

15-10

REVISED May 1, 2015

Additions to the original opinion of April 29, 2015 are in *italics*.

IN RE: ENDS, LLC

DOCKET NUMBERS: 36BPMERZZ8005 & 36WMMMERZZ9305

Statement of Record:

1. ENDS, LLC filed a Petition for Appeal on December 20, 2013 to the Tax Review Board (TRB) for an assessment bill for Business Income and Receipts Tax and Wage Tax for the years 2009 through 2012. The Petition for Appeal stated the Petitioner was requesting a re-audit for the tax years in question.
2. A public hearing before the TRB was scheduled for May 20, 2014. The matter was continued at that time, so that the re-audit requested by Petitioner could occur. The TRB directed the City to, within 30 days, provide to Petitioner the list of required documents for the re-audit. Petitioner was directed to provide those documents within 30 days of receiving the City's list of requested documents. The TRB requested to be notified by each party when their action was completed. The TRB then determined it would schedule a status hearing in 90 days to be updated.
3. The TRB received a copy of the letter from the City's counsel sent to Petitioner's representative, dated May 23, 2014, and the attached list of documents requested for the re-audit of Petitioner's account.
4. The TRB received a letter from Petitioner's representative stating his refusal to provide the requested documents to the City's counsel and his position that he would send such documentation only when it "is requested by the City of Philadelphia Department of Revenue Audit Division upon receipt from the City of Philadelphia Department of Revenue Audit Division of notification of the re-audit and who has been assigned to handle the audit."
5. As authorized by the TRB, its Executive Director, sent a response letter to Petitioner's representative to inform him that the request for documents by the City's attorney was in compliance with the Board's directive at the hearing of May 20, 2014. This letter reiterated that a status hearing would be scheduled for the end of July. This letter was dated June 2, 2014.
6. The TRB received a letter dated June 19, 2014 from Petitioner's representative to confirm that some, but not all, requested documents had been transmitted to the City's attorney.

7. A public hearing before the TRB was scheduled for July 31, 2014. The matter was continued at that time *for a hearing on the merits to be scheduled promptly before the TRB.*
8. A public hearing before the TRB was scheduled for August 12, 2014.

At this hearing, the TRB reviewed a letter from Petitioner's representative, faxed to the TRB that day, requesting a continuance due to "receiving notice of death that will require my assisting my son during these sad times." Petitioner did not appear at the hearing.

It was the decision of the TRB to deny this continuance request as it did not contain sufficient information as to why a last minute continuance was required.

TRB members then questioned the City representative as to whether Petitioner's representative had provided any of the documents discussed at the July 31, 2014 TRB hearing so that the City could begin its re-audit. The City representative replied that the documents received were insufficient and the information provided was incomplete.

The decision of the Tax Review Board was to deny the Petition for Appeal.

9. Petitioner filed an appeal to the Court of Common Pleas.

FINDINGS OF FACT:

1. *A status hearing before the TRB was held on July 31, 2014 to determine what progress, if any, had been made by the parties with regard to a re-audit by the Revenue Department (Revenue) based on documents the Petitioner was to provide to the department as a result of the TRB directive at its May 20, 2014 hearing. It was at the May 20 hearing that the TRB, in agreeing to Petitioner's request that Revenue consider a re-audit, directed that the City provide to Petitioner a list of the documents needed for such a re-audit and Petitioner then provide those documents.*
2. *Petitioner requested the re-audit because it did not participate in the original audit process that resulted in this appeal. When Petitioner did not respond to the original audit request, the City issued the assessment under appeal without a review of Petitioner's full records.*
3. *At the July 31, 2014 hearing, the list of documents requested by Revenue that would allow for a re-audit was reviewed with the parties. Prior to the hearing, Petitioner provided only some of the documents with no explanation as to why other documents requested were not supplied.*

4. The city provided a list of 10 documents to Petitioner that would be required for a re-audit. Petitioner's documents provided partial responses to only items 1, 3 and 8 on the City's list.
 - a. Federal forms 1065 for the years 2010 – 2012 were provided without accompanying 1099 forms, w-2 forms or K-1 forms for substantiation of the 1065 forms;
 - b. Bank statements were provided listing check numbers and amounts, without check information showing payees and confirming payments;
 - c. Expense spreadsheets with summary amounts by category were provided without detail or source documents as to who was paid or what was purchased for the business.
5. The owner of the petitioner business chose to not appear at any of the TRB hearings.
6. Petitioner's representative appeared at the July 31, 2014 without a file or any documents and therefore was unprepared to answer questions posed by TRB members.
7. Petitioner's representative testified to the following at the July 31, 2014 TRB hearing:
 - a. Counsel for the City was intentionally not provided with the K-1 forms because they contained certain confidential tax information.
 - b. Counsel for the City was intentionally not provided with 1099 forms because they were mailed to the enumerated City post office box during the various tax years in question. He stated to the TRB that as a result of the prior years' mailings "(t)he City has them in their possession, and they should find them...if they maintain adequate records." See July 31, 2014 Notes of testimony, page 9.
 - c. Other requested documents do not exist but the City was not so notified.
8. Petitioner established its business in 2010.
9. Petitioner did not file City of Philadelphia tax returns for the years 2010-2012.
10. Petitioner filed its application for a Philadelphia Business Tax Account number on June 4, 2012 stating a business start date of January 1, 2012.
11. Petitioner provided a U. S. Return of Partnership Income Form 1065 filed with the federal government that stated a start date of January 1, 2010.
12. Petitioner did not respond to the City of Philadelphia initial notifications for an audit.

CONCLUSIONS OF LAW:

In an administrative hearing before the Tax Review Board, the burden of proof is on the petitioning party to provide substantial evidence to establish that the tax assessment under appeal is defective or warrants adjustment. *The burden is on the taxpayer to prove that the tax has been improperly assessed. City of Philadelphia v. Litvin 235 A.2d 157, Pa. Super. 1967*

In this circumstance, Petitioner requested the opportunity for a re-audit by the Department of Revenue prior to proceeding with a TRB hearing. The Board granted this opportunity and time for Petitioner to provide its documents to the City for review and audit so that assessment could be made using Petitioner's information. The TRB even asked the City's attorney to provide the list of documents needed so the audit could go forward promptly.

Petitioner refused to provide the documents to Counsel for the City and when further directed by the TRB to do so, failed to provide all documents and failed to offer an explanation to the TRB for why all documents were not submitted. He repeatedly requested a re-audit rather than a review hearing and was provided that opportunity. He then did not provide the City with the needed documentation.

The TRB scheduled and continued the case more than once to give Petitioner's representative ample time to gather needed documents, provide them to the city, engage in the re-audit and provide the petitioner with every opportunity to get a fair and accurate assessment of taxes owed.

As a result, the TRB scheduled the hearing of July 31, 2014 for a status report on the *progress of the parties in the re-audit process. At this hearing, the TRB reviewed with the parties the list of documents provided by counsel for Revenue to Petitioner's representative.*

Petitioner's representative neither provided the documents *nor provided the TRB with a satisfactory explanation* as to why he would not comply with the TRB direction to supply the requested documents that he had available for re-audit. *At the July 31, 2014, Petitioner's representative testified that he had not provided certain documents to the City's counsel despite the TRB directing him to do so because they contain certain confidential tax information. He finally conceded that he would "be happy to provide it to the lawyer for the City on the fact that she is a lawyer for the City." Notes of Testimony, July 31, 2014, page 7.*

If the Petitioner was unwilling to supply its "confidential tax information" and its books and records to the City taxing authority, it was clear to the TRB that the Petitioner's request for a re-audit was without merit. On one hand, Petitioner complained that an audit occurred without it being able to participate and provide its records, and on the other hand, Petitioner did not want to hand over its books and records.

It was an insufficient response to the TRB that since Petitioner mailed its 1099s to the City several years prior, Petitioner did not have to comply with the TRB directive to provide them to City's counsel as part of the TRB proceeding. Despite the TRB request that documents requested by the City be provided to them as part of the re-audit process that Petitioner itself was requesting, Petitioner refused to cooperate, stating to the Board that they "assumed the city could find what was sent in to begin with". See Notes of Testimony, July 31, 2014, page 14. This statement prompted the TRB Chair, Nancy Kammerdeiner, to respond that when the TRB told the petitioner to "provide documents to the city within 30 days of receiving the list...(w)e didn't say the documents of your choosing. We didn't say the documents that you thought were here already didn't have to be provided. We said we wanted you to provide the documents that were included in the list from the city." See Notes of Testimony, July 31, 2014, page 14.

Petitioner's responses were inadequate and disrespectful to the Board members and to the City representatives.

When it was apparent that the matter would not be resolved outside of an administrative hearing, the August 12, 2014 date was scheduled for the purpose of proceeding with a hearing on the merits of the appeal.

No one appeared for Petitioner on August 12, 2014 to put forth its case as to why the assessment under appeal should be abated or adjusted.

It was the finding of the TRB that Petitioner was provided sufficient opportunity and notice throughout the TRB process to put forth its case either to the Revenue Department or the TRB. At every turn, Petitioner chose to provide incomplete information and documents, and at one point, no documents at all despite the TRB's very clear directive issued in an effort to offer Petitioner exactly what it had requested- a re-audit.

Therefore the petition was denied.

Petitioner appealed this decision to the Court of Common Pleas *on September 15, 2014 and at the time of the preparation of the original Opinion in this matter dated April 29, 2015, had yet to fully comply with the Court's Case Management Order to provide the TRB with the hearing transcripts. The TRB has received the transcript for the August 12, 2014 hearings but, to date (April 29, 2015), not the transcript for the hearing of May 20, 2014 or July 31, 2014. The TRB has since received the July 31, 2014 transcript and this amended Opinion is being provided.*

CONCURRED:

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