

August 31, 2004

In Re: Gold Elevator Services Inc.

Tax Review Board Docket #: **35WMMERZX9644**

Statement of Record:

1. Gold Elevator Services, Inc. (hereafter "Petitioner") filed a Petition for Review with the Tax Review Board of an audit assessment by the Philadelphia Department of Revenue for Wage Tax on February 23, 2004.
2. A public hearing before the Tax Review Board was held on June 3, 2004. At the conclusion of the hearing, the Board announced its decision to abate three-quarters of the interest and penalty.
3. Petitioner has appealed to the Philadelphia Court of Common Pleas.

Findings of Facts:

1. Petitioner requested review of an assessment for Wage Tax for the year 1999 through 2002. Principal amount due is \$27,557.30 Interest and Penalty due as of the date of the Tax Review Board hearing was \$23,491.29.
2. Petitioner is a New Jersey corporation, with its principal place of business in Voorhees, N.J.
3. Petitioner does not have a Philadelphia office or warehouse location.
4. Petitioner has employees who are Philadelphia residents for whom it deducts and remits Philadelphia Wage Tax.
5. Petitioner also has employees who are not residents of Philadelphia. These employees perform services in Philadelphia from time to time. Petitioner did not withhold Philadelphia Wage Tax from the wages of these employees.
6. Petitioner's employees perform services both inside and outside of Philadelphia.
7. Petitioner filed Business Privilege Tax returns and remitted Business Privilege Tax to Philadelphia for the tax years in question.
8. On its Philadelphia Business Privilege Tax returns, Petitioner provided apportionment information as to the percentage of its receipts attributable to services provided within the City. The percentage of its receipts earned in Philadelphia ranged from 80% in 1999 to 97% for 2002.
9. Petitioner has a registered address in Pennsylvania for receipt of service of process. Petitioner does not have a registered address office or business address in Philadelphia.
10. Petitioner inspects and services installed elevators. It enters into contracts with customers both within and outside the City of Philadelphia. The contracts require customers to pay a monthly fee to Petitioner. This fee is due and payable regardless of whether services are rendered in a given month.

Conclusions of Law:

1. The obligation on an employer to withhold City Wage Tax is stated in The Philadelphia Code § 19-1504 as follows:

"Each employer within the city who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct at the time of payment thereof, the tax imposed by this chapter..."

Petitioner claims that it does not fit the category of "employer within the City" and is therefore not required to withhold City Wage Tax from its non-resident employees who perform services in Philadelphia.

The Department of Revenue Income Tax Regulations Section 404 addresses the issue of the responsibility of non-resident employers as follows:

“An employer with a legal resident outside of Philadelphia is an ‘employer within the City’ and is required to deduct the tax if the said employer maintains an office or other business address in Philadelphia is otherwise subject to serve of legal process.”

It is agreed that Petitioner does not have a legal residence or place of business within the City of Philadelphia.

Therefore the decision hinges on whether Petitioner is “subject to service of legal process” as meant by Regulation 404.

Petitioners argued at the hearing that the nature of Petitioner’s business is such that it was not subject to service of legal process in Philadelphia. The city’s attorney argued that is certainly subject to service of process by the City of Philadelphia and that is sufficient to meet the requirement of the regulations.

The Tax Review Board has had the opportunity to review this issue on several past occasions. The Tax Review Board 1958 opinion in the case of M.E.Zinn Co. involved a taxpayer in business as a plasterer and contractor. As in the instant case, the Zinn Company maintained no offices, warehouses or other place of business in Philadelphia. Unlike the instant Petitioner, Zinn earned only a small percentage of its gross receipts from work performed in Philadelphia. In the case of Herald Contractors, Inc., a 1972 Tax Review Board opinion, the taxpayer was, once again, a business that did not maintain any office or other place of business in Philadelphia. Its employees came into Philadelphia to perform services for customers such as The Bell Telephone Company and the Philadelphia Gas Works for the purpose of constructing underground utilities.

In both cases, the Tax Review Board reviewed the ordinance and regulations still in effect today in order to determine whether the petitioners were subject to the withholding requirements of the Philadelphia Code §19-1504 and Income Tax Regulation §404.

And in both cases, the Tax Review Board concluded that as an employer providing services in the city of Philadelphia, a company may be present as an “employer within the City” for purposes of the Wage Tax by virtue of its activities and services provided in Philadelphia.

In both of the previous cases, the Tax Review Board’s stated interpretation of the Income Tax Regulation that “liability to service of legal process as a test, meant to indicate that in general a non resident employer is subject to the withholding obligation, although he has no office or business address in the City, if his business activity within the City is such as to make him present for purpose of court jurisdiction”. M.E. Zinn Company, Tax Review Board Opinion No. 58.7(1958).

Petitioner argues that it is not subject to service of process in Philadelphia as required by the regulation because it has no place of business in Philadelphia and only sends its workers in as needed. The ordinance does not limit the city to imposing a withholding requirement on companies that are subject to service of process in Philadelphia.

While Petitioner argued that the presence of its workers was insufficient to subject the corporation to service of process in Philadelphia, Petitioner failed to provide testimony or documentation to establish for the Board that a corporation providing most of its services in Philadelphia did not have sufficient presence by an agent of the corporation to accept service of process.

Petitioner did not provide information as to the jobs, titles or responsibilities of its employees nor was it able to provide accurate information as to the time spent in Philadelphia.

Petitioner, by virtue of its own Business Privilege Tax returns has established that virtually all of its gross receipts are generated from Philadelphia based clients. Common sense dictates that if most of its receipts are from Philadelphia clients than its employees, be they Philadelphia residents or non-residents must perform a significant portion of their services in the City of Philadelphia, notwithstanding the fact that Petitioner's office is located in New Jersey.

Petitioner failed to show that it was not subject to service of process by the City of Philadelphia even though it transacts a substantial and continuous amount of its business in Philadelphia and has a regular presence in the City through its employees.

Therefore, Petitioner meets the requirement of being an "employer within the City" for purpose of the Wage Tax withholding requirement.

2. As to the allocation of its employees' services to clients within and outside of the City, Petitioner argues that it had failed to maintain records to document where its non-resident employees spent their working hours, and therefore, the city could not require that they provide allocation information to be used for a wage tax assessment. Petitioner presented their best estimate as to where the employees spent their time. But as Petitioner admitted, they could not vouch for or certify its accuracy.

Petitioner's failure to maintain such records are not the fault of the City. Petitioner has not asserted that such records could not have been maintained; only that it did not do so. This does not excuse Petitioner or its employers from their obligations to comply with the City's taxing requirements.

Petitioner has left the City no alternative but to use Petitioner Business Privilege Tax allocation as the basis for determining how its employees were deployed and the percentage of time spent in Philadelphia.

Petitioner failed to meet its burden of proof with respect to the allocation of services in the city provided by non-resident of Philadelphia. It was the burden of the Petitioner to establish the time spent in the City performing services by its employees who were not residents of the City of Philadelphia.

3. It was the finding of the Tax Review Board that Petitioner acted in good faith and without intent to defraud the city. Petitioner filed Business Privilege Tax returns as required. It did not attempt to hide the scope of its business activity in Philadelphia.

Petitioner withheld and remitted Wage Tax for its employees who resided in Philadelphia.

Petitioner cooperated with the City's audit.

Therefore the decision of the Board was to abate 75% of the interest and penalty.

CONCURRED:
Derrick Johnson, Chair
Una Vee Bruce
Joseph Ferla