DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: May 8, 2006
Decision: MTHO #288
Tax Collector: City of Phoenix
Hearing Date: None

DISCUSSION

Introduction

On January 3, 2006, ***Taxpayer*** ("Taxpayer") filed a protest of a tax assessment made to the City of Phoenix ("City"). After review, the City concluded on January 3, 2006, that the protest was timely and in the proper form. On January 9, 2006, the Municipal Tax Hearing Officer ("Hearing Officer") classified this matter as a redetermination and ordered the City to file a response on or before February 23, 2006. On January 18, 2006, the City filed a response to the protest. On January 20 2006, the Hearing Officer ordered the Taxpayer to file any reply on or before February 10, 2006. On February 3, 2006, The Taxpayer sent an email request to have the matter reclassified as a redetermination and requested an extension for its reply. On February 4, 2006, the Hearing Officer reclassified the matter as a redetermination and granted the Taxpayer an extension to file its reply until March 10, 2006. On March 8, 2006, the Taxpayer filed its reply. On March 11, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before April 25, 2006.

City Position

The City indicated the Arizona Department of Revenue ("DOR") conducted a multijurisdictional audit for the State of Arizona ("State") and the City. The audit period was September 1999 through July 2003. The Taxpayer was assessed additional taxes of $42,000.83, penalties of $10,500.28, and interest up through October 2005 of $19,197.34.

According to the City, the Taxpayer is in the business of rental of sign posts. The Taxpayer placed the sign posts on properties on behalf of realtors for property that was for sale. The City taxed the rental of sign posts as rental of tangible personal property pursuant to City Code Section 14-450 ("Section 450"). The City noted that the State also originally taxed the rental of sign posts as rental of tangible personal property. Subsequently, the State entered into a closing agreement ("Agreement") with the Taxpayer and concluded the Taxpayer did not owe tax for the rental of signs. The City indicated there was no reason given by the State for this conclusion.

According to the City, it is not relevant that the realtors did not take physical control of the sign posts. The City asserted the realtors paid for the temporary use of tangible

personal property which is taxable pursuant to Section 450. In response to the Taxpayer, the City argued that there has been no extensive misunderstanding or misapplication of provisions of the tax code. The City indicated that City Code Section 14-546 (a) (1) ("Section 546") provides as follows:

> "extensive misunderstanding or misapplication of the tax laws occurs if the Tax Collector determines that more than 60% of the persons in the affected class have failed to properly account for their taxes owing to the same misunderstanding or misapplication of tax laws."

The City asserted that no documentation was provided to demonstrate that an extensive misunderstanding or misapplication of provisions of the tax code had occurred. Based on the above, the City requested the tax assessment be upheld.

The City noted that City Code Section 14-540 (a) ("Section 540 (a)") provides that any taxpayer who fails to timely pay taxes will be assessed interest. Section 540 (a) provides that interest may not be waived by the City nor abated by the Hearing Officer except as it relates to tax abated. As a result, the City argued the interest may not be abated.

The City also assessed penalties pursuant to City Code Sections 14-540 (b) (1) and (b) (2) ("Section 540 (b)") for failure to timely file tax returns and failure to timely pay taxes. The City asserted the penalties were proper and should be upheld.

Taxpayer Position

The Taxpayer asserted it has been unfairly assessed City taxes for the audit period. The Taxpayer argued that its primary business was the installation and removal of real estate sign posts and signs and not the rental of sign posts. The Taxpayer indicated customers during the audit period were charged $19.00 to $24.00 for service. According to the Taxpayer, the charge included the installation of the sign post and customer's sign at the customer specified location, the removal of the sign post and sign when the real estate transaction was completed, and use of the Taxpayer's sign post for a period not to exceed six months. The Taxpayer indicated that in some instances, the customer preferred to use their own sign posts. In those cases the Taxpayer charged an additional $1.00. During the initial six month period, the Taxpayer charged a one way trip charge of $9.50 to $12.00 to further service a sign at the customer's request.

If the customer needed the post for more than six months, the Taxpayer charged an additional fee for continued use of the sign post. According to the Taxpayer, these additional fees equated to approximately seven percent of net revenue. The Taxpayer argued the sign post and its associated cost is an insignificant cost of the service the Taxpayer provides. The Taxpayer indicated it handles hundreds of installations each week and supplying of uniform sign posts reduces the problems for the Taxpayer's installers. The Taxpayer asserted it is far less costly to lend a customer a sign post then to install sign posts that are different. The Taxpayer cited City Regulation 14-460.4 (d) (3) ("Regulation 460") in support of its insignificant cost argument.

The Taxpayer indicated the DOR had conducted an industry wide audit in August 2003 and found that no real estate sign post installation business was collecting or paying rental tax for their services. The Taxpayer asserted the lack of rental tax collection was an accepted and common practice. As a result, the Taxpayer argued any past tax liability must be forgiven pursuant to City Code Section 14-546 ("Section 546").

ANALYSIS

The Taxpayer did receive income from realtors for the use of the Taxpayer's sign posts. We note that City Code Section 100 ("Section 100") defines licensing for use as follows:

> "*Licensing (for use)* means any agreement between the user ("licensee") and the owner or the owner's agent ("licensor") for the use of the licensor's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement."

As a result, we conclude that the Taxpayer's income would be taxable pursuant to Sections 100 and 450. While it appears that the Taxpayer was also providing some non-taxable services, the Taxpayer generally did not separately bill or separately maintain those services in the Taxpayer's records. Section 450 (c) (6) does provide for an exemption for separately billed services. Based on Taxpayer Exhibit Nos. three and four, the Taxpayer did have separate "Trip" charges which we conclude would be a charge for a non-taxable service. Based on Exhibit Nos. three and four, those charges represented 1.57 percent of the Taxpayer's net revenue. We shall order the City to remove those charges from the taxable income.

