PHILADELPHIA TAX CASE DEVELOPMENTS

TAX REVIEW BOARD

Realty Transfer Tax

1. ***Federal Realty Investment Trust***, Opinion 99-D, April 13, 1999. – Value.

   The dispute between the petitioner and the City centered on the correct valuation of the real estate transferred. The petitioner, Federal Realty Investment Trust ("FRIT") exercised an option to purchase a property from the Hotel Ambassador Company ("HAC"). At the time the option was exercised, the consideration due to HAC included the purchase price of $4,055,209 as well as satisfaction (by FRIT) of the first and second mortgage encumbrances of $2,812,009 and $2,625,000 respectively.

   The Tax Review Board ruled that the petitioner's initial calculation of the tax, based on the contract sale price did not accurately reflect the actual consideration for the sale of the property. The Board ruled, that since the transaction was a bona fide sale between unrelated parties at arm's length, the "***value***" subject to tax was "***the actual consideration…including liens or other encumbrances thereon existing before the transfer and not removed thereby…"*** [Philadelphia Code § 19-1402(14)]. At the closing of the sale, HAC, as seller, received not only the sale price of over $4 million but also release of the first mortgage and satisfaction of the second mortgage. These two encumbrances were the responsibility of HAC that were transferred to FRIT during the course of the lease and purchase. FRIT not only paid the $4,055,209 end sale price but also assumed the two mortgages as part of the contract. This was a release of HAC from responsibility to repay over $5 million when the property was transferred to FRIT in addition to more than $4 million in cash given to HAC by FRIT. Therefore, the Board concluded that these amounts should be totaled to reflect the actual consideration on which the Realty Transfer Tax should be levied (i.e. $9,492,218).

   The petitioner, FRIT, argued that the encumbrances assumed or satisfied should be removed from the taxable consideration since they were removed shortly ***after*** the sale as opposed to ***"removed thereby"***. The Board countered that to allow purchasers to deduct from the amount of the consideration the amount of any liens satisfied at closing would lead to an "***absurd result***".

Parking Tax

2. ***OLS Hotel Partners, LP, - Central Parking Systems of Pennsylvania, Inc.- Standard Parking Corporation,*** Opinions 99-I, 99-J, 99-K, June 29, 1999. – Valet Parking.

   The primary issue before the Tax Review Board was whether any portion of the monies collected by OLS Hotel Partners, LP ("OLS") for its valet parking service, less amounts paid to the independent parking garages, initially Standard Parking Corporation ("Standard") and then its successor, Central Parking Systems of Pennsylvania ("Central"), was subject to the Parking Tax.

   OLS operated the Four Seasons Hotel in Philadelphia. They offered valet parking as a service to their guests. They did not own a parking garage or parking lot but instead contracted with operators of a nearby parking garage to park the cars of their guests. OLS paid the parking fees to the garage operators pursuant to the contract. The garage operators in turn paid the Parking Tax on the fees received from OLS.

   As this case was initially presented to the Board, the City was seeking to collect the Parking Tax from OLS based on the total gross receipts collected for the valet parking service provided for its guests.

   As to Central and Standard, the issue before the Board was whether they were entitled to refunds of the Parking Tax they had paid on the parking fees paid to them by OLS. They requested refunds based on the City's assertion that the Parking Tax was due from OLS on the entire amount collected by OLS from their parking patrons. The argument advanced by Central and Standard was that if OLS was held to be responsible for the tax on the total gross receipts it collected for valet parking service, then Central and Standard would be entitled to a refund of the Parking Tax since in effect, the City would be seeking to tax the same transaction twice.

   In its written brief and oral argument to the Board, the City modified its position so that it sought to tax OLS only on the difference between the receipts collected for valet parking and the amounts paid to Central and Standard. The City urged the Board to find that OLS was an ***"operator"*** of a parking facility, therefore subjecting the hotel's patrons to the parking tax on the entire cost of the valet parking service. The Board concluded that since OLS did not own or operate a parking garage, they were paying to park as a customer and not as an operator of the facility. OLS petition was granted. The Board also concluded that Central and Standard would continue to be responsible for remitting the tax based on the receipts received from OLS and denied their refund petitions.

