

May 20, 2003

IN RE: BRASIL'S RESTAURANT, INC.
DOCKET NO:36BPMERZZ9208

STATEMENT OF RECORD:

1. Brasil's Restaurant, Inc. (hereafter "Petitioner") filed a Petition for Review with the Tax Review Board on December 23, 2002. The petition requested review of an assessment for Philadelphia Business Privilege tax for the years 1996 through 2001.
2. A public hearing before the Tax Review Board was held May 4, 2003. At the close of the hearing, the tax review Board announced its decision to deny the petition.
3. Petitioner has appealed to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. Petitioner appealed the Business Privilege Tax assessment for the tax years 1996 through 2001. The principal amount due is \$18,271. As of the hearing date of March 4, 2003, interest was \$7,791.77 and penalty was \$12,696.40.
2. This assessment came about as a result of an audit by the Philadelphia Department of Revenue on Petitioner's business activity and is a deficiency assessment. The assessment arose from a recharacterization of receipts from food sales to liquor sales.
3. Petitioner is a restaurant with a license to sell liquor. For the tax years in question, Petitioner listed most receipts as food sales and under reported the liquor sales.
4. Petitioner purchased and sold significant amounts of liquor but did not account for all of its liquor sales on its Business Privilege Tax returns.
5. Petitioner was audited by the City of Philadelphia Department of Revenue. The auditor calculated the liquor sales by multiplying the liquor purchases by 3. Liquor Sales Tax was assessed against Petitioner on the amount calculated as the liquor sales. Petitioner did not challenge the Liquor Sales Tax assessment.
6. Petitioner's reported liquor sales were less than his reported liquor purchases. For example, in 1997 Petitioner reported \$29,376 in liquor purchases and \$28,733 in liquor sales; in 1999, Petitioner listed liquor purchases of \$39,207 and liquor sales of \$34,960. The owner, Razeem Kalla, testified that there was little liquor remaining in storage at the end of each year thus confirming that Petitioner had been selling the liquor it reported purchasing.
7. Additional Business Privilege Tax was assessed by the auditor because additional receipts and income were calculated from the liquor sales as determined by the auditor. For example, the original return for 2000 listed liquor sales of \$41,619. This was adjusted by the auditor and agreed to by Petitioner to be liquor sales of \$101,371. The additional \$59,752 was added to Petitioner's receipts and additional BPT was assessed.

Petitioner claimed that all receipts were reported for all years but were not properly labeled to distinguish food sales from liquor sales and that therefore it was improper to assess additional Business Privilege Tax. It was Petitioner's position that the additional \$59,752 amount recharacterized as liquor sales should be deducted from the amount on the return listed as food sales. The City's position was that the

increased receipts for liquor sales represented unreported receipts and should be added to the already reported receipts and assessed Business Privilege Tax. Petitioner's position of deducting the newly created liquor sales from the existing receipts results in a profit margin for the food business of less than one and one half percent after expenses are taken into account.

8. Petitioner did not provide any materials, books or records at the hearing to substantiate which of its sales were from food and which from liquor sales or to refute the City's position.

CONCLUSIONS OF LAW:

The City of Philadelphia Business Privilege Tax ordinance requires every business, other than certain regulated industries, doing business in the city to pay a tax on its annual receipts. The Philadelphia Code Chapter 19-2600.

Petitioner's position was that all receipts were reported on the BPT returns it filed but were not correctly characterized as to which receipts were attributable to food sales and which to liquor sales.

When the city auditor used Petitioner's reported liquor purchases to calculate a liquor sales figure on which to assess the Liquor Sales Tax, Petitioner had no objection to the figure arrived at by the auditor. By treating these newly calculated receipts as having already been accounted for in the reported receipts, Petitioner would have the TRB believe that the under-reporting of the liquor sales was unrelated to the previously reported receipts on the tax returns and should be considered as having been already included in those reported receipts.

The TRB was not persuaded by Petitioner's argument that the under-reporting of liquor receipts was an innocent oversight. It should have been obvious to anyone reviewing the records and returns, be that the owners or tax return preparers, that liquor sales could not have been routinely less than liquor purchases absent some explanation.

Petitioner did not meet its burden of proof before the TRB to establish by substantial evidence that the assessment in question was erroneous. Petitioner did not provide testimony or documentation to adequately explain how these major errors, such as under reporting most of the liquor sales, could have occurred year after year.

Petitioner's owner testified that it had been habit or simply their usual practice to report everything as food sales, yet there was a small amount each year, however inaccurate, designated as liquor sales. Therefore, someone doing Petitioner's books and records was aware that liquor sales had to be reported. And if someone was aware of the requirement to report liquor sales separately, then someone also made the decision as to what dollar value to assign to these liquor sales. This was not adequately explained or excused by Petitioner so as to convince the TRB that the additional accepted liquor sale receipts should not also be assessed Business Privilege Tax.

In addition, Petitioner's testimony did not provide a basis for waiver of interest or penalty in this matter. The standard by which the TRB determines that a waiver of some or all interest and penalty is warranted is a finding that Petitioner acted "in good faith, without negligence and no intent to defraud." The Philadelphia Code Chapter 19-1705
Petitioner's sole explanation for the deficiencies in their tax reporting was that the owner was simply doing things the way they had always been done. Each business owner in the City of Philadelphia or indeed anywhere has the responsibility to insure that the way things are done is sufficient to meet all legal obligations.

Concurred:

Daniel Saidel, Esq., Chair

Derrick Johnson, Vice Chair

Una Vee Bruce

Joseph Ferla

Wade Stevens