

February 4, 2013

In Re: Andrey Nesterenko

Docket No:36BPMERZZ8315

Statement of Record:

1. Andrey Nesterenko (hereafter "Petitioner") filed a Petition for Appeal with the Tax Review Board (TRB) on March 30, 2011 requesting review of a Business Privilege Tax (now known as the Business income and Receipts Tax or BIRT) assessment for the years 2003-2009.
2. A public hearing before the TRB was scheduled for September 13, 2011 and continued at Petitioner's request.
3. A public hearing before the TRB was scheduled for December 6, 2011. This hearing was continued at that time for Petitioner to request documents from his employer and provide proof to the TRB that he had done so within 30 days of this hearing date, and for the City to provide copies of audit documents to the TRB and Petitioner.
4. A public hearing was scheduled before the TRB for January 24, 2012 and was continued for the TRB to issue a subpoena to Petitioner's employer, Russell Roofing, for documents.
5. A public hearing was scheduled before the TRB for June 5, 2012 for the reissuance of the subpoena to Russell Roofing for documents related to Petitioner's work for them.
6. A public hearing before the TRB was scheduled for September 27, 2012 at which time the decision of the TRB was to grant the petition as to the Business Privilege Tax (BPT or BIRT) and to direct the Department of Revenue to recalculate the Petitioner's NPT liability with interest through August 5, 2009 and abate all other interest and penalty.

Findings of Fact:

1. On September 27, 2012, the Tax Review Board convened a public hearing on the appeal of Petitioner, having continued the matter on June 5, 2012 for a subpoena to be issued to Russell Roofing for documentation regarding the locations of work performed for them by Petitioner during the tax years in question. Upon learning that the documentation had not been received, Petitioner stated that he wished the hearing to proceed and would put on his case without those documents.
2. Petitioner had appealed a Business Privilege Tax (BPT) assessment for the years 2003 through 2008. The principal amount due was \$38,830.42, with interest of \$34,780.40 and penalty of \$49,300.07 as of the TRB hearing date, for a total due of \$122,910.89.
3. In the course of the public hearing on September 27, 2012, it was determined that Petitioner's delinquency included a Net Profits Tax (NPT) assessment and the petition was amended to include this assessment as well. For the tax years 2003 through 2009, the principal due was \$3,104, with interest of \$2,745.12 and penalty of \$3,897 as of the TRB hearing date, for a total due of \$9,746.12.
4. Petitioner operated a roofing business as a sole proprietor from 2003 through 2007, after which he operated through a Subchapter S corporation.
5. Petitioner's accountant, Danuta Zieliska, testified that in 2009 she prepared returns for Petitioner for city taxes due for all years, NPT and BPT. For BPT, she reported rental income from a property owned by Petitioner in Philadelphia as his only Philadelphia based income. She made a determination with information supplied by Petitioner that any income from the roofing business was not subject to BPT because all work was performed outside of Philadelphia.
6. The NPT was calculated using the Schedule C from Petitioner's federal returns and included the net income from the roofing business and rental property, after subtracting out his expenses.
7. Petitioner testified that all roofing work was performed outside of Philadelphia.

8. At the time that Petitioner's accountant prepared the NPT returns in 2009, she calculated the tax principal and the interest due as of August 5, 2009.
9. In August 2009, Petitioner filed the returns with a check for \$14,994.38, the amount of NPT principal and interest his accountant determined was due at that time for all years.
10. The City Department of Revenue (Revenue) returned the check uncashed and requested additional documentation. To substantiate labor expenses for the roofing business, Petitioner supplied copies of 1099 forms issued each year to the subcontractors he hired.
11. Petitioner was able to show the TRB original check sent to Revenue from 2009 to the TRB.
12. Revenue performed an audit of Petitioner's business activities beginning January 20, 2011. Petitioner and his accountant attended and cooperated with the audit. The years under audit were 2003 through 2009. The bulk of the taxes assessed were for the years 2003 through 2006. The City's determination was that BPT due for 2007 was \$7, for 2008 was \$9 and for 2009, Petitioner had a credit of \$203.
13. It was unclear what documents were presented at the audit other than Petitioner's federal tax returns. At some point after the audit, petitioner provided the 1099s for subcontractors hired for his roofing business, bank statements, and his accountant's work papers developed while preparing the tax returns. Petitioner testified that he no longer had the invoices for the actual roofing work that would have had the job locations due to the length of time that had passed.
14. Petitioner resided in Philadelphia for all tax years in question.
15. The records custodian for Revenue testified that the auditor reviewed "(t)ax returns, checks, bills, sales journal, 1099s." Notes of Testimony, page 26. He clarified that the 1099s he reviewed were issued by Russell Roofing not by Petitioner.
16. The auditor disallowed all exclusions for receipts earned outside of Philadelphia and labor expenses for both BPT and NPT purposes.
17. The 1099s which Petitioner provided as proof of contract labor expenses were not accepted as sufficient proof of labor costs. It was the City's position that a cancelled check to each named 1099 recipient was required to prove the expense was paid for each 1099.
18. It was also the City's position that had the 1099s been used to show that tax was due from each recipient, then they would have been acceptable as proof of payment to those recipients.

Conclusions of Law:

The BPT, now known as BIRT, is hereby imposed upon every person engaging in any business in the City of Philadelphia beginning with the tax year 1985, and annually thereafter. The Philadelphia Code Chapter 19-2603.

As to the BPT assessment for years 2003 through 2006, it was the finding of the TRB that Petitioner had demonstrated through testimony and documentation that his business activity was exclusively outside of Philadelphia and that he had labor expenses for subcontractors who performed work outside of Philadelphia. The TRB accepted the 1099s supplied by Petitioner that were issued to subcontractors working for him as credible and substantial evidence of business expenses incurred and as part of the totality of the evidence provided as to the nature and location of Petitioner's business activities.

For the tax years 2007, 2008, by the City's own admission there were de minimus BPT assessments and for 2009, there was a credit on the account well in excess of these amounts.

The City of Philadelphia Net Profits Tax is "(a)n annual tax on the net profits earned in businesses, professions or other activities conducted by residents of Philadelphia... The tax levied under § [19-1502\(2\)\(a\)](#) and (b) shall relate to and be imposed on the net profits of any business, profession, or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons." The Philadelphia Code Chapter 19-1502(2).

Petitioner resided in the City of Philadelphia for all tax years in question and engaged in business as a sole proprietor to 2007. When alerted to possible Philadelphia tax liabilities, Petitioner engaged an accountant who prepared the NPT returns for all years. This accountant calculated both the tax and interest due for those years.

In August 2009, Petitioner attempted to file the NPT returns and remit the tax and interest due for all years. Petitioner's check was returned to him uncashed and an audit was undertaken by the City of Philadelphia. This left Petitioner with an unpaid tax principal due and interest and penalty that continued to accrue up to and including the date of the final TRB hearing.

Petitioner acknowledged owing the NPT in 2009 and attempted to pay in full at that time, with the exception of any penalty portion which he may have intended to appeal. Additional interest and penalties accrued over 3 years as a result of the City's actions not the taxpayer. The City was deprived of the use of this money because of its own decision not to accept his check in 2009.

The TRB accepted Petitioner's expenses. However, Petitioner was not entitled to any credit from the net income portion of the BPT provided for in The Philadelphia Code Chapter 19-2604(4) based on the TRB decision explained above that Petitioner was not liable for BPT for these tax years.

The TRB determined that the amount Petitioner remitted in 2009 was the correct amount with the exception of a mathematical error of \$294.41.

Therefore the TRB decision as to the NPT was that Petitioner be held responsible for the full tax due with interest calculated through August 5, 2009, the date of the tendered check.

All penalties were abated as the TRB found that in accordance with The Philadelphia Code Chapter 19-1705(2) Petitioner had acted in good faith, without negligence and no intent to defraud.

Concurred:

T.David Williams, Esq., Chair

Nancy Kammerdeiner

Joseph Ferla

George Mathew, CPA