COURT OPINIONS

Business Privilege Tax & Wage Tax

3. ***Philadelphia Eagles Football Club, Inc. v. Tax Review Board of the City of Philadelphia.*** - ***City of Philadelphia v. Tax Review Board of the City of Philadelphia.*** Court of Common Pleas, NO. 9712-2250, NO. 9712-2353 December 31, 1998. (Opinion not reported.)

   This was an appeal by the City of Philadelphia of the Tax Review Board's opinion that media receipts received by the Philadelphia Eagles were fees for services rendered as opposed to royalties. The Tax Review had previously concluded that one-half of the media receipts received by the Eagles from the NFL should be excluded from the Business Privilege Tax base since one-half of all games were played outside Philadelphia. The Board concluded that the required service on the part of the Eagles was for the actual playing of a ***"live"*** game. The Board did not believe the payments from the NFL to the Eagles to be a royalty since the right to broadcast the games was not copyrighted. The contracts between the television networks and the NFL did not allow the networks the right to rebroadcast or reuse a taped version or copy of the game.

   The Court of Common Pleas held that the Tax Review Board committed an error of law by concluding that the media receipts received by the petitioner were fees for services rendered. Citing ***United States Football League v. National Football League*** [842 F.2d 1335 (1988)], the court stated that these fees were royalties resulting from the licensing of a property right. Being properly classified as royalties, the court concluded **all** of the media receipts should be included in the tax base pursuant to Business Privilege Tax Regulation 322 since they were attributable to the Eagles commercial domicile (i.e. Philadelphia).

   This case was also an appeal by the Philadelphia Eagles as to the Board's finding that additional non-cash compensation (subject to Wage Tax) was paid to the corporate principal, Norman Braman. Aside from business travel on the Eagles' behalf, the corporate airplane was used by Mr. Braman for the purpose of commuting between his personal home and other businesses (in Florida) and Philadelphia. The plane was also rented out for charter use to unrelated third parties and on occasion, to Mr. Braman who used in for vacations and other personal trips. While the team was reimbursed certain amounts for the various charter flights for Mr. Braman and others, these reimbursements were below the actual cost to the Eagles of operating the airplane. The reimbursements did not amount to the full equivalent value for either a comparable commercial flight or a standard charter rate. The court

affirmed the Board's decision that additional compensation (subject to the Wage Tax) was paid to Mr. Braman equivalent to the following:

- The difference between the standard value of charter flights and the amount reimbursed by Mr. Braman for the flights;
- Airplane costs of commuting to and from Florida;
- Cost to the Eagles for Mr. Braman's vacation, medical and other personal use of the airplane

Mr. Braman would be subject to Wage Tax for the additional compensation based on his Philadelphia wage allocation percentage of 30.5%.

Miscellaneous Issues

Real Estate Tax - Interest on Refund – Date interest accrues - Rate of interest

4. ***841 Associates v. Tax Review Board of the City of Philadelphia and the City of Philadelphia*** No. 1229 C.D. 1997, April 23, 1998. (Opinion not reported)

   The main issue before the Commonwealth Court was from what date does interest on a refund of Real Estate Taxes accrue, the date of payment or the date the assessed value of the property was reduced?

   The taxpayer owned a commercial building at 819-41 Chestnut Street in Philadelphia. The property originally had been assessed with a fair market value of $43.2 million for the 1994 tax year. The Board of Revision of Taxes ("BRT") reduced the value of the property to $37million and the taxpayer paid its 1994 Real Estate taxes based upon the new assessed value. After payment and still believing the assessed value to be too high, the taxpayer further appealed the assessed value to the Court of Common Pleas and then to the Commonwealth Court. In 1996, the Commonwealth Court reduced the assessed value to $25 million for tax year 1994 and the City refunded $198,336 to the taxpayer without interest. The taxpayer appealed to the Tax Review Board and was seeking interest from the date of payment. The Tax Review Board awarded interest from the date the assessment was reduced and the Common Pleas Court affirmed that decision. The taxpayer then appealed to the Commonwealth Court.

   The Commonwealth Court upheld the lower trial court's decision by stating ***"…where only the amount of the refund is in issue and not the validity of the tax, the taxpayer's money is not improperly detained until it is***

determined that the tax was incorrectly computed, and interest accrues from the date of the court's decision".

The remaining issue for the Commonwealth Court was which rate of interest should be applied to the refund. The taxpayer asserted that ***the Fiscal Code*** (i.e. 72 P.S. § 5566b), which prescribes a political subdivision to use the Commonwealth's rate of interest on tax refunds, to be applicable. The Court's reading of the statute led them to a different conclusion. The provision was not applicable in this instance since it can only be used when a taxpayer has no other ***"specific remedy"*** under another statute. In this instance, the taxpayer's request for a refund was governed by Philadelphia Code § 19-1703 so 72 P.S. § 5566b did not apply. The Court did note that the Philadelphia Code was silent with respect to the interest rate to be used and ultimately concluded that 41 P.S. § 202, which specifies a ***"legal rate of interest"*** of six percent (6%) per annum to be applicable in this instance.

Business Privilege Tax – Audit Assessment – Burden of Proof - Doctrine of Laches

5. ***Charlie's Dream, Inc. v. Tax Review – City of Philadelphia*** No. 2825 C.D. 1998, August 5, 1999. (Opinion not reported)

   Charlie's Dream, Inc. ("Charlie") appealed an order of the Court of Common Pleas that affirmed a decision by the Tax Review Board that ordered the payment of Business Privilege Taxes assessed for tax years 1986 -1990. Charlie operated an adult entertainment business and deducted on its tax returns consulting fees paid to companies whose shareholders and partners were in some cases, also shareholders and officers of Charlie. The City conducted an audit and disallowed these deductions for lack of supporting documentation.

   Charlie had claimed that it filed a petition for review of the audit assessment with the Tax Review Board on May 22, 1991. The Board had no record of it. On April 23, 1992, Charlie's controller wrote to the Board requesting a hearing as soon as possible. In April 1993, the City filed a complaint in the Common Pleas court in order to collect the taxes but discontinued the action when it learned that Charlie purportedly petitioned for review. The hearing before the Board was finally held on February 10, 1998. Charlie's controller had died in the interim (i.e. 1993). Charlie did not notify the Board between 1993 and 1998 that it had a petition pending or inquire as to the delay in hearing the petition.

Charlie did not introduce any supporting documentation for the consulting fees at the original Board hearing. No officers or shareholder's of Charlie's or of the companies that received the consulting fees testified. Charlie introduced three affidavits from the recipients of the consulting fees. The Board concluded that Charlie failed to establish that the deductions disallowed by the City were ordinary and necessary business expenses.

Charlie then requested that the Board bar the claim based on the doctrine of laches. (Note***:*** *"Laches" is a failure to do something that should be done or to claim or enforce a right at the proper time. It is principally a question of inequity of permitting a claim to be enforced due to delays in the proceeding or the passage of time that changes a defendant's position for the worse.)* The Board stated that Charlie had not unfairly been prejudiced by the delay. There was no allegation that the participants with first hand knowledge of the issue at hand were no longer available to testify. It was true that the original controller who had prepared the Business Privilege Tax returns had passed away, but whatever information had been used to prepare the returns was still available from the original sources. In addition, Charlie had not paid the tax assessment so it had use of the disputed monies for all the years it awaited administrative action. While it was true that interest and penalty had continued to accrue over the years, the Board had full authority to abate any and all interest and penalty and therefore correct any injustice from the delay in the proceedings.

Charlie appealed the Board's decision to the Common Pleas court. The Common Pleas court affirmed the Board's decision. Charlie next appealed to the Commonwealth Court who upheld the previous two decisions. With respect to the validity of the audit assessment, the Commonwealth Court stated:

> ***" It is clear in this case, as the common pleas court found, that the City's introduction of its audit report established a*** **prima facie** ***case Charlie owed the amounts stated in the audit report. Then, in order to challenge the amounts in question, Charlie had to prove that the amounts claimed as due and owing by the City were incorrect. The common pleas court followed the correct procedure…. The Board determined that the evidence presented by Charlie was an insufficient and unpersuasive challenge to the City's assessment. The Board, as an agency serving as factfinder, has the authority to make credibility determinations and to decide the weight given to conflicting evidence. "***

As to the Laches defense to bar collection of the tax, the Commonwealth Court stated:

> ***"Under our standard of review, we are constrained to agree with the common pleas court that even if Charlie were permitted to assert the doctrine of laches against the City or the Board, it is unclear that it was prejudiced by the delay….Charlie had the opportunity at the hearing to submit documentation supporting the tax returns for the years in question and could have had the corporate officers testify and explain the consulting fees. Similarly, Charlie could have had the recipients of the consulting testify rather than submit affidavits."***