13-10

September 16, 2013

In Re: Albert's Restaurant

Docket Nos: 36BPMERZZ8428, 36LSMERZZ9946, 36WMMERZZ9419

STATEMENT OF RECORD:

1. Albert's Restaurant, Inc. (hereafter "Petitioner") filed 3 Petitions for Appeal with the Tax Review Board (hereafter "TRB") on March 15, 2010 requesting review of certain assessments for Liquor Sales Tax, Wage Tax, and Business Income and Receipts Tax.
2. Several public hearings were held before the Tax Review Board beginning on October 19, 2010.
3. On February 21, 2013, the Tax Review Board announced its decision to deny all petitions.
4. Petitioner filed an appeal to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. Petitioner filed a Petition for Appeal requesting review of the following taxes:

- Business Income and Receipts Tax for the years 2005 through 2009 with principal due of [illegible] interest of [illegible] and penalty of [illegible] as of the September 11, 2012 TRB hearing date, for a total due of [illegible]
- Wage Tax for the years 2006 through 2008 with principal due of [illegible], interest of [illegible] and penalty of [illegible] as of the September 11, 2012 TRB hearing date, for a total due of [illegible]
- Liquor Sales Tax for the years 2006 through 2009 with principal due of [illegible] interest of [illegible] and penalty of [illegible] as of the September 11, 2012 TRB hearing date, for a total due of [illegible]

2. These tax assessments were estimates issued in 2009 after Petitioner failed to respond to an audit request for information. Petitioner's accountant subsequently responded by filing this TRB appeal.
3. The City requested documentation to substantiate liquor sales, including sale prices, so that the Liquor Sales Tax could be properly assessed.
4. The City also requested information as to the number of employees, their hours worked, and salaries or wages so that Wage Tax could be properly assessed.
5. At what turned out to be the first of 3 scheduled hearings before the Tax Review Board, the Board requested that certain documents with regard to purchases and sales, including liquor sales, be provided to the City, as well as documents related to the number of employees, their hours, and wages.
6. After the first TRB hearing, a binder of information that, by his own admission, was incomplete
7. At a status update on August 16, 2011, the City's attorney reported to the TRB that Petitioner's accountant had provided some tax returns, some work papers, and some bank records. The City had also requested point of sales records for liquor sales, pricing, menus

and other documents to show liquor was sold and what the mark ups were for these products.

8. Petitioner's accountant, Joseph Grey, testified that there were no records to show daily sales, prices, mark ups, etc. for any of Petitioner's activities.
9. Mr. Albert Buoncristiano, owner of Albert's Restaurant was not present at the hearing on August 16, 2011.
10. Petitioner's business was a bar and restaurant with catering facilities.
11. There were liquor and food sales for the daily walk in business.
12. There were rental fees, food and liquor sales for catering events.
13. There was rental income from T-Mobile for use of the rooftop of the property.
14. Petitioner's accountant provided most of the testimony at the August 16, 2011 hearing before the TRB. He testified that he recorded cost of goods and sales information onto scraps of paper or worksheets based on information phoned into him from the business owner, Albert Buoncristiano or his employees. This was the information he used to prepare the tax returns for the business. He did not retain any of these papers or records pertaining to the years under audit once the tax returns were filed. This information about daily sales was also not retained by Mr. Buoncristiano or his employees.
15. There was no general ledger, cash register or point of sale machine to create a register tape or record of sales that could be retained for record keeping or audit purposes.
16. The audit came about when Petitioner applied for a variance to allow smoking in the bar. To qualify for this variance, it was required that Petitioner establish that less than 20% of sales were food related.
17. After receiving the smoking variance application, the City determined that an audit was necessary to confirm the sales information provided on this application. The application stated that [redacted] of gross receipts were food related, with all other receipts being for liquor sales.
18. The audit expanded to the Wage Tax and a review of gross receipts and expenses.
19. Petitioner responded to the City that documents related to catering, including any catering contracts, food costs, and menu samples with pricing information were unavailable.
20. Some [redacted] an [redacted] for employee and staff were provided along with some bank statements and cancelled checks. This information was incomplete.
21. The bank statements showed that the only deposits into the account were from credit card transactions. There was no evidence presented showing where the cash taken in at the bar or from the diners was deposited or how it was accounted for in any records provided.
22. The checks provided were either signed by Mr. Buoncristiano or had his name affixed using a stamp.
23. There was limited information to back up the gross sales figures reported on the tax returns.
24. Petitioner's practice for recording sales, as confirmed by the testimony of Nicole McFadden, one of the restaurant 's managers during the audit period, was to have individual bartenders or other staff write down their sales on slips of paper as they were serving. These pieces of paper were not retained.

