

December 1, 2015

In Re: Platinum Ownerco, LLC

Docket Nos: 36BPMERZZ8031; 36NPMERZZ9094; 36BPREFZZ9731

Statement of Record:

1. Platinum Ownerco, LLC (Petitioner) filed two Petitions for Appeal with the Tax Review Board on September 3, 2013 requesting Tax Review Board (TRB) review of the following:
 - A refund denial by the Philadelphia Department of Revenue for the 2010 Business Income and Receipts Tax(BIRT); and
 - A BIRT assessment and a Net Profits Tax (NPT) assessment attributable to the tax year 2010.
2. At a hearing before the TRB on August 7, 2014, the matter was continued and the parties directed to each provide a pre-trial memorandum to the Board.
3. A hearing before the TRB was held on October 2, 2014, following which the matter was taken under advisement for the parties to provide post-trial briefs.
4. A hearing before the TRB was held on January 29 2015, following which the matter was continued for further review by the TRB.
5. On August 6, 2015, the TRB announced its decision as follows:
 - Petitioner's refund request for the 2010 BIRT is granted in the amount of 
 - The 2010 NPT appeal is granted and no additional tax is due from Petitioner;
 - The 2010 BIRT appeal is granted and no additional tax is due from Petitioner.
6. The City of Philadelphia filed an appeal to the Court of Common Pleas.

Findings of Fact:

- 1) This case involves the Petitioner corporation and ownership and transactions with related or subsidiary corporations as follows:

- a. Petitioner owned 100% of a subsidiary company known as South 17th Street Ownerco Mezzanine, LLC. (Mezzanine).
 - b. South 17th Street Ownerco Mezzanine, LLC owned 100% of the company known as South 17th Street Ownerco, LLC
 - c. South 17th Street Ownerco, LLC owned the Sofitel Hotel in Philadelphia.
 - d. Petitioner formed and owned a subsidiary company known as South 17th Street InterMezzCo, LLC. (InterMezzCo). This new entity elected to be taxed as a corporation.
 - e. Petitioner contributed a portion of its interest, .01%, in Mezzanine, LLC to the new corporation, InterMezzCo.
This transfer of ownership interest caused Mezzanine to become a partnership between Petitioner & South 17th Street InterMezzCo, LLC.
- 2) Petitioner and InterMezzCo, LLC entered into an agreement for each to sell all of their partnership interest in South 17th Street Ownerco Mezzanine, LLC to an unrelated third party.
 - 3) Pursuant to this Agreement of Sale, a new purchaser acquired the entire interests of Petitioner and InterMezzCo which was comprised of 100% of Mezzanine and its assets including South 17th Street Ownerco, LLC., the company that owned the Philadelphia hotel. This sale occurred in 2010.
 - 4) Petitioner was a Chicago domiciled corporation during all periods in question.
 - 5) The sale of the partnership interest in 2010 terminated all of Petitioner's business interest in Philadelphia.
 - 6) Following the sale of its partnership interest, again which resulted in the termination of any business interest in Philadelphia, Petitioner determined that it had overpaid the 2010 BIRT estimated payment which it paid when filing the 2009 BIRT. On its final BIRT return, Petitioner requested a refund in the amount of [REDACTED]
 - 7) Upon receipt of this refund request, the City of Philadelphia initiated an audit of Petitioner.
 - 8) As a result of the audit, Petitioner was assessed BIRT & NPT on the approximately [REDACTED] million capital gain from the sale of the partnership interest in Mezzanine, none of which was reported on its final BIRT return.

The refund request was then denied because of these open tax balances determined by the audit:

BIRT 2010: principal [REDACTED]
interest [REDACTED]
penalty [REDACTED]
NPT 2010: principal [REDACTED]
interest [REDACTED]
penalty [REDACTED]

Conclusions of Law:

Petitioner appeals an assessment by the City of Philadelphia seeking BIRT and NPT on the capital gain earned from the sale of a partnership interest. This partnership was created by Petitioner through the transfer of a small interest, only .01%, by & between itself and a corporation wholly owned by Petitioner. The partnership was created concurrently with the negotiations for the sale of the partnership to an unrelated third party.

It was Petitioner's position that the creation of this partnership relieved Petitioner of the obligation of the BIRT and NPT on its share of the gain from the sale of its partnership interest because once the partnership was created Petitioner itself ceased doing business in the City of Philadelphia. Therefore, any income or gain realized on the sale of its partnership interest was not subject to taxation by Philadelphia because Petitioner was domiciled in Chicago at all times, not in Philadelphia.

Following the sale of the partnership known as Mezzanine, Petitioner concluded that it was due a refund from its BIRT estimated payment for 2010. Petitioner's refund request triggered a full audit by the Department of Revenue and the resulting BIRT and NPT assessments that are the subject of this appeal.

Petitioner's TRB petitions and case, as presented to the TRB, focused on its business transactions. The City and the TRB were provided with Petitioner's documents showing its business structure & activities surrounding the creation of the partnership and its subsequent sale.

At the hearing, it was accepted by the TRB that all of Petitioner's documents had been shared with the City prior to the TRB hearing and agreed on as relevant documents for the TRB. It was

at the hearing that the City insisted on authentication. The TRB accepted all documents at the hearing and permitted Petitioner to provide authentication affidavits at a later date.

The initial hearing focused on the BIRT and NPT assessment with little or no discussion of the original refund request except as it was the catalyst for the audit that resulted in the BIRT and NPT assessments under appeal.

At the close of the public hearing, the matter was taken under advisement pending receipt of briefs by the parties.

After an initial deliberation period, the TRB convened to announce its decision on January 29, 2015 to grant the Petition and abate the assessment as to the BIRT and NPT. At that time, it was brought to the Board's attention that they had neglected to address the issue of the refund of Petitioner's BIRT estimated payment for 2010. The matter was continued at that time.

On August 6, 2015, the TRB announced its decision to grant the petitions. The BIRT and NPT audit assessments were abated and the refund was granted in the amount of [REDACTED], an amount agreed to by the parties as the amount of the Petitioner's overpayment. This agreement by the parties as to the dollar amount for the refund was made without the City waiving its right to appeal the issue of whether a refund of this overpayment should be granted by the TRB.

The questions before the TRB were legal arguments, requiring an analysis of and interpretation of the transactions set forth in the Exhibits. There was no question that the transactions as stated in the documents occurred. The questions for the TRB were did these transactions create a set of circumstances whereby Petitioner's capital gain was not subject to the BIRT and NPT, and was it permissible to use these transactions for this purpose.

The City raised the issue of whether these documents created a true partnership, and contended the transactions were all a sham and should be ignored, thus creating a circumstance where Petitioner was the sole owner and seller of Mezzanine, and subject to Philadelphia's taxing authority for the gain. After raising this argument, the City contended it was Petitioner's burden to disprove the City's theory.

The TRB disagrees. Petitioner put forth its case based on the documents that show the corporate transactions and agreements leading to the sale of South 17th Street Ownerco Mezzanine, LLC.

If the City had reason to believe a fraud had been perpetrated the burden was on the City to at least lay a foundation for the assertion. A bare statement by the City does not shift the burden

to the Petitioner to disprove these bare allegations as though it is part of the Petitioner's initial burden of proof.

It would be unreasonable to expect a Petitioner to raise on its own the issue of whether its transactions were a sham and then refute it.

The City's own audit report characterized the assessment under challenge as imposition of the BIRT and NPT on "the capital gain from sale of partnership interest", without further explanation. See City Audit Report, pages C1 & D1. The auditor testified (Notes of Testimony, October 2, 2014, pg. 22) that Petitioner was in a partnership that had an interest in a Philadelphia hotel. There was no evidence presented to establish that Petitioner owned the hotel itself or that a direct sale of the Philadelphia hotel occurred.

It is the finding of the TRB that the capital gain from the sale of the partnership is not subject to tax by Philadelphia when the partner corporation is domiciled outside of Philadelphia.

BIRT Regulation {406 (2)(C)} expressly states that "(c)apital gains and losses from sales of intangible personal property are allocable to Philadelphia if the taxpayer's commercial domicile is in Philadelphia." There is no additional test or standard stated.

Petitioner had its commercial domicile in Chicago while owning an interest in a partnership with a business interest in Philadelphia. As Petitioner's domicile is not in Philadelphia, the capital gains from the sale of its partnership interest are not subject to BIRT.

Therefore, under the City's own regulations, the capital gain from the sale of intangible income by a non-Philadelphia based entity is sourced to the entity's domicile for purposes of taxation.

The City maintains that the taxpayer failed to meet its burden of proof to prove that it was not subject to taxation by Philadelphia.

Petitioner provided substantial documentation to support the position that the partnership was real. Petitioner also provided substantial existing case law and IRS information to show that the creator of such a partnership where each partner has a capital interest in the partnership and will be subject to the gains and losses of the partnership is valid regardless of the partners' motives for entering the partnership.

The City responded by stating a number of theories as to how or why these gains were taxable to Philadelphia but did not provide any substantiating argument or materials to support these theories. The City argued that the TRB must look beyond the face of the Petitioner's documents and transactions to analyze the motives for the creation of partnership, InterMezzCo, but provided little or no authority for this assertion.

The Petitioner, on the other hand, provided case law and IRS support for its position that motive is immaterial if a true partnership is created, meaning each partner shares in the gains and losses of the partnership, proportional to their ownership interest.

While the Board recognizes that IRS rules and regulations are not necessarily binding and the City could choose to go a different way, in the absence of any express City authority, the TRB was guided by the federal authority presented in this matter. Specifically, the TRB looked to Title 26 Section 704(e) of the IRS Code which states that "(a) person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income producing factor...".

All agree that the burden of proof is on the taxpayer, as the petitioning party, to provide substantial evidence to prove its case and prevail. Once the Petitioner does put forth its arguments and evidence, it is the City's obligation or right to offer rebuttal evidence for the Board to consider. In this case, the City offered only its audit report and conclusory opinion that the taxpayer could not prevail because the taxpayer did not provide any fact witnesses. The City claimed it was deprived of its opportunity to make its case. Certainly the City could have requested the Board issue subpoenas to compel attendance of any witnesses it needed and was not at the mercy of the taxpayer for an opportunity to question any participants in the partnership and sale.

The City's arguments prevail only if the partnership with InterMezzCo, is disregarded and the City did not prove to the TRB that there was authority, either in law or fact, for the TRB to do so.

The TRB found the Petitioner's documents and arguments compelling and substantive. They provided their federal tax return for 2010 as filed and accepted by the IRS (Exhibit A), the Membership Interest Purchase Agreement for the sale of Mezzanine by the partners, Petitioner and InterMezzCo, (Exhibit B), and the Limited Liability Company Agreement to form InterMezzCo (Exhibit C). All supported the creation and activity of the partnership in line with Petitioner's position that the partners each had a real and participatory interest in the partnership.

These documents demonstrated that InterMezzCo was an economic partner participating in any profits or losses of the partnership proportionate to its ownership interest, no matter how small that might be in relation to the whole of the partnership.

Petitioner's partnership interest was an intangible asset governed upon its sale by BIRT Regulation §406(A)(2)(c). Capital gains from such sales are allocable to the taxpayer's commercial domicile.

After a review of all documents and information provided, it was the findings of the TRB that the capital gain attributed to Petitioner from the sale of its partnership interest in South 17th Street Ownerco Mezzanine, LLC is not subject to Philadelphia BIRT and NPT.

As a result, Petitioner's request for a refund of the BIRT overpayment is granted. While the City disagrees that the refund should be granted, it did agree that the correct amount in dispute is

In addition, the petition is granted as to the additional BIRT and NPT assessments resulting from the audit and those bills are abated.

Concurred:

Nancy Kammerdeiner, Chair

Kaitlyn Fiumara-McKenzie, Esq.

Joseph Ferla

George Mathew, CPA

Martin Bednarek