

April 20, 2017

IN RE: Warfield Philadelphia, LP

Docket No: 36PLMERZZ9965

Statement of Record:

- 1) Warfield Philadelphia, LP (hereafter "Petitioner") filed a Petition for Appeal with the Tax Review Board (TRB) on September 29, 2015 and an amendment to that petition on July 13, 2016 requesting review of an audit assessment bill from the City of Philadelphia Department of Revenue ("Revenue"). This bill for the tax years 2008 through 2014 was for Parking Lot Tax for Petitioner's business located at 1600 S. Warfield St. Philadelphia, PA.
- 2) An administrative hearing was held before the Tax Review Board on August 9, 2016 and August 11, 2016. At the conclusion of the hearing, a briefing scheduled for the parties was announced and the matter was taken under advisement.
- 3) On December 15, 2016, the TRB had a hearing for the purpose of announcing to the parties its decision in this matter. The decision of the TRB was to deny the petition.
- 4) Petitioner filed an appeal to the Court of Common Pleas.

Findings of Fact:

- 1) Petitioners requested review of an audit assessment issued by the City of Philadelphia Parking Lot Tax for the years 2008 through 2014. Principal amount due was [REDACTED], with interest of [REDACTED] and penalties of [REDACTED], for a total due of [REDACTED]. This assessment was pursuant to a 2015 audit by the City of Philadelphia Department of Revenue.
- 2) Petitioner owned the property located at 1600 South Warfield St. Philadelphia, PA during all years under appeal.
- 3) This property is primarily a lot where cars can park. A shuttle service is provided at the lot.
- 4) The property is in proximity to Children's Hospital of Philadelphia, the Hospital of the University of Pennsylvania, and other nearby institutions.
- 5) Petitioner operates a business at this location that allows a driver to park his or her vehicle on the lot, and take a shuttle service provided by Petitioner to their destination along a route that includes the nearby hospitals and educational institutions.
- 6) The business is called Campus Park and Ride.
- 7) It is open 24 hours a day for both parking and shuttle service.
- 8) The property is in an industrial location near the I-76 expressway that makes walking to the hospitals nearby, if not completely, impossible.
- 9) In 2008, Petitioner was granted a PUC license to operate its shuttle as a public convenience. The shuttle buses operate within PUC prescribed regulations for insurance, maintenance, driver drug testing, etc. Petitioner did not pay any PUC license fees until March 2014, when he paid for the period of 2010-2014. No fees were paid for 2008-2009.
- 10) Drivers who park on Petitioner's lot pay either on a daily basis, monthly basis or by buying a "12 pack". Payment is by credit card or payroll deductions.
- 11) The price is the same per car, regardless of the number of passengers in the car who will be using the shuttle service. There is no fee attributed to the shuttle service specifically.

- 12) Petitioner also provided parking for recreational vehicles (RVs) & pays the Philadelphia Parking Lot Tax on those revenues. The same shuttle service is available to RV drivers and passengers.
- 13) On its website, Petitioner compares itself to nearby parking garages and the rates they charge.
- 14) There are approximately 900 parking spaces.
- 15) According to the testimony of Myron Berman, managing member of BP Real Estate Fund, LLC, the general partner of Petitioner, Warfield LP, the shuttle service is used by everyone who parks on the lot. He stated that his customers "would not park there if not for the shuttlebuses." Notes of Testimony, August 9, 2016, Page 43.
- 16) If a customer parks, their car and chooses to not use the shuttle service, there is no reduction in the fee charged by Petitioner.
- 17) Someone who does not park in the lot cannot use the shuttle service.
- 18) Some customers pay monthly using a federally approved payroll deduction program administered by a company called Wageworks. Petitioner promotes this on its website, directing customers to notify Wageworks that they want to use the program to pay for monthly parking, with no mention of a transportation service.
- 19) In October 2008, Petitioner became involved in litigation against the University of Pennsylvania. The complaint filed by Petitioner stated that Petitioner operated a parking lot at the property at 1600 S. Warfield St. "with parking spaces for lease to members of the public". See exhibit N. This lawsuit dealt with issues occurring in 2006, 2007 and 2008.
- 20) Petitioner was also involved in litigation against Amtrak Corporation where it described its business as owning and operating "a parking facility as 1600 S. Warfield St. in Philadelphia, PA. The facility for a charge of \$8 provides a parking space for 24 hours at the facility and a shuttle to and from 30<sup>th</sup> Street Station in Philadelphia." See City Exhibit O, paragraph 9. In paragraph 34, Petitioner went on to describe itself as "the only parking facility in Philadelphia that provides free shuttle service to 30<sup>th</sup> Street Station".
- 21) In 2015, following the audit, Petitioner hired an accounting firm to review its financial records for the audit years and prepare an analysis of its costs. Mathew Tomlin, CPA, prepared the analysis and testified at the hearing to explain his report that showed allocation of Petitioner's costs and revenue to transportation, parking, and other activities. He provided a summary for each year. Petitioner's Exhibits 20 through 27.

Mr. Tomlin reviewed the expenses and apportioned these expenses to parking costs or transportation costs based on discussion with Petitioner's personnel and counsel and their representations as to the nature of the business. For example, he testified that he allocated Petitioner's advertising expenses only to the transportation and other lines of business, specifically not to parking, because it was explained to him that Warfield was advertising to promote itself as a transportation service, not as a parking lot. N.T., August 11, 2016, pg. 16. Mr. Tomlin did not do an independent analysis of Petitioner's business activities, costs, or revenue streams.

He concluded that in each year the vast majority of both revenue and expenses were related to the transportation service. From 2008 to 2014, he reported the percentage of costs allocated to transportation as ranging from 79% to 86.80% and the remaining percentages of costs each year

as parking related, ranging from 13.20% to 16.05%. He then used these same percentage figures to allocate Petitioner's revenue for each year by source i.e. parking or transportation.

At the time Mr. Tomlin undertook his analysis in early 2016, he was aware of the Parking Lot Tax assessment under appeal and that his report would be used as part of the current appeal.

- 22) As part of the City audit, Petitioner's general ledger for the audit years, 2008-2014, was reviewed and introduced at the hearing as City Exhibit C. This ledger has a category labeled Parking Income. It did not have any categories for transportation income or shuttle bus income.
- 23) Petitioner's documents and ledgers provided to the City auditors did not allocate the income between parking and transportation. The fees from customers were treated as one unified payment received.

#### Conclusions of Law:

The City of Philadelphia imposes a tax on the use of parking lots as follow:

There is hereby imposed upon every person parking or storing a motor vehicle in or on any parking facility in the City, and upon every person who leaves a motor vehicle with a valet for parking in the City... on July 1, 2015 and thereafter, a tax of twenty-two and one-half percent (22.5%) of the amount charged for the transaction, which tax shall be collected by the operator from the person parking or storing the vehicle, and shall be paid over to the City as provided herein. The Philadelphia Code Chapter 19-1202(1)(b).

(3) Any operator required under this Chapter to collect tax from another person, who shall fail to collect the tax, shall be liable for the tax upon the full amount charged. The Philadelphia Code Chapter 19-1202(3).

It is the finding of the TRB that Petitioner operated a parking facility subject to Parking Lot Tax for all years under appeal.

The testimony and documentation provided by Petitioner and supplemented by the City clearly established that Petitioner operated a parking lot primarily for employees who worked in the area near the Children's Hospital of Philadelphia and the Hospital of the University of PA.

Both Petitioner's documentation and the testimony of its managing partner, Mr. Berman, confirmed that the business focuses on its service as a parking provider.

Drivers are charged a flat fee regardless of the number of passengers who will use the shuttle after the car is parked on the lot. There is no ticket needed to get on or off the shuttle either at the lot or in the City, nor any tally of patrons for whom the transport services are provided. If a driver parks on the lot and does not use the shuttle there is no refund, full or partial.

Throughout the audit period, in both its advertising and several court filings, Petitioner labeled itself as a parking facility and specifically compares itself, its services and fees to what it called comparable and competing parking lots in the area. Some of Petitioner's advertising announced a free shuttle service for anyone using the parking lot.

