

October 22, 2013

In Re: RD JD, Inc.

Docket Nos: 36BPMERZZ8439, 36WMMERZZ9422, 36NPMERZZ9301, 36LSMERZZ9947

STATEMENT OF RECORD:

1. James D'Amico, operating RD JD LLC, (hereafter "Petitioner"), filed a Petition for Appeal with the Tax Review Board (TRB) on February 25, 2012 requesting review of City of Philadelphia Department of Revenue audit assessments for Business Income & Receipts Tax, Liquor Sales Tax, Wage Tax, and Net Profits Tax.
2. A public hearing was scheduled for June 30, 2011 and continued at Petitioner's request for an opportunity to submit additional documentation for review by the City's counsel.
3. A public hearing was scheduled for January 10, 2012 and continued at Petitioner's request, again for an opportunity to submit additional documents to the City's Counsel.
4. A public hearing was scheduled for October 11, 2012 and administratively continued by the TRB.
5. A public hearing was scheduled for December 6, 2012. At the conclusion of the hearing, the matter was taken under advisement by the TRB. Petitioner was directed to provide additional information to the City to document family loans to the business and allow for verification that there were no additional wages paid. The City was directed to review the additional liquor sales information provided by Petitioner at the hearing and advise the TRB of any impact on the Liquor Sales Tax assessment. The parties given 60 days to report back to the TRB.
6. On March 26, 2013, the Tax Review Board announced its decision to abate 50% of the interest and penalties accrued against all tax balances under appeal.
7. Petitioner filed an appeal to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. Petitioner filed a Petition for Appeal for the following tax assessments:
  - Business Income and Receipts Tax (BIRT) for the years 2005 to 2007; tax principal due of \$41,130.29, with interest of \$23,097.23 and penalty of \$35,041.12 , for a total due of \$99,268.64
  - Net Profits Tax (NPT) for the years 2005 and 2007; tax principal due of \$5,337.00, with interest of \$2,988.72 and penalty of \$4,536.46, for a total due of \$12,862.18
  - Wage Tax for the years 2006 to 2008; tax principal due of \$20,475.00, with interest of \$11,841.78 and penalty of \$17,873.48, for a total due of \$50,190.26

- Liquor Sales Tax (LST) for the period 2005 to June 30, 2009; tax principal due of \$65,296.19, with interest of \$19,077.15 and penalty of \$38,154.22, for a total due of \$122,527.56.

All interest and penalty figures were calculated as of the TRB hearing date of December 6, 2012.

2. This restaurant/bar/catering facility opened in 2005.
3. James, D'Amico, owner, testified at the TRB hearing on behalf of Petitioner.
4. Petitioner admitted to an error in reporting its Liquor Sales Tax liability by failing to report liquor sales for its catering events at the restaurant. Petitioner reported all sales for Sales Tax purposes but omitted these liquor sales from the City's Liquor Sales Tax returns.
5. Petitioner provided 2 recalculations for the Liquor Sales Tax with different amounts due but did not provide an explanation or basis for these 2 recalculations.
6. The assessment under appeal was the City's audit recalculation based on the restaurant's sales, including catering and liquor purchase documents. Petitioner did not provide the catering contracts to the city until the TRB hearing.
7. Petitioner disputed that it had underreported its gross receipts on its BIRT returns.
8. At the TRB hearing, Petitioner provided a liability sheet to show that contrary to the auditor's contention that there was unreported income, the business was borrowing large amounts of money to make ends meet during the tax years in question. Petitioner did not bring any documents with specific loan information.
9. Petitioner's returns showed few W-2 forms for employees. Mr. D'Amico's explanation was that most of the needed labor to run the business was volunteered by friends and family. They did not get paid for their services. They were giving their time to help keep the business afloat.
10. The auditor used Petitioner's reported figures for tips collected to assess additional Wage Tax for which Wage tax was not withheld and paid to the city. Mr. D'Amico testified that the tips were distributed to his family and not to any employee or unpaid workers.
11. At the TRB hearing, the City's auditor testified for the portion of the audit related to the reporting of liquor sales he reviewed, among other things, the LST returns, Liquor Control Board reports of its wine and liquor purchases, and Petitioner's liquor and beer sales reports.
12. It was the auditor's finding that Petitioner's reported liquor and beer sales were less than its liquor purchases for 2006, 2007 and 2008. Using Petitioner's own records and the LCB report as confirmation for 2008 as a test year, Petitioner purchased \$121,589 worth of liquor, wine and beer. Petitioner reported sales for these drinks of \$81,375. This underreporting was consistent through 2006 and 2007 as well. Using Petitioner's mark up information, the auditor added additional sales receipts based on Petitioner's purchased amount of liquor, wine and beer.
13. The auditor did not include the catering information in the audit assessment or use the catering contract pricing for alcoholic drinks because the catering contracts were not provided until the TRB hearing.
14. The City auditor accepted Petitioner's 2005 and 2006 BIRT gross receipts figures based on cost of food figures presented and using a generally accepted mark up percentage.
15. For 2007, it was determined by the auditor that the reported gross receipts were not in line with the reported cost of food submitted of \$583,056. Petitioner used a lower mark up percentage

