

**Jerry Rudibaugh
Municipal Tax Hearing Officer**

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: February 16, 2004
Decision: MTHO #152
Tax Collector: City of Phoenix
Hearing Date: None

DISCUSSION

Introduction

On October 6, 2003, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Phoenix (“City”). After review, the City concluded on October 30, 2003 that the protest was timely and in the proper form. On November 6, 2003, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file any response to the protest on or before December 2, 2003. On December 2, 2003, the Taxpayer filed a request to process the protest as a redetermination. On December 3, 2003, the City filed a response to the protest. On December 4, 2003, the Hearing Officer reclassified this matter from a hearing to a redetermination and ordered the Taxpayer to file any reply to the City on or before January 5, 2004. On January 4, 2004, the Taxpayer filed its reply to the City. On January 29, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before February 25, 2004.

The City audited the Taxpayer for the period June 1999 through December 2002. The City concluded the Taxpayer had underreported construction contracting income for the audit period and owed taxes pursuant to City Code Section 14-415 (“Section 415”) in the amount of \$4,180.93. The City also assessed a penalty in the amount of \$418.12 for failing to timely pay taxes plus interest of \$1,242.14 up through July 2003.

City Position

City Code Section 14-100 (“Section 100”) defines a Construction Contractor as:

“...a person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation, or other structure, project, development, or improvement to real property, or to do any part thereof. “Construction contractor” includes subcontractors, specialty contractors, prime contractors, and any person receiving consideration for the general supervision and/or coordination of such a construction project except for remediation contracting. This definition shall govern without regard to whether or not the construction contractor is acting in fulfillment of a contract.”

In the Proposal/Contract with the owner, the Taxpayer states they “schedule, coordinate and supervise construction work”. As a result, the City concluded the Taxpayer received consideration for the general supervision and/or coordination of a construction project as defined in Section 100. The City indicated that the Taxpayer also took out the building permits for their construction contracting job. According to the City, the fact the Taxpayer issued the building permits would indicate they were involved with the construction project as more than an advisor. While the Taxpayer has argued that some of their revenues were from non-taxable services, the City argued that the Taxpayer has provided no invoices separately stating non-taxable services. Without such documentation, the City asserts all of the revenues are taxable as construction contracting revenues pursuant to City Code Regulation 14-100.2(e) (“Regulation 100.2”).

In response to the Taxpayer’s request to waive the penalties and interest, the City argued that pursuant to City Code Section 14-540(a) (“Section 540(a)”) neither the Tax Collector or the Hearing Officer can waive the interest if the tax assessed is proper. As to the penalties, the City indicated the penalty was assessed because the Taxpayer failed to timely pay the taxes, and for that reason, the City argued that the penalty was appropriate.

Taxpayer Position

The Taxpayer argued that it did not matter whether they called themselves a Construction Manager since they did not perform any construction and did not contract subcontractors to perform any construction work. According to the Taxpayer, they only advised the owner and the owner would hire and contract directly with the contractors. The Taxpayer argued that the contracts entered into with the owners provided that the owners would be “solely responsible for payment of all taxes owed”. In addition, the Taxpayer argued that all work performed during the preconstruction phase of contracted work has nothing to do with construction and would not be taxable income.

The Taxpayer asserted the intent in the contract of the phrase “supervise construction work” was for the Taxpayer to inspect or examine the work performed between the owner and trade contractors who performed the actual construction. Further, the Taxpayer argued the intent in the contract of the phrase “coordinate construction work” was for the Taxpayer to find out and coordinate when to inspect or examine the work performed by the trade contractors hired by the owner.

While the Taxpayer acknowledged their name appeared on the building permits, the Taxpayer asserts the owners and architects were the parties that filled out the paperwork and listed the Taxpayer’s name on the permits. The Taxpayer also acknowledged that the invoices do not separately state charges. The Taxpayer argued that it would be easy to make an assumption of how much the maximum amount of gross income was actually taxable work. The Taxpayer indicated the audit review period covered 600 workdays. According to the Taxpayer, it would take no more than 2 hours per day @ \$50 per hour to coordinate and inspect for a total of \$60,000.00 of taxable income.

The Taxpayer asserted that it is unfair to charge interest until the point in time it is determined

that taxes are owed. According to the Taxpayer, that point in time would be on the date a Decision was issued in this matter. The Taxpayer also requested all penalties be waived in this matter. The Taxpayer requested the waiver because a legitimate argument exists that none of the income is taxable and because the City failed to provide a detailed written explanation of why the Taxpayer's explanation did not constitute reasonable cause.

ANALYSIS

The primary issue was whether or not the Taxpayer's business activity was that of non-taxable consulting services or taxable construction contracting. Based on a review of the Proposal/Contract between the owner and the Taxpayer, we must conclude that the Taxpayer's activity went beyond the scope of consulting services. The Hearing Officer concludes that the Taxpayer was acting as a general supervisor of the construction contracting and their activity would fall under the definition of a construction contractor pursuant to Section 100. In addition, while the Taxpayer may have also performed some non-taxable services, there was no documentation provided to demonstrate the amount, if any, of non-taxable income. As a result, the Hearing Officer concludes all of the Taxpayer's income was taxable as construction contracting. If the Taxpayer believes the owner(s) are responsible for the taxes, the Taxpayer will have to pursue that claim against the owner(s). While the Hearing Officer does not have the authority to waive interest assessed on the taxes, the Hearing Officer does have the authority to waive penalties when the Taxpayer demonstrates they had a reasonable belief there were no taxes due. In this case, the Hearing Officer does find the Taxpayer presented a reasonable belief that no taxes were due. As a result, all the assessed penalties shall be waived.

FINDINGS OF FACT

1. On October 6, 2003, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on October 30, 2003 that the protest was timely and in proper form.
3. On November 6, 2003, the Hearing Officer ordered the City to file any response to the protest on or before December 22, 2003.
4. On December 2, 2003, the Taxpayer filed a request to process the protest as a redetermination.
5. On December 3, 2003, the City filed a response to the protest.
6. On December 4, the Hearing Officer reclassified this matter from a hearing to a redetermination and ordered the Taxpayer to file any reply to the City on or before January 5, 2004.

7. On January 4, 2004; the Taxpayer filed its reply to the City.
8. On January 29, 2004, the Hearing Officer closed the record and indicated a written Decision would be issued on or before February 25, 2004.
9. The City audited the Taxpayer for the period June 1999 through December 2002.
10. The City concluded the Taxpayer had underreported construction contracting income for the audit period and owed taxes pursuant to Section 415 in the amount of \$4,180.93.
11. The City also assessed a penalty in the amount of \$418.12 for failing to timely pay taxes plus interest of \$1,242.14 up through July 2003.
12. In the Proposal/Contract with the owner, the Taxpayer states they “schedule, coordinate and supervise construction work.”
13. In the Proposal/Contract with the owner, the Taxpayer agrees to let the owner utilize the Taxpayer’s contractor license on the building permits.
14. There were no invoices separating taxable and non-taxable activities.
15. In the Proposal/Contract between the owner and the Taxpayer, there was a provision that the owner would be responsible for all sales taxes.
16. The Taxpayer had a reasonable belief that their work as a construction manager was not taxable as construction contracting.

CONCLUSIONS OF LAW

1. Pursuant to ARS Section 42-6056, the Municipal Tax Hearing Officer is to hear all reviews of petitions for hearing or redetermination under the Model City Tax Code.
2. The City imposes a tax on income from construction contracting pursuant to Section 415.
3. Section 100 defines a construction contractor.
4. Based on the Proposal/Contract, the Taxpayer was performing activities that would fall under the definition of a construction contractor.
5. Without documentation to separately state non-taxable services, all the revenues are taxable pursuant to Regulation 100.2.
6. The Taxpayer has demonstrated reasonable cause that they did not believe any taxes were due and all penalties should be waived.

7. The Hearing Officer is unable to waive interest pursuant to section 540(a).
8. With the exception of the penalties, the Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the October 6, 2003 protest of *Taxpayer* of a tax assessment made by the City of Phoenix, with the exception of the penalties, is hereby denied.

It is further ordered that the City of Phoenix shall revise the assessment by removal of all penalties.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer