February 11, 2002
IN RE: Northeast Oxford Enterprises, L. P.
DOCKET NOS: 36UOREFZZ9875
STATEMENT OF RECORD:

1. On June 13, 2000, Northeast Oxford Enterprises, L. P. (hereafter "Petitioner") filed a petition for review of a Use and Occupancy tax refund.
2. The matter was scheduled for a public hearing on October 12, 2000 and continued at the requests of the parties.
3. Public hearing was held before the Tax Review Board on December 19, 2000 following which a briefing schedule and a joint stipulation of facts was announced for the parties, all due by March 1, 2001.
4. Public hearing was held before the Tax Review Board on March 27, 2001 following which a post-hearing briefing schedule was announced for the parties and the matter was taken under advisement.
5. On October 30, 2001 the Tax Review Board announced its decision to deny the petition on the merits.

Petitioner has appealed to the Court of Common Pleas of Philadelphia County Civil Division.

FINDINGS OF FACT:

1. Petitioner is a limited partnership.
2. Petitioner owns and operates a self-storage facility at 6204-08 Oxford Avenue in the City of Philadelphia ("Oxford Store").
3. Pursuant to Philadelphia Code Section 19-1806(2), the Petitioner has paid to the Philadelphia Department of Revenue use and occupancy tax ("U & O Tax") in the amount of $42,256.60 for the tax period August 1997 to November 1999.
4. On April 12, 2000, Petitioner timely filed a Refund Petition with the Philadelphia Department of Revenue for the refund of use and occupancy tax paid by Petitioner in the amount of $42,256.60 plus interest thereon, pursuant to 72 P.S. sec. 5566(b), for the tax period August 1997 to November 1999.
5. On May 25, 2000, the Philadelphia Department of Revenue denied Petitioner's Refund Petition.
6. Jerry Ford ("Ford"), regional manager of Storage USA for the northeast, testified at the Tax Review Board ("TRB") hearing on March 27, 2001. He testified that Storage USA, located at 175 Toyota Plaza, Memphis, Tennessee, is a real estate investment trust that, and pursuant to a management contract, manages the day-to-day operation of Petitioner and that he was familiar with the Oxford Store. Ford described the Oxford Store as 5 one-story buildings, on 4 to 5 acres of land leased from PECO, consisting of 54,100 rentable square feet, divided into 450 units ranging in size from 25 to 500 square feet.
   He stated that every customer must execute a written lease and have sole access to a lockable unit.

Ford also testified that the: a.) Petitioner collects Pennsylvania Sales Tax from each customer, b.) storage units cannot be used for physical occupancy, personal dwelling or residential purposes, c.) customers are not permitted to operate a business out of the facility d.) business and non-business property may be stored in the storage units, and e.) Oxford Store's storage unit occupancy was near 100% as of December 2000.

7. Ford testified that at the Oxford Store, a "perspective tenant has to fill out a tenant information sheet, which asks all the questions, what they're storing, what their business is, and so forth." See Notes of Testimny, Pages 64-65. Ford stated that Petitioner pays about $4.00 per month per unit for U & O Tax and Petitioner never tried to collect U & O Tax from their business use customers. Ford also testified that he never filed forms with the City of Philadelphia that indicated that any customers of the Oxford Store would be liable for U & O Tax.
8. Petitioner also called Paul Coleman ("Coleman") to testify. He testified that he is the Revenue Collection Manager with the City of Philadelphia Department of Revenue and is in charge of the Use and Occupancy Tax Unit. He also testified that the Department of Revenue has not exempted properties from the U & O Tax that were rented to homeowners and used for storage and that the self storage industry is viewed by him as to its U & O taxability on its own terms.
9. Petitioner offered no expert witnesses. Ford and Coleman were Petitioner's only witnesses.

<u>CONCLUSIONS OF LAW:.</u>

<u>1.</u> The School District of Philadelphia ("School District") is authorized to impose U & O Tax for "general school purposes on the use or occupancy of real estate…for the purposes of carrying on any business, trade, occupation, profession, vocation, or any other commercial or industrial activity. This tax is imposed on the user or occupier of real estate." Philadelphia Code Section 19-1806(2). The U & O Tax is imposed on the business use and occupier.

The Petitioner claims the following exemption applies to it: Phildelphia Code Sec. 19- 1806(3)(a) includes the following residential exemption, "[t]his authorization shall not include the authority to levy [U & O Tax] on the use or occupancy of real estate to the extent that the real estate is used or occupied as the dwelling or principal place of residence of the user or occupier..." The Petitioner's agreements with their customers do not allow anyone to live in the storage units, so this exemption does not apply (N.T., pp. 34, 58).

2. The self-service storage industry operates under the Pennsylvania statute known as the Self-Service Storage Facility Act ("SSSF Act"). 73 P.S. §§1901-1917. A self-service storage facility is defined under SSSF Act as: "Any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such space for the purpose of storing and removing personal property. No occupant shall use a self-storage facility for residential purposes." 73 P.S. §1902.
3. Petitioner actively engaged and operated a service business at the Oxford Store. Customers of Petitioner have drop off and pick up rights and access to storage

space to store their personal property. Petitioner's customers cannot operate businesses out of the storage units. Petitioner is the only business operating at the Oxford Store. Petitioner's active operation of its service business at the Oxford Store is different from rental of real estate. Petitioner's customers are only entitled to access to the storage units.

Upon default of the customer's agreement by the customer or at the termination of the customer's agreement, after proper notice and thirty (30) days, the Petitioner may deny access to the customer, seize customers' property, repossess the storage units and sell the personal property without any court intervention. 73 P.S. §1905.

