts to the nonmoving party to show the existence of an issue of material fact. *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310 (D.C. 1982).

Here, the parties agree that there is no genuine issue of material fact. The sole issue is whether Canada Dry’s refrigerators, vending machines, and delivery trucks constitute places of business, offices, or warehouses, which would subject Canada Dry to the business franchise tax and ball park fee.

B. Analysis

OTR alleges that Canada Dry must pay the business franchise tax and ball park fee because it is a corporation engaging in a trade or business within the District. D.C. Official Code

§ 47-1807.02(a); D.C. Official Code § 47-2762(a)(1). But, D.C. Official Code § 47-1810.01 explicitly provides “income derived from the sale of tangible personal property by a corporation, financial institution, or unincorporated business not carrying on or engaging in trade or business within the District as defined in §§ 47-1801.01 to 47-1801.04 shall not be considered as income...” Moreover, D.C. Official Code § 47-1801.04 (6)(A) (2010)¹ provides:

The term “trade or business” shall not include, for the purposes of this chapter, sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year.

Therefore, whether Canada Dry is subject to the taxes hinges on whether Canada Dry maintains an office, warehouse, or other place of business in the District.

The general principles of statutory interpretation require that the court look at the plain meaning of words and give effect to the ordinary and common meaning of the words. *See National Geographic Soc’y v. District of Columbia Dep’t of Empl. Servs.*, 721 A.2d 618, 620 (D.C. 1998); *Office of People’s Counsel v. Public Serv. Comm’n*, 477 A.2d 1079, 1083 (D.C. 1984); *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). “The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.” *Jeffrey v. U.S.*, 892 A.2d 1122, 1128 (D.C. 2006) (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983)).

The ordinary meaning of office, warehouse, and other place of business does not encompass Canada Dry’s refrigerators, vending machines, and delivery trucks. OTR alleges that

¹ Subsequent to Canada Dry filing its hearing request, the D.C. Official Code was amended. Therefore, it is appropriate to use the 2010 version of the Code instead of the current version.

Canada Dry's refrigerators and vending machines are "other places of business" because Canada Dry retains ownership of the refrigerators and vending machines and they create a market for Canada Dry products. While Canada Dry retains ownership of the refrigerators and vending machines, the refrigerators and vending machines were provided to the third party retailers free of charge and Canada Dry does not receive any money from the sale of soft drinks housed in them. Moreover, the refrigerators and vending machines are located in the third party retailer's place of business. Therefore, Canada Dry's vending machines and refrigerators are merely pieces of tangible personal property located in its third-party retailer's place of business, and cannot be considered a place of business or market for Canada Dry.

Furthermore, OTR alleges that Canada Dry's delivery trucks are warehouses or offices. The word "warehouse" is defined as, "A building or part of a building used for the storage of merchandise; the building in which a wholesale dealer keeps his stock of goods for sale; a building in which furniture or other property is housed, a charge being made for the accommodation." Oxford English Dictionary, Online Version March 2012. OTR argues that Canada Dry's delivery trucks are warehouses because Canada Dry employees drive the stocked delivery trucks into the District and leave the unsold merchandise in the trucks overnight.

In light of the ordinary meaning of the word "warehouse" Canada Dry's delivery trucks are not warehouses. A delivery truck is a moving vehicle whose purpose is to *transport* goods from one place to another. Therefore it is entirely different from a warehouse whose purpose is to *store* goods. Moreover, at the end of the day when the soft drinks are stored in the delivery trucks overnight, the trucks are parked in Maryland and not the District. Thus, even if one could construe the delivery trucks as a warehouse, the warehouse would be maintained in Maryland, where the soft drinks are stored during the night, and not the District.

The word “office” is defined as, “A room, set of rooms, or building used as a place of business for non-manual work.” Oxford English Dictionary, Online Version March 2012. OTR argues the delivery trucks are offices because Canada Dry employees deliver products to customers in the District, collect payments, and pick up damaged merchandise. As a delivery truck is not a room or building used as a place of business, but instead is a vehicle used to transport products and payments from one location to another, a delivery truck does not fall within the plain meaning of “office.”

Moreover, the court in *District of Columbia v. Cities Service Oil Company*, 258 F.2d 426, 427-28 (D.C. Cir. 1958) found that delivery trucks did not constitute warehouses or offices when they transported motor fuel from warehouses outside of the District to local stations that had purchased the fuel within the District. Similar to the facts here, in that case, Cities Services Oil Co. petitioned a decision from the Tax Court that required Cities Services Oil Co. to pay the franchise tax in the District because it allegedly engaged in business within the District. *Id.* The court found Cities Services Oil Co. did not engage in business when it used delivery trucks to deliver products located outside of the District and bring them into the District for sale by a third party retailer. *Id.* Therefore, delivery trucks are not considered offices or warehouses for the purpose of determining whether a corporation is engaging in business in the District.

Canada Dry did not maintain any offices, warehouses, or places of business in the District and therefore is not subject to either the business franchise tax or ball park fee.

It is therefore this ____ day of April, 2012:

ORDERED, that Petitioner Canada Dry's Motion for Summary Adjudication is **GRANTED** and Petitioner is not liable for the Franchise Tax and Ball Park Fee from Tax Years 2000-2009; and it is further

ORDERED, that Respondent OTR's Cross Motion for Summary Adjudication is **DENIED**; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are stated below.

Wanda Tucker
Administrative Law Judge