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Pathmark Stores, Inc., Petitioner v. Commonwealth of Pennsylvania, Respondent

426 FR 2005

COMMONWEALTH COURT OF PENNSYLVANIA

2005 Pa. Tax LEXIS 1003

PETITION FOR REVIEW

July 15, 2005, Received and Filed

COUNSEL:

[*1]

Pa. I.D. No. 18122, Jeffrey S. Blum, Esq., Buchanan Ingersoll PC, 301 Grant Street, One Oxford Centre, Pittsburgh, PA 15219, (412) 562-8940

Attorney for Petitioner

OPINION:

1. This Court has jurisdiction over this matter by reason of Section 763 of the Judicial Code of 1976, P.L. 586, 42 Pa. C.S.A. § 763; Article V, Section 9 of the Constitution of the Commonwealth of Pennsylvania; and Pa. R.A.P. 1571.

2. On June 24, 2005, the Board of Finance and Revenue mailed to Petitioner a Decision and Order at Board Docket No. 0410379 refusing Petitioner's Petition for Review and affirming the Settlement of the Petitioner's Corporate Net Income Tax for the year ended January 31, 2002.

3. The Decision and Order of the Board of Finance and Revenue and Settlement complained of erroneously and illegally calculated the Petitioner's Pennsylvania taxable income by improperly and illegally disallowing depreciation deductions claimed by Petitioner in the amount of \$ 45,573,345 even though such deductions properly related to Petitioner's Pennsylvania depreciation expense, as adjusted, to take into consideration the timing difference resulting from the differing treatments of forgiveness of debt income under § [*2] 108 of the Internal Revenue Code of 1986, as amended, for Federal tax purposes ("§ 108") and 11 U.S.C. § 346(j)(7) for Bankruptcy Law and state tax law purposes.

4. In 2000 Petitioner was discharged from Federal bankruptcy proceedings pursuant to a plan of reorganization under Chapter 11 of the Bankruptcy Law. The Plan of Reorganization included exchange of stock in Petitioner in exchange for the forgiveness of indebtedness. IRC § 108(a) of the Internal Revenue Code provides that gross income does not include any amount which would be includable in Federal gross income by reason of the discharge of indebtedness income in Title 11 Bankruptcy cases or if the discharge occurs when the taxpayer is insolvent. However, under IRC § 108(b), of the Internal Revenue Code the amount excluded from gross income in such cases must be applied to reduce certain tax attributes of the taxpayer, with the taxpayer having the option under § 108(b)(5) of the Internal Revenue Code to apply such reduction to the basis of depreciable property prior to any other tax attributes. Thus, Petitioner elected to reduce the basis of its depreciable property under § 108 when the discharge [*3] of its indebtedness occurred in 2000.

5. Section § 346(j)(7) of the Bankruptcy Law, 11 U.S.C. § 346 (j)(7) provides for state and local tax purposes a stock-for-debt exception to the requirement to recognize income on account of the discharge of indebtedness. Thus Petitioner was not required to reduce the basis of its depreciable assets for Pennsylvania Corporate Net Income tax purposes as the result of having exchanged its stock for the forgiveness of debt.

6. In settling Petitioner's Corporate Net Income Tax liability for the tax year ending 1/31/02 the Commonwealth improperly and illegally refused to permit Petitioner to claim an additional depreciation deduction of \$ 45,573,345 representing the difference between the depreciation deduction attributable to Petitioner's depreciation of its depreciable

property and the depreciation deduction which Petitioner reported for federal purposes in the tax year 1/31/02, taking into consideration the reduction in the basis of Petitioner's depreciable assets on account of the forgiveness of debt income in 2000.

7. Section 346 of the Federal Bankruptcy Law, 11 U.S.C. § 346, [*4] is applicable "...notwithstanding any state or local law imposing a tax, ...". To the extent the foregoing provisions may be inconsistent with Article IV of the Pennsylvania Tax Reform Code of 1971, P.L. 6, as amended, 72 P.S. § 7401 et seq., federal law takes precedence and pre-empts Pennsylvania tax law.

8. Said Settlement and Decision and Order are erroneous, illegal, unconstitutional and void for the following reasons, among others:

(a) Said Settlement and Decision and Order are violative of the Supremacy Clause of the Constitution of the United States (Article VI, Cl. 2) since said Settlement and Decision and Order are inconsistent with and contrary to the specific provisions of § 346 of the U.S. Bankruptcy Law, 11 U.S.C. § 346.

(b) Said Settlement and Decision and Order and any supposed authority therefor are contrary to the provisions of TRC Article IV, as amended, inasmuch as said Act in no manner authorizes the Settlement imposed against Petitioner.

(c) Said Settlement and Decision and Order result in an arbitrary, palpably excessive and illegal tax contrary to the provisions of TRC Article IV, as amended.

(d) Settlements with [*5] respect to Corporate Net Income Tax must be made in accordance with law and equity and the instant Settlement is illegal and inequitable under all the circumstances.

(e) Said Settlement and Decision and Order have resulted in an arbitrary, palpably excessive and illegal tax, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

(f) Said Settlement and Decision and Order have resulted in a Corporate Net Income Tax liability greater than that of other taxpayers similarly situated for comparable periods of taxation. Hence, said Settlement is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1, of the Constitution of the Commonwealth of Pennsylvania.

(g) The provisions of TRC Article IV, as amended, and any regulations adopted by the Commonwealth pursuant to the authority thereof, are unconstitutional and void insofar as such provisions authorize said Settlement, being contrary to (i) the Supremacy Clause (Article VI, Cl. 2), (ii) the Fourteenth Amendment of the Constitution of [*6] the United States, (iii) § 346 of the U.S. Bankruptcy Law, 11 U.S.C. § 346, and (iv) Article 1, Section 9 of the Constitution of the Commonwealth of Pennsylvania.

(h) Upon all the facts and under the principles of law above stated, the within Settlement and Decision and Order are erroneous, illegal and unconstitutional.

WHEREFORE, Petitioner prays that the Court review and set aside the said Decision and Order of the Board of Finance and Revenue and grant such further relief as may be just in the circumstances.

Respectfully submitted,

Pa. I.D. No. 18122, Jeffrey S. Blum, Esq., Buchanan Ingersoll PC, 301 Grant Street, One Oxford Centre, Pittsburgh, PA 15219, (412) 562-8940, Attorney for Petitioner

Dated: July 15, 2005

NOTICE

Section 503.1 of the Fiscal Code, 72 P.S. § 503.1, which was added by Act 20 of 1989, requires the Board of Finance and Revenue to issue a written opinion in any case in which the Board denies a petition for review or refund, in

whole or in part, and in which the petitioner requests a written opinion. The opinion, in addition to setting forth the decision of the Board, must summarize the relevant factual and legal [*7] issues and explain the rationale upon which the decision is based. Issuance of the opinion, when requested, is a prerequisite to the Board's decision becoming a final order for the purpose of appeal to Commonwealth Court.

In order to comply with Section 503.1 of the Fiscal Code within the time limits of the various taxing statutes, the Board of Finance and Revenue has decided to issue written opinions that meet the content requirements of Section 503.1 in every case decided by the Board, whether the Board grants or denies the petition, and whether or not the petitioner requests a written opinion. Accordingly, unless specifically indicated to be "interlocutory", in which case you will subsequently receive a tax resettlement, the enclosed Opinion and Order is the Board's "final order" for the purpose of an appeal to Commonwealth Court; no written opinion need be requested and no further opinion or order will be issued.

If you are dissatisfied with the enclosed Order, you may appeal to the Commonwealth Court of Pennsylvania by filing a Petition for Review within the time specified by Rule 1571(b) of the Pennsylvania Rules of Appellate Procedure with the Court. Inquiries concerning an [*8] appeal to Commonwealth Court may be addressed to the Court at 6th Floor, Irvis Office Building, Harrisburg, PA 17120 Telephone (717) 255-1600.

You are further advised that if, pursuant to the enclosed Order, you are found by the Board to owe taxes and/or penalties to the Commonwealth, Rule 1782 of the Pennsylvania Rules of Appellate Procedure requires that you post bond in the amount of 120% of the taxes and penalties owed before the appeal can operate as a supersedeas. Rule 1782 prescribes a proposed form of bond for this purpose.

IF SECURITY IS NOT POSTED AS REQUIRED, the Commonwealth may file liens and pursue collection of the unpaid taxes and penalties.

Secretary, Board of Finance and Revenue

9/3/03

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR REVIEW was served on this 15th day of July, 2005, upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 1514(c) and 1571(d):

Service by Certified First Class Mail addressed as follows:

Honorable Tom Corbett, Office of the Attorney General, 16th Floor, Strawberry Square, Harrisburg, PA 17120

Diane Zdradzinski, Secretary, [*9] Board of Finance and Revenue, Commonwealth of Pennsylvania, Riverfront Office Center, 1101 South Front Street, Suite 400, Harrisburg, PA 17120

Honorable Carol L. Weitzel, Chief Deputy Attorney General, Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA 17120

Jeffrey S. Blum, Esq.