

01/03/13

In Re: Jane Guerin

Docket Nos: 36BPMERZZ8456 & 36NPMERZZ9311

STATEMENT OF RECORD:

1. Jane Guerin (hereafter "Petitioner") filed a Petition for Appeal on December 11, 2009 requesting review of assessments for Business Privilege Tax (now known as the Business Income and Receipts Tax, but herein referred to as BPT) for 2006 and 207 tax years and Net Profits Tax for 2006 (NPT).
2. A public hearing was scheduled before the Tax Review Board for September 16, 2010 and continued at that hearing.
3. A public hearing was scheduled before the Tax Review Board for February 17, 2011 and continued at Petitioner's request.
4. A public hearing was scheduled before the Tax Review Board for May 24, 2011 and continued at the request of the City of Philadelphia law Department.
5. A public hearing was held before the Tax Review Board for October 11, 2011 and the matter taken under advisement by the Board.
6. A public hearing was scheduled before the Tax Review Board for a status update on May 22, 2012 and was administratively continued by the Tax Review Board.
7. A public hearing was held by the Tax Review Board on July 31, 2012 for the purpose of rendering the following decision: all penalty is abated; petitioner is liable for \$1,644.29 total interest covering both BPT and NPT liability. The Tax Review Board did not adjust or reduce the principal due.
8. Petitioner filed a timely appeal to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. Petitioner requested review of the Business Privilege Tax (BPT) assessment for the tax years 2006 and 2007. The tax principal due was \$7485.84, with interest of \$4039 and penalty of \$6171.77 as of the Tax Review Board (TRB) hearing date, for a total due of 417,696.73.
2. Petitioner also requested a review of the Net Profits Tax (NPT) assessment for the tax year 2006. The tax principal due was \$2196, with interest of \$1185.84 and penalty of \$1811.70 as of the TRB hearing date, for a total due of \$5193.

3. In 1991, Petitioner was the sole beneficiary of her husband's estate. As a result, she inherited the following 5 Philadelphia properties at issue in this case:
  - 4541 Pulaski Ave.
  - 6537 Limekiln Pike
  - 6535 Limekiln Pike
  - 4541 Green St.
  - 308 West Apsley St.
4. The taxes under appeal were assessed by the City on the gains from the sales of the properties located at 4541 Pulaski Ave. and 6537 Limekiln Pike in 2006.
5. In 1992, Petitioner took ownership to the above 5 Philadelphia properties from the estate of her late husband who had owned the properties individually.
6. From 1992 until approximately 2006 Petitioner maintained these 5 properties as rental properties.
7. For the tax years at issue and prior to any sales, Petitioner received rental income from the properties inherited from her husband and reported the rents as business income for both BPT and NPT purposes.
8. In addition, Petitioner owned 4543 Pulaski Ave. Philadelphia, Pa. After her marriage, Petitioner moved elsewhere but continued to own this property, leasing it to tenants and receiving rental income from it.
9. She currently resides in a multi unit dwelling she owns, with tenants in the other units who pay her rent.
10. Petitioner did not retain a management company but collected rents and had repairs done as needed to the rental properties on her own.
11. Petitioner deducted from her tax returns the expenses associated with the properties as business expenses. By way of example, the TRB reviewed Petitioner's 2006 federal tax return. Petitioner filed a Schedule E with this return on which she deducted all expenses associated with the rental of these properties, such as snow removal costs, license fees, eviction costs and bank fees.
12. Upon the sales in 2006, Petitioner reported the gains from the real estate sales on her federal tax returns but not on her City of Philadelphia BPT or NPT returns. Again, by way of example, on Petitioner's 2006 federal tax return, the gains received for the sale of 2 of the properties were reported on IRS form 4797 specifically for the "Sales of Business Property" and not as Schedule D capital gains.
13. Petitioner was a piano teacher for all years in question as well and considered this to be her main occupation. When her husband was alive the property management fell to him and she considered it a nuisance and a headache but continued to actively hold the properties on her own for 14 years.
14. Petitioner testified that she was actively involved with these properties as her tenants, as well as the properties, tended to be in need of a great deal of attention and assistance from her.

## CONCLUSIONS OF LAW:

The City of Philadelphia argues that the gains from the sale of rental real estate by Petitioner constitutes business income and as such is subject to both the Business Privilege Tax.

Petitioner argues that the gains were the result of a passive investment and should not be viewed as business income subject to the city's BPT or NPT. Petitioner asserts that the method of acquisition through inheritance is dispositive of the passive, non-business, nature of the investment and that Petitioner's activities were minimal and merely to conserve their value as Petitioner was primarily a piano teacher and not in the real estate business..

It was the finding of the Tax Review Board that Petitioner was in the real estate business that by its nature includes the buying and selling of real estate and that therefore the gains from any sales are subject to the Philadelphia BPT and NPT.

While recognizing that these properties were acquired by devise and not actively purchased by Petitioner, it is the finding of the Board that the nature of acquisition, while to be considered, is not the determining factor.

"The test is neither the characterization of the receipt nor the size of the business; rather it is the nature of the activity producing the receipt." *Tax Review Board v. Brine Corporation*, 414 Pa. 488, 200 A.2d 883 (1964). It is the active holding, renting, and maintaining of these and 3 other properties, as well as Petitioner's own characterization of these holdings on federal tax returns that are the determining factors in this case for reaching the conclusion that Petitioner's activities rise to the level of a real estate business and that subject these gains to these taxes.

While Petitioner testified that she did not want these properties even when her husband was alive, the facts remain that she held them for 14 years after his death and continued the rental business activity that her husband engaged in and in which she was peripherally involved prior to his death. She even added to the couple's holdings by retaining her pre-marriage residence and renting it to tenants, as did they by purchasing a multi unit dwelling with one unit to occupy and the rest to lease.

It does not make Petitioner's activities any less a business that she may not have enjoyed it. It also does not make the activities less of a business that she may not have always been successful in finding tenants or collecting rents. Unhappy business owners and unsuccessful businesses are not uncommon to find before the TRB.

While Petitioner considered her primary profession to be a piano teacher, this does not negate that her real estate activities were a business endeavor in which she was actively engaged. A sideline activity may also be a business activity. Extensive involvement and rendering of services to rental properties is not a requirement for a finding that the holdings constitute a business and create business income. *Maggio v. Tax Review Board*, 674 A.2d (755 (Pa.Commwlth. 1996), *Tax Review Board v. Weiner*, 211 Pa. Super 229, 235 A.2d 184 (1967).

Petitioner's activities meet the definition within The Philadelphia Code §19-2601 for the Business Privilege Tax, which defines a "business" as the "carrying on for gain or profit within a city of the first class any trade, business...or commercial activity, including the partial or complete liquidation or sale of business asset" Even without a TRB review, Petitioner acknowledged this by filing BPT and NPT returns for the rents received and deducting costs related to the properties as business expenses, all of which were accepted by the City.

Additionally, Petitioner's federal tax returns were compelling as they clearly were evidence of intent to designate these properties and the sales of them as part and parcel of Petitioner's business activity, and to accept the favorable tax treatment available with that designation. That perhaps the City's tax treatment would not have been considered by Petitioner to be as favorable does not mean that Petitioner can choose to redesignate the characterization of these properties into a passive, non-business, activity only for City taxation purposes.

Concurred:

T.David Williams, Esq., Chair

Joseph Ferla

Nancy Kammerdeiner

George Mathew, CPA