14-6

March 3, 2014

IN RE: Bella Trattoria, Inc.
Docket Nos: 36BPMERZZ8521; 36LSMERZZ9956

STATEMENT OF RECORD:

1. A Petition for Appeal to the Tax Review Board (TRB) was filed on behalf of Bella Trattoria, Inc. (hereafter "Petitioner") on June 16, 2009. The petition requested review of certain City of Philadelphia Department of Revenue (Revenue) assessments for Liquor Sales Tax (LST) and Business Privilege Tax, now known as the Business Income and Receipts Tax (BIRT).
2. A public hearing was scheduled before the TRB for February 9, 2010 and continued at Petitioner's request.
3. A public hearing was scheduled before the TRB for March 3, 2011 and continued at Petitioner's request.
4. A public hearing was scheduled before the TRB for August 2, 2011 and continued at the request of the City of Philadelphia.
5. A public hearing before the TRB was scheduled for December 6, 2011 and continued at the request of the parties to allow time to complete a pending settlement. The TRB learned sometime later that this settlement was not completed.
6. A public hearing before the TRB was scheduled for May 28, 2013. Petitioner requested a continuance which was denied. The hearing was convened for a status update only and the matter was the continued.
7. A public hearing was scheduled before the TRB for August 20, 2013 and continued at Petitioner's request.
8. A public hearing was scheduled before the TRB for October 29, 2013. At the conclusion of the hearing the TRB announced its decision that the LST assessment for the petition years was to be recalculated based on liquor sales as of gross sales with a corresponding adjustment to the BIRT based on the LST reduction, with of the interest and all penalty to be abated provided Petitioner made arrangements to pay the balance due within 30 days.
9. Petitioner filed an appeal to the Philadelphia Court of Common Pleas.

FINDINGS OF FACT:

1. The Petition for Appeal requested a review of the following tax assessments issued by Revenue following an audit of Petitioner's books and records for the operation of a restaurant with food and alcohol sales:

   -Liquor Sales Tax for the years 2002 through 2007 for principal due of , with interest of and penalty of as of the TRB hearing date, for a total due of , and

   -Business Income & Receipts Tax for the years 2002 through 2007 for principal due of with interest of and penalty of as of the TRB hearing date for a total due of Petitioner operates a restaurant in the Manayunk section of Philadelphia which sells beer, wine and liquor to diners. The restaurant has a small bar area.

2. Petitioner filed all tax returns as required through the tax years in question and reported that approximately)of its gross sales were from the sale of alcoholic beverages with the remaining from food sales.
3. At various times, Petitioner had computer generated point of sale data to show liquor sales, but due to computer system problems, there was limited sales data for the periods in question available at the time of audit as data had been lost in these computer crashes.
4. Mario Presta, an owner of the Petitioner-restaurant, testified as to the policies and practices during the audit period with regard to the consumption and sale of liquor o the premises.
5. Mr. Presta testified that)of its sales were through credit card payments.
6. Mr. Presta testifed that the owners were lax with internal controls on alcohol consumption. They did not realize, until the audit results under appeal, the stringent documentation requirements the city would require for accounting for the use and sale of alcoholic beverages that would then be compared to the purchase reports obtained from the Pa. Liquor Control Board (PLCB).
7. During the audit years, Petitioner allowed its employees complimentary drinks with their meals at the ends of their shifts, allowed the owners to take bottles of wine with the meals they ate at the restaurant, and allowed bartenders to provide complimentary drinks to regular customers on a routine basis. Wine that went bad would be disposed of with no formal record keeping. The menu showed numerous dishes prepared with wine or alcohol with no records kept of the amounts used for cooking. They did not keep records of any of the alcohol use by employees and owners or served as complimentary drinks to customers.
8. The bartender did not strictly measure what was being poured for individual drinks. Petitioner could not account for how much of its inventory use was a result of "overpouring" occurring because bar tenders were not measuring ounces as they poured. A drink that called for 1 ounce of liquor could just as easily be poured with 1 and 1/2 ounces with no way to account for this.
9. Petitioner provided current dining and happy hour menus that were representative of the activity and pricing during the audit years. They documented the amounts charged to customers for different drinks at different times and on different days of the week.
10. Mr. Presta testified that following the audit results and assessment stricter internal controls were put into place. Complimentary wine and liquor for staff, employees and customers were eliminated. Measured pouring was put into place for bartenders. Consistent point of sale records were established.
11. Petitioner's point of sale records for periods post audit, after the new internal controls were in place, showed sales of alcoholic beverages to be in the range of of gross sales.
12. The city auditors used Petitioner's records and purchase records from the PLCB to recalculate Petitioner's liquor and beer sales as a percentage of gross sales. The auditors did not use the records petitioner did have for the audit or post-audit periods.
13. The auditors did a straight drink to bottle ratio for liquor and wine and did not make any allowance for use by staff or owners, complimentary drinks to customers, over pouring by bartenders or waste, spillage or spoilage.
14. The auditors made no price adjustments for happy hours and drink specials. For example all beer bottles were assessed at per bottle regardless of price when they were sold and again without allowance for complimentary use by staff, owners and customers.

CONCLUSIONS OF LAW:

It was the finding of the TRB that Petitioner's testimony as to past practices and lax internal controls on alcohol use by staff, owners and bartenders provided credible and sufficient information to account for much of the alcohol purchased for the business that did not show up in gross sales. The city auditor made no allowances for this when common sense alone would dictate that at least to some degree there is always spillage, overpouring, spoilage, etc.

Mr. Presta testified that the business was primarily a restaurant serving food with most of the alcoholic beverages sold as a compliment to the food. It was not primarily a bar. Therefore, liquor sales were a small portion of their gross sales. Petitioner's returns for the audit period showed liquor and beer sales as[illegible] of gross receipts.

Petitioner provided menus and flyers to show the prices for both the table service and the bar area, including happy hours and other drink specials.

The auditors assumed a flat and consistent mark up with no acknowledgement of reduced prices during happy hours despite Petitioner's documentation. The auditor did not dispute that Petitioner regularly had happy hours with discounted prices or other discounted alcoholic drink specials.

While Petitioner did not have full point of sale records for the audit period, they were able to provide some records. In addition, they had point of sale records for the post audit period showing approximately [illegible] of gross sales attributable to the sale of alcoholic beverages. Although the city claimed that it needed point of sale records to do an adequate assessment from Petitioner's actual records, the records that were available were not accepted, but with no explanation as to why they were deemed inadequate.

Petitioner testified that [illegible] of its sales were through credit card transactions. The city auditor determination of additional liquor sales meant more gross receipts assumed by the city than reported by Petitioner. Yet the city did not dispute the testimony that the credit card records documented 90% of the gross sales.

The city did not provide an explanation as to why Petitioner's records were not used or were inadequate, even as a sample of Petitioner's sales activity. Instead, the city chose a straight formula that did not make any allowances for the real life experience of a business such as this where exact usage by the ounce, with no spillage or overpouring, seemed highly unlikely.

The TRB concluded that the testimony of Petitioner as to the nature of the business activity along with the records, including current sales records, were sufficient to establish and confirm that the city audit conclusion for the Liquor Sales Tax was not accurately reflective of Petitioner's sales.

Based on consideration of Petitioner's testimony and documentation as to its sales and practices during both the audit period and the post audit period, it was the determination of the TRB that Petitioner's

Liquor Sales Tax assessment should be calculated on of its reported gross receipts with an abatement of all the penalties and of the interest as there was no showing of a lack of cooperation with the audit, or bad faith on the part of this taxpayer.

Concurred:
Nancy Kammerdeiner
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