This is different from rights of a landlord under the Landlord Tenant Act of 1951, 68 P.S. §§ 250.101 et seq. There is no automatic lien in favor of a landlord under the Landlord Tenant Act of 1951. Upon the termination of a lease and in order to sell a tenant's property there must be an execution and levy process. Hoyt v. Christoforou, 692 A.2d 217,222 (Pa. Super. 1997). Bednar v. Marino, Pa Super. 417,426,646 A2d 573,577-78 (1994).

In Marwood Rest Home v. Tax Review Board, 112 Pa. Cmwlth. Ct. 240, 535 A.2d 281 (1987), nursing home patients voted, received rent rebate checks from Pennsylvania and were residents of the nursing home. The nursing home operators were found by the Commonwealth Court to be the actual business users and occupiers and therefore the nursing home operators were liable for the U & O Tax.

The Petitioner's argument is that it is merely a landlord and is exempt from the U & O Tax. Petitioner's argument fails, as it is actively engaging in a service business as the business user or occupier at the Oxford Store.

4. Article II, Part II, of the Tax Reform Code of 1971 is the statutory authority to impose Sales Tax. Pennsylvania, beginning in 1991, made self-service services subject to Sales Tax. The General Assembly amended the language of the statute to include "obtaining for consideration of [self-storage] services" to be included in "purchases at retail." 72 P.S. §7201(f)(5) and sale at retail to include as taxable the "rendition for consideration of self-storage service." 72 P.S. sec 7901(k)(18). Self-storage service is defined as "[p]roviding a building, a room in a building or a secured area within a building with separate access provided for each purchaser of self-storage service, primarily for the purpose of storing personal property." 72 P.S. §7201(kk).

The Pennsylvania Sales Tax is an excise tax imposed on the sales at retail of tangible personal property and certain listed services. 72 P.S. §7202. U & O Tax is imposed on the use of real estate for commercial activities and is calculated based on the assessed value of the real estate. Philadelphia Code §. 19-1806(2) and (4). The Petitioner's customers are subject to sales tax on their purchases of the service that they receive at the Oxford Store. Lessors of real estate do not pay sales tax. The measurement, subject and the entity or person who pays the Pennsylvania Sales Tax is clearly different from the U & O Tax and therefore the Pennsylvania Sales Tax is not duplicative and does not preempt the U & O Tax.

5. Section 19-1806(5)(b) of the Philadelphia Code requires that the owners "shall collect as agent for the School District of Philadelphia, from each user or occupier

the proper portions of the user's or occupier's tax…" and "any person …who shall fail to collect the proper amount of [U & O Tax] shall be liable for the full amount of the tax which is due..." The filing of UO-3 forms by the Petitioner would have shifted the U & O Tax liability from the Petitioner to another. Petitioner could have filed UO-3 tax returns identifying the delinquent user or occupier other than itself, but it failed to do so. Petitioner filed the U & O Tax forms as if they were the business user.

6. The Tax Review Bard concludes from this, and other facts stated above, that Petitioner is the actual user and therefore liable for the tax.

7. Petitioner claims that the Public Storage Management, Inc. et al., Tax Review Board Docket Numbers 36UREFZZ9952-9957 ("Public Storage et al.") settlement of their U & O Tax case with the School District violates its rights under the uniformity and equal protection clauses of the Pennsylvania and United States Constitution.

   In Tredyffrin-Easttown School District v. Valley Forge Music Fair, Inc., 156 Pa. Commw. 178, 190-91, 627 A. 2d 814, 820-821, the trial court stated that to establish a denial of equal protection in the application of a tax statute, there should be an intention or fraudulent purpose, to disregard principle of uniformity." We find that the School District did not deliberately or intentionally discriminate against the Petitioner and there was no bad faith. The imposition of the U & O Tax by the School District against the Petitioner was not arbitrary and capricious because the School district has an obligation to collect all taxes that are legally due it.

   The Public Storage et al. settlement involved 4 self-storage facilities. The petitioners were Public Storage Management, Inc., Partners Preferred Yield, Inc., Partners Preferred Yield II, Public Storage Properties, Public Storage Management, and Waterfront Renaissance. Public Storage et al. filed Refund Petitions for U & O Taxes they paid pursuant to their 1993 settlement agreement with the School District. The Philadelphia Department of Revenue denied these Refund Petitions and the matter was appealed to the TRB. The January 27, 1999 decision of the TRB in favor of Public Storage et al. was based, in large part, on the 1993 settlement agreement ("1993 Agreement"). The TRB never issued an opinion in this matter as the parties entered into a settlement agreement on March 21, 1999 ("1999 Agreement"). In the 1999 Agreement, the School District agreed not to appeal the January 27, 1999 decision of the TRB and not collect the U & O Tax on residential self-storage use beginning in 1997 and the petitioners in Public Storage et al. agreed not to pursue refunds for U & O Taxes paid before 1997. The 1999 Agreement also provided: "The Parties agree that any subsequent appellate court decisions or changes in the law will be applied prospectively to the Petitioners." Therefore, if the Court of Common Pleas or a higher court holds that self-storage operators are liable to pay U & O Tax on their entire facility (including the residential use), the petitioners in Public Storage et al. will also. The Petitioner was not a party to the 1993 Agreement or the 1999 Agreement.

8. Petitioner claims that the 1999 Agreement forced it to be at a competitive disadvantage to the petitioners in Public Storage et al. Ford, though, testified that based upon a report he prepared for the Petitioner's TRB hearing, December

2000's unit occupancy rate at the Oxford Store was near 100%. The business realities, supported by Ford's own testimony, are indicative that the Petitioner's business volume and profit was not materially impacted by 1993 Agreement or 1999 Agreement.

Concurred:

Daniel Saidel, Chairman
Derrick Johnson, Vice-Chairman
Una Vee Bruce
Joseph Ferla
Wade Stevens