for 2007 than was used for the prior years. Therefore, using the higher mark up percentage, the auditor calculated a higher gross receipts figure than was reported and assessed BIRT on the amount of the additional receipts. This was supported by the bank statements' deposit amounts showing deposits in excess of Petitioner's reported gross receipts for 2007.

#### Conclusions of Law:

While the matter was under advisement, the TRB reviewed the materials and testimony provided at the hearing, as well as documents submitted following the hearing, including the affidavits submitted by Petitioner from family and friends attesting to the services provided without compensation and loans to the owners.

Petitioner admitted underreporting LST liabilities. He provided 2 additional calculations for the City to consider, never making clear to the TRB which he was asserting as correct and why it should be accepted as such by the TRB. In addition, the LST audit calculation did by the City, by its own admission, did not even all of the catering sales because the full years' catering contracts were not provided to the auditor at the time of the audit. Petitioner did not establish that the audit assessment was not due and owing. Therefore the TRB accepted the City's audit result for LST.

As to the additional Wage Tax assessment, Petitioner's tax documents reported that tips were received for services. Wage Tax was paid on only a portion of the reported tip earnings. While Petitioner testified that the workers who earned these tips did not take them and that he and his wife used this money for their own living expenses, there was no evidence to support that this money was taken as other than wages even if it was by the D'Ameco's. Affidavits were provided by relatives who stated they worked, some for significant hours, without any compensation. The auditor did not assess any imputed income or Wage Tax for these volunteer workers. The additional Wage Tax assessment was solely related to the tips reported by Petitioner as being actually collected and therefore this assessment was accepted by the TRB.

As to the BIRT assessment, the auditor applied the mark up percentage to 2007 food purchases that Petitioner used in prior years. The auditor confirmed this as a reasonable mark up by looking at business web sites that provide data as to the expected and usual mark ups for goods sold in a business of this type. Petitioner did not provide an explanation as to why the mark up percentage for the 2007 tax year was different than that used in the other years and therefore why the resulting lower gross receipts figure reported should be accepted.

Petitioner's explanation that bank deposits that looked like additional income were loans coming in to keep the business afloat didn't address the mark up percentage change in 2007 that resulted in a lower reported gross receipts based on cost of goods sold.

The City acknowledged that Petitioner was very cooperative with the auditor and provided most of what was requested when it was available.

Therefore, it was the decision of the TRB that Petitioner met the standard set forth in The Philadelphia Code Chapter 19-1705(2) which provides that “the Tax Review Board may abate in whole or in part interest or penalties, or both, where in the opinion of the Board the petitioner acted in good faith, without negligence and no intent to defraud. “

The decision of the Board was to abate 50% of the interest and penalty for all taxes at issue and provide 60 days for Petitioner to enter into payment arrangements for the balances still due.

Concurred:

Nancy Kammerdeiner, Chair

Christian DiCicco, Esq.

George Mathew, CPA

Joseph Ferla

Milton Oates