25. There was no record of how much of a specific beer, wine or other alcoholic beverage was sold on a particular day.
26. Petitioner did not use a payroll service. Much like the process for keeping track of inventory costs and sales, Mr. Grey initially testified that Mr. Buoncristiano would call to provide employee wage and tip information. At the TRB hearing on November 8, 2012, Mr. Grey changed his testimony and stated that one of the managers, Linda, Nicole or Randi would provide the information to him and he was mistaken in his prior testimony that the information was provided by Mr. Buoncristiano.
27. Using the gross sales figure and general information as to the type of business activity, the City auditor made an assumption as to the number of employees who would be needed to manage the business, prepare the food, wait on customers, mix drinks, wash dishes and glasses, etc. An estimated Wage Tax assessment was prepared from this when Petitioner did not provide its own complete documentation.
28. The hearing before the TRB on August 16, 2011 was continued for the City to attempt a re-audit using additional documents supplied by Mr. Grey. The TRB also requested that Mr. Buonchristiano be present to testify at any future hearing.
29. On September 11, 2012, owner Albert Buoncristiano testified before the TRB that he did not work in the restaurant. He considered it an investment property and the business was run by a manager he hired. According to Mr. Buoncristiano, the manager, Randy Levine, provided Mr. Grey, his accountant, with all of the information needed each month. He also stated that he did not know what was purchased by Ms. Levine for the business.
30. At some point, Ms. Levine left to open her own restaurant and Linda Marrone took over.
31. In July 2011, the business operation that was the focus of this audit and assessment was ended by Mr. Buoncristiano and the corporation was dissolved.
32. At the time of the TRB hearings, Mr. Buoncristiano continued to own the property. Another business entity owned by his daughter was running a similar operation in the property still using the name Albert's Restaurant. This business was paying rent of [illegible] per month to Mr. Buoncristiano for the facility, including the restaurant equipment.
33. The liquor license used by his original corporation, Albert's Restaurant, had been transferred to the new corporation set up by his daughter, known as 3180 MJT Corp. No consideration, separate from the [illegible] monthly rental, was paid to Albert's Restaurant for the transfer of this license.
34. Any liquor left over when Petitioner closed its restaurant was given to the new entity for its operation.
35. To gather and verify information as to staff hours and payroll, the City requested payroll records. None were forthcoming from either Petitioner directly or its accountant. Mr. Grey testified that all his information came from verbal reporting by the restaurant managers, Ms. Levine or Ms. Marrone and that he destroyed whatever work papers on which he may have written down this information. Mr. Buoncristiano testified that he had no knowledge about employee work hours or compensation. Mr. Buoncristiano also testified at first that he had not seen any of the tax returns because his employees would use a stamp to enter his name. Upon further questioning and review of the some tax documents, he admitted

that some of the signatures on these returns looked to be original and perhaps he had signed them.

36. To gather and verify information as to the T Mobile rental income, the Board requested that a copy of the contract be provided to both the Board and the City's counsel. Counsel for the City requested this again, along with other documents, by letter dated March 20, 2012 and delivered by fax at that time to counsel for Petitioner. Petitioner's counsel stated that he made a verbal request, was told the documents did not exist and did not respond in writing to either the Board or the City's counsel. Mr. Buoncristiano testified that he did have, at least, the full T-Mobile contract. However, the City and TRB were only provided page 1 by Mr. Grey. See Notes of Testimony, September 11, 2012, pages 36-39.
37. When asked if he tried to get the information requested by the auditor for sale prices for liquor, wine and beer, Mr. Buoncristiano testified that he did not do so. He testified that he did not work at the bar and did not request pricing information from the manager at the time.
38. Mr. Buoncristiano further testified that he was not involved in any paperwork, never looked at any books or records, never visited the business or checked on the operation to see if it was running properly. His only concern was that the mortgage be paid every month so he could pay off the building. He stated that it did not matter to him if the business made money or lost money. Yet he was not only the landlord, but he also owned the business operation.
39. When shown the application for a smoking exemption, Mr. Buoncristiano acknowledged his signature on the application. He testified that he did not fill out the information on the application and that his manager "lied so she could get the smoking permit". See Notes of Testimony, September 11, 2012, Page 51.
40. The restaurant was managed by at least 3 different women over the course of several years. Wages reported by Petitioner for each woman was as low as the rate of [illegible] per shift. So as an example, in 2006, for manager Nicole McFadden, wages reported were [illegible] for the entire year. Tips they may have earned were not reported.
41. Patrons were able to pay at the bar with cash but the bank records provided showed no cash deposits.
42. Prior to 2007, the establishment had one bar area in the front while the remaining area was set up with restaurant tables.
43. In 2007, Mr. Buoncristiano built a second bar in the back room because his manager, Randi, had left to open her own restaurant nearby and the food business had dropped dramatically.
44. The basement was used for catering purposes, primarily "beef and beer" events. There were no catering or rental contracts provided to show rental prices, if food and drink were provided or at what prices.
45. Mr. Buoncristiano added a second floor where a DJ would play music. There was also a bar on this second floor that was shut down sometime in 2011. There were no financial records provided for this venture.

46. Although Mr. Buoncristiano testified that he had nothing to do with the business, he also testified that he would do some purchasing when asked by the manager. Liquor sales receipts with his signature were provided by Petitioner's accountant.
47. Ms. McFadden, Mr. Buoncristiano and Mr. Gray, all testifying on behalf of Petitioner, each testified that they were not the responsible party for the business bank accounts nor did they know who was the responsible party. This left the impression that no one was responsible for the deposits, checks, etc. despite the incontrovertible fact that there was a bank account connected to this business, funds were being deposited from credit card transactions and checks with Mr. Buoncristiano's name signed or stamped were being written by someone.
48. The W-2 records provided for the years 2006 to 2009 showed as few as 3 employees (2007) to a high of 7 employees (2006). There were no 1099's or other explanations to answer the questions about how this few employees could operate 1-2 bar areas and a kitchen operation.
49. Testimony was provided from a "guest" bartender who stated that he got to keep the tips left at the bar when he bartended, but no records were provided about payments to "guest" bartenders.
50. The audit assessment was based on standard industry mark ups. The auditor determined the mark up based on his own prior audit experience and a website for this type of business and these types of liquor and non-liquor sales. He used as a starting point the purchasing and gross receipts information that was provided by Petitioner. To prepare the Liquor Sales Tax assessment, the auditor used the beer purchase figures supplied by Petitioner and the liquor purchase information supplied by the Pa. Liquor Control Board. The audit analysis concluded the average industry mark up on sales of alcoholic drinks was [illegible] and assessed accordingly for 2006 through 2009.
51. The auditor also estimated a reasonable payroll figure for a restaurant and bar of this size and scope with the sales and receipts provided by Petitioner. He also factored in his assumption that wages were paid in cash from the cash receipts at the end of each business day since there were no cash deposits into Petitioner's checking account even though cash was accepted from patrons for drinks and food along with the credit card deposits shown in the bank statements. After trying unsuccessfully for a year to get the actual information from petitioner, the auditor used his 20 years of audit experience and national average estimates to determine the expected payroll for this type and size of business.
52. Prior to completing the audit, the auditor visited Albert's Restaurant and testified to seeing multiple bar areas on all 3 levels.

Conclusions of Law:

Petitioner failed to meet its burden of proof to establish that the City's assessments were incorrect. As per the testimony of the business owner and Petitioner's accountant, Petitioner failed to keep the records to establish that the City's assessment figures were incorrect. Sales records were kept on scraps of paper and thrown away daily, even by the accountant. Cash payments were not recorded. There were

no menus to show prices for food or drinks. There were no catering contracts to show prices for catering events. The contract document that was turned over for the T-Mobile rental income was incomplete. Mr. Buoncristiano's attitude towards the Board's proceedings was cavalier with minimal information provided, even though he was given multiple opportunities.

Although Mr. Buoncristiano testified that he was not involved in or interested in the business, in fact he was the business owner and signed or allowed his name to be signed to the tax returns and bank account checks. A business owner is not absolved from responsibility because he may turn over the daily operation of his business to an employee.

In addition, testimony at the TRB hearing established that he was more than a disinterested landlord whose only concern was the rent. Along with signing the tax returns, he either made the decisions or was actively involved in decisions as to how to expand the business; he did some purchasing; he interacted with the accountant; he hired the restaurant/bar managers, etc. By way of example, testimony regarding the adding of a second bar and upstairs entertainment indicated that he was involved in these expansions of the business enterprise. He testified that in 2005, he expanded the building and borrowed money to do so.

Petitioner provided testimony that there were liquor sales with happy hours and other events that offered different pricing levels, but provided no pricing information for the City to work with for an audit. Mr. Gray complained that the auditor did a straight mark up based on purchasing information without accounting for those happy hours where a lower price may have been charged than at other times, but then could not provide the city with any of the sale prices, whether during standard business hours or happy hours. While understandably, the audit period was several years prior to the TRB hearings and perhaps the menus used at that time were no longer available, it was not understandable to the Board why current prices and current menus were also unable to be produced at the hearings.

Certainly there are businesses that may not use the most current technology to monitor inventory and purchases, record sales, or provide payroll. It stretched credibility to believe that Petitioner kept records of none of these things, even on paper or in ledger books, and still managed to run an active business venture. In the same way, it stretched credibility to believe that the restaurant managers worked for per shift while running an establishment with a full service bar, restaurant kitchen and catering facility.

When discussing the application to allow smoking in the establishment, Mr. Buoncristiano admitted that his manager completed the application and lied about the percentage of sales attributable to food and liquor in order to qualify for the exemption and that he went along with it. This admission had to be considered by the TRB members when evaluating the credibility of testimony on other topics.

While Petitioner's representatives, owners and employees who testified were quite clear that they believed the City's assessment to be just plain wrong, they could not support this assertion with records, documents or substantive testimony. The tax returns submitted and these bare statements were insufficient without records and documentation to show sales, purchases, cash receipts, catering rental income, payroll records, employee work schedules, etc.

The owner, accountant and managers of Albert's Restaurant had multiple opportunities to provide first the City Revenue Department and then the Tax Review Board with documentation to show that the audit assessment was incorrect. Over many months and many hearings, Petitioner was unable to provide records to show what they sold, how much they charged, who worked for them, and how they were paid. Records were minimal and, as admitted by the parties, incomplete.

Therefore, the decision of the Tax Review Board was to deny the petitions.

Concurred:

Nancy Kammerdeiner, Chair
Christian DiCicco, Esq.
Joseph Ferla
George Mathew, CPA