

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: October 31, 2007

Decision: MTHO #375

Taxpayer: *Taxpayer A*

Tax Collector: City of Mesa

Hearing Date: October 17, 2007

DISCUSSION

Introduction

On July 9, 2007, *Taxpayer A* (“Taxpayer”) filed a protest of a tax assessment made by the City of Mesa (“City”). After review, the City concluded on July 26, 2007 that the protest was timely and in the proper form. On August 2, 2007, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response to the protest on or before September 17, 2007. On September 13, 2007, the City filed a response to the protest. On September 17, 2007 the Hearing Officer ordered Taxpayer to file any reply on or before October 8, 2007. On September 20, 2007, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on October 17, 2007. Taxpayer filed a reply on October 4, 2007. Both parties appeared and presented evidence at the October 27, 2007 hearing. On October 22, 2007, the Hearing Officer indicated the record was closed and a written decision would be issued on or before November 20, 2007.

City Position

The City conducted an audit of Taxpayer for the period April 15, 2004 through January 2007. The City assessed additional taxes for understated publishing activity income pursuant to City Code Section 5-10-435 (“Section 435”). The City’s assessment was for taxes due in the amount of \$36,008.24, interest up through April 30, 2007 in the amount of \$3,693.77, and penalties totaling \$27,006.18.

The City indicated Taxpayer was owned and operated by *Owner*, as an individual. The City noted that during the audit period Taxpayer published three monthly magazines that were distributed in the *X Valley*. