

October 24, 2005

In Re: **STYLE SETTER FASHION, INC.**
DOCKET NO: **36BPMERZZ9319**

STATEMENT OF RECORD:

1. Style Setter Fashion, Inc. (hereafter "Style Setter") filed a Tax Review Board petition on September 26, 2001, requesting review of Business Privilege Tax (BPT) assessments for the years 1998, 1999, and 2000, and abatement of interest and penalty. The total tax principal under appeal was \$88,559, with interest of \$66,310.17 and penalty of \$96,166.48 calculated through June 14, 2005.
2. Style Setter filed amended petitions on February 4, 2002 and June 24, 2002 setting forth additional information as to the basis for their appeal. The tax, assessment years and principal amount under appeal remained the same.
3. Several status hearings were held before the Tax Review Board as the parties engaged in settlement discussions and, alternatively, developed a Partial Stipulation of Facts to present to the Board when settlement discussions proved unsuccessful.
4. A public hearing was held before the Board on February 15, 2005, following which a briefing schedule was announced and a date set for final argument.
5. Final argument was held before the Board on June 14, 2005 and the matter was then taken under advisement.
6. The decision of the Tax Review Board was announced at a public hearing on July 21, 2005. The decision of the Board was to abate all of the penalty and three fourths (3/4) of the interest.
7. Style Setter has appealed to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. A Partial Stipulation of Facts submitted by the parties is hereby incorporated by reference.
2. A summary of the facts is as follows:
 - A. Style Setter operates a woman's clothing manufacturer located in Philadelphia.
 - B. Almost all of its finished product is sold to Brylane Inc. (Brylane), a company located outside of Pennsylvania.
 - C. Orders are faxed from Brylane in New York to Style Setter in Philadelphia.
 - D. All finished products are shipped out of Pennsylvania to Brylane via a trucking company, Oliver Trucking, hired by Brylane at Brylane's expense. Brylane and Oliver Trucking have entered into a Transportation Agreement that expressly hires Oliver Trucking as a contract carrier for Brylane. The trucking company is an independent contractor and may co-mingle Style Setter's product with other deliveries for either Brylane or other customers
 - E. The shipping terms "FOB Philadelphia" are on Style Setter invoices.

- F. When Style Setter filed its Business Privilege Tax, it excluded the gross receipts from its sales to Brylane, considering these receipts as attributable to sales outside of Philadelphia.
- G. The Department of Revenue disallowed these exclusions on the grounds that Style Setter delivered its product to Brylane's contract carrier within Philadelphia thus completing the sale and delivery in Philadelphia.
3. At a hearing before the Tax Review Board on February 5, 2005, Abraham Cades, accountant for Style Setter, testified as to his knowledge and understanding of the relationship between his client, Style Setter, and Brylane.
- Mr. Cades testified that Style Setter receives payment for its goods upon their delivery to Brylane's location and that Style Setter has insurance to cover their shipments. He testified that he "assumed" that Style Setter would be the responsible party if a claim was not paid for by the insurance company. See Notes of Testimony, Page 8.
- The shipping arrangement has been in effect since 1985.
- Mr. Cades was aware that Style Setter invoices are marked F.O.B. Philadelphia. He stated that his understanding of that term was that the "material was in their possession at that point", meaning Brylane. But that in his opinion and understanding, Brylane owned the goods only upon delivery in Indiana.

CONCLUSIONS OF LAW:

The issue before the Tax Review Board is whether Style Setter may exclude from its Business Privilege Tax gross receipts the proceeds of its sales to Brylane that are manufactured in Philadelphia and shipped from Philadelphia to Brylane's location outside of Philadelphia.

The determining factor is the point of sale i.e. where title to the goods passes from the seller to the buyer. It is Style Setter's position that title to the goods and the risk of loss remain with Style Setter until they arrive at Brylane's location outside of Philadelphia. It is the City's position that title and risk of loss pass to Brylane when the goods are handed over to the trucking company in Philadelphia, thus completing the sale in Philadelphia.

Style Setter's goods are picked up in Philadelphia by Oliver Trucking, a carrier hired by and under contract to Brylane.

The invoices prepared by Style Setter are marked "FOB Philadelphia", which stands for "Freight on Board" in Philadelphia. This is a commonly used shipping term that sets the point at which title of goods will pass from the seller to the buyer. F.O.B. Philadelphia would be commonly understood to mean that title passes from the seller when there is delivery to the carrier in Philadelphia.

Testimony by Abraham Cades, accountant for Style Setter, was that it was his belief that both the practice and belief of Style Setter officials were that the risk of loss stayed with Style Setter until

Brylane received the goods in Indiana, notwithstanding that the invoices indicated otherwise by virtue of the F.O.B. Philadelphia designation.

Mr. Cades was not an employee of Style Setter. He testified that he has been their accountant for many years, with responsibility for their monthly records and all tax returns. Shipping was not his area of responsibility and his testimony was tentative, at best. He did not testify to first hand knowledge but rather, provided his answers as his “assumptions” of the situation.

Mr. Cades was asking that the Board ignore the written terms of the invoices and any other writings in favor of his understanding of the actual course of dealing between the parties. But Mr. Cades could only testify to his assumptions and understandings, from his many years as the company accountant, about the actual course of dealings or understandings between the parties. He was not a direct participant in the shipping transaction.

There was no evidence provided by Style Setter employees nor by any representatives of Brylane who may have had first hand knowledge of the sales transactions or involvement with the sales or transportation processes. Style Setter did not offer any evidence from Brylane as to their understanding or beliefs regarding the sales transactions. There was no testimony or documentation from anyone with direct knowledge of and involvement in the day to day shipping and delivery of Style Setter’s product.

The City of Philadelphia Business Privilege Tax Regulations, Section 304(3)(b), provide that “(d)elivery to a contract carrier under contract to a party other than the seller, or delivery to an agent (except a common carrier) of the purchaser...where delivery is made to the party or vehicle or carrier operated by such parties, shall constitute delivery to such other party at the location where physical possession is transferred, including the location at which the property is placed on such vehicle or carrier.”

Style Setter argued that Oliver Trucking, the company contracted by Brylane to pick up the goods in Philadelphia and deliver them to Brylane’s location, should be considered a common carrier regardless of the terms of the express agreement between Oliver Trucking and Brylane. Oliver Trucking was hired by Brylane at Brylane’s expense. The Transportation Agreement (Exhibit 2 of the parties Stipulation) refers to Brylane as the “shipper” and not Style Setter.

This Transportation Agreement clearly provides that “whether or not Carrier is authorized to operate, or does also operate as a common carrier, that each and every shipment tendered on or after the date of this agreement shall be deemed to be a tender to Carrier as a contract carrier...Both Carrier [Oliver] and Shipper [Brylane] acknowledge the specialized and unique needs of Shipper and that only contract motor carriage services can provide including but not limited to expedited service, extended hours, dedicated equipment, knowledge of Shipper’s products, and customers unique needs and it is specifically because Carrier acknowledges its ability and willingness to meet the specialized needs of Shipper that Shipper had entered into this contract carriage agreement.”

Style Setter offered no evidence to contradict the terms of this agreement. While Style Setter argued in its brief that Oliver Trucking was registered as a common carrier and had attached its Interstate Commerce Commission Certificate of Public Convenience and Necessity No. MC

14290 SUB 30 to the Agreement, it did not establish that Oliver Trucking was in fact operating as a common carrier in this specific circumstance. The contract between Oliver Trucking and Brylane specifically states otherwise.

Petitioner also relies on *Commonwealth v. Gilmour Manufacturing, Co.*, 573 Pa. 143,822 A.2d 676 (2003) to support its position that Style Setter should be permitted to exclude its sales receipts to Brylane from its BPT gross receipts. Petitioner characterizes Gilmour as standing for the position that a sale is to be considered an out of state sale if the buyer's location is out of state and the ultimate destination of the goods is out of state, regardless of where delivery to the buyer occurs.

Gilmour appealed the imposition of Pennsylvania Corporate Net Income Tax (CNI) on sales to out of Pennsylvania purchasers where the purchaser picked up the goods from Gilmour's loading dock in Pennsylvania. Gilmour paid for or gave an allowance to its purchasers for all freight charges.

The CNI tax is governed by the Tax Reform Code of 1971. The specific wording of the section at issue in Gilmour is as follows:

“Sales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other condition of sale.” 72 P.S. §7401 (3)2(a)(16)

The Pa. Supreme Court interpreted the above section to mean that goods purchased by an out of state purchaser and destined for an out of state location are excluded from the CNI tax regardless of whether they were delivered to that purchaser in Pa. i.e. the phrase “within this state” modifies “purchaser” not “delivered”

The Philadelphia Code which governs the Business Privilege Tax specifically states the goods are to be delivered to the out of Philadelphia location, not just to the out of Philadelphia purchaser. The Philadelphia Code Chapter 19-2601 excludes from taxable receipts those “receipts or portion of receipts attributable to any sale involving the bona fide delivery of goods...**to a location** regularly maintained by the other party to the transaction outside the limits of the city of the first class.” (emphasis added) This language mirrors the language of the First Class City Business Tax Reform Act, Act of May 30, 1984, P.L. 345, No. 69, as amended, 53 P.S. §§16181-16193, the enabling statute for the BPT.

The Gilmour Court also addressed the usage of the term F.O.B. This term designates the point at which title passes to the purchaser. The general, “legal” rule is that for F.O.B. at point of shipment, title passes at the moment of delivery to the carrier. In Gilmour, the F.O.B. designation was to be disregarded because the governing statute section clearly stated to do so. This is not the governing statute in the matter before the TRB and the First Class City Business Tax Reform Act section does not have any such provision.

Therefore, it appears that comparing the Gilmour analysis to the case at hand is comparing apples to oranges. We have a different governing statute with different language. The Tax

Reform Code in Gilmour focuses on the ultimate location of the purchaser. The First Class City Business Tax Reform Act focuses on the location of the delivery.

The decision of the Tax Review Board was that the transaction between Style Setter and Brylane resulted in delivery of the goods in Philadelphia thus completing the sale in Philadelphia.

The petition was denied on the merits, all of the penalty and three-fourths ($\frac{3}{4}$) of the interest were abated.

Concurred:

Derrick Johnson, Chair

Joseph Ferla

Una Vee Bruce