Petitioner pointed to its PUC registration as proof that parking was ancillary to its primary business of being a transportation service for employees in the neighborhood. However, it was only after the audit that Petitioner paid any PUC fees required for regulation of its shuttle service. These fees when paid did not cover audit years 2008 and 2009. In addition, offering a transportation service would not preclude also offering a parking lot facility. They are not mutually exclusive operations.

Petitioner argued that it was not operating a parking lot at all but was entirely set up as a transportation/shuttle service. In the alternative, Petitioner argued that if the TRB found that Petitioner was offering a parking lot facility in addition to shuttle service, its receipts should be allocated to each and any Parking Lot Tax should be assessed only on the receipts attributable to the parking component.

When reviewing Petitioner's own records, there was no evidence that Petitioner had set itself up to be a transportation service separate from the parking lot. Its general ledgers and tax returns labeled its income as parking receipts until after the City audit and assessment. No receipts were allocated to any category that could be considered the shuttle service.

The Board did not find persuasive the report or testimony of Mathew Tomlin as his report was not prepared contemporaneously to the audit years nor was it based on independent research or investigation. His conclusion that Petitioner was in the business of providing transportation, not parking, and his categorization of the business receipts as related to the transportation services provided by Petitioner were based on his discussions with Petitioner's personnel and counsel. These were self-serving conclusions offered by Petitioner and accepted by Mr. Tomlin as accurate descriptions of Petitioner's business activity. He was hired and prepared his reports in response to the audit bill and anticipated appeal to the TRB. The conclusion of this report that, depending on the year under review, approximately 79% to 86% of receipts should be attributed to the shuttle service and only the remaining 13% to 21% to any parking related business was not accepted by the TRB.

Petitioner also argues the Parking Lot Tax cannot be assessed because it is duplicative of the PUC License Fee and therefore pre-empted by this state imposed fee on Petitioner's same gross revenues.

This argument fails because the Parking Lot Tax is imposed by the City on the parking patrons or customers, not on the parking facility owner. The fact that Petitioner failed to collect the tax from its customers for the City is why liability now falls on it. The Philadelphia Code Chapter 19-1202(3). The PUC License Fee is assessed against the business income of Petitioner. These 2 assessments are against different taxpayers and different revenue and are not, therefore, duplicative.

In addition, for two of the audit years, 2008 and 2009, Petitioner did not pay the PUC fees. For the remaining audit years, Petitioner paid the fees after the audit bill was issued, not during the years of operation that were the subject of the audit. It did not appear that Petitioner considered itself a shuttle service with complimentary parking, as it argued to the Board, until faced with the City's bill for Parking Lot Tax.

Therefore, the decision of the Tax Review Board was to deny the Petition for Appeal and to uphold the Parking Lot Tax assessment.

As to interest and penalties accrued against delinquent taxes, The Philadelphia Code §19-1705(2) provides:

Upon the filing of any petition for the waiver of interest and penalties accruing upon any unpaid money or claim collectible by the Department of Revenue, for or on behalf of the City or the School District of Philadelphia, 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.

In this circumstance, this Petitioner is a sophisticated corporation with professional advisors throughout the audit period. The evidence showed that throughout the audit period, Petitioner held itself out to be a parking lot. Its books and records confirmed that it considered itself to be in the parking business.

Petitioner failed to collect the Parking Lot Tax from its customers and did not provide the TRB with any valid excuse or mitigating circumstance for this. Any claim of PUC regulation was undermined by the fact that during the audit period, Petitioner failed to pay any of the PUC fees that it claimed pre-empted the Parking Lot Tax and by the TRB finding that the PUC Fee and the Parking Lot Tax are not duplicative as the Parking Lot Tax is not assessed against the parking lot operator but is a tax assessed against the parking lot customer with the collection responsibility assigned to the operator to collect in trust for the City.

Concurred:

Nancy Kammerdeiner, Chair

Joseph Ferla

Kaitlin McKenzie-Fiumara, Esq.

Gaetano Piccirilli, Esq.

George Mathew, CPA