Based on Exhibit Nos. three and four, the Taxpayer also separately charged for extensions for the use of these sign posts which would represent approximately seven percent of net revenue. While these are separate charges, we find the charges are for continued use of the sign posts which would be taxable pursuant to Section 100 and 450. We also find that the amount charged for the renewal of the posts goes against the Taxpayer's argument that the charges for the sign posts are inconsequential. Further, City Code Section 360 ("Section 360") provides that all deductions, exclusions, and exemptions are conditional upon adequate proof and documentation being provided by the Taxpayer. In this case, the Taxpayer has failed to meet the burden of proof pursuant to Section 360 and 450 (c) (6). We reviewed the Agreement between the State and the Taxpayer but could find no reasoning on why the State assessment was reduced from $165,000.00 to zero. As a result, the Agreement does not provide us with any basis on which to reduce the City assessment. We also note the State Agreement provides no reference to any determination by the State that concluded there has been an "extensive misunderstanding or misapplication of the tax laws … by more than sixty percent (60%) of the persons in the affection class . . . ." Accordingly, we do not find any basis to conclude that Section 546 applies in this case.

Since the Taxpayer failed to timely file reports and failed to timely pay taxes, the City

was authorized to assess penalties pursuant to Section 540. However, we do find that the Taxpayer has demonstrated "reasonable cause" for failing to timely file and timely pay. As a result, we shall abate all penalties assessed. As to the interest charges, Section 540 makes it clear that the Hearing Officer shall not waive any interest except when it is related to a tax abated. In this case, the only taxes abated were those related to our removal of 1.57 percent of the net revenue and the interest associated with those taxes shall be removed.

FINDINGS OF FACT

1. On January 3, 2006 the Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on January 3, 2006, that the protest was timely and in the proper form.

3. On January 9, 2006, the Hearing Officer classified this matter as a redetermination and ordered the City to file a response on or before February 23, 2006.

4. On January 18, 2006, the City filed a response to the protest.

5. On January 20, 2006, the Hearing Officer ordered the Taxpayer to file any reply on or before February 10, 2006.

6. On February 3, 2006, the Taxpayer sent an email request to have the matter reclassified as a redetermination and requested an extension for its reply.

7. On February 4, 2006, the Hearing Officer reclassified the matter as a redetermination and granted the Taxpayer an extension to file its reply until March 10, 2006.

8. On March 8, 2006, the Taxpayer filed its reply.

9. On March 11, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before April 25, 2006.

10. The DOR conducted a multijurisdictional audit for the State and the City.

11. The audit period was September 1999 through July 2003.

12. The Taxpayer was assessed additional taxes of $42,000.83, penalties of $10,500.28, and interest up through October 2005 of $19,197.34.

13. During the audit period, the Taxpayer placed sign posts on properties on behalf of

realtors for property that was for sale.

14. The State originally taxed the rental of sign posts as rental of tangible personal property.

15. Subsequently, the State entered into an Agreement with the Taxpayer and concluded the Taxpayer did not owe tax for the rental of signs.

16. There was no reason given in the Agreement on why the State concluded the Taxpayer did not owe any tax.

17. During the audit period, the Taxpayer charged its customers $19.00 to $24.00 for the services provided by the Taxpayer.

18. The charge by the Taxpayer included the installation of the sign post and customer' sign at the customer specified location, the removal of the sign post and sign when the real estate transaction was completed, and use of the Taxpayer's sign post for a period not to exceed six months.

19. In some instances, the customer preferred to use their own sign posts.

20. In those cases in which the customer sign posts were used, the Taxpayer charged an additional $1.00.

21. During the initial six month period, the Taxpayer charged a one way trip charge of $9.50 to $12.00 to further service a sign at the customer's request.

22. If the customer needed the post for more than six months, the Taxpayer charged an additional fee for the continued use.

23. The additional fee for more than six months equated to approximately seven percent of net revenue.

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 Taxpayer had income that would be taxable pursuant to Sections 100 and 450.

3. Section 450 (c) (6) provides for an exemption for separately billed non-taxable services.

4. The Taxpayer has demonstrated that 1.57 percent of the Taxpayer's net revenue was from separately billed non-taxable service.

5. With the exception noted in Conclusion of Law No. 4, the Taxpayer has failed to provide adequate proof or documentation to support any other exemption from income pursuant to Section 360 and 450 (c) (6).

6. The Agreement provides no reasoning on why the State assessment was reduced from $165,000.00 to zero.

7. The Agreement provides no basis on which to reduce the City assessment.

8. There was not sufficient evidence to conclude Section 546 applies in this case.

9. Since the Taxpayer failed to timely file reports and failed to timely pay taxes, the City was authorized to assess penalties pursuant to Section 540.

10. The Taxpayer demonstrated "reasonable cause" for failing to timely file and timely pay.

11. All penalties should be abated.

12. Interest may not be waived except when it relates to a tax abated.

13. The Taxpayer's protest should be partly granted and partly denied consistent with the Discussion, Findings, and Conclusions, herein.

ORDER

It is therefore ordered that the January 3, 2006 protest of ***Taxpayer*** of a tax assessment made by the City of Phoenix is partly granted and partly denied consistent with the Discussion, Findings, and Conclusions herein.

It is further ordered that the City of Phoenix shall revise the assessment by removing 1.57 percent of the net income.

It is further ordered that the City of Phoenix shall remove all penalties from the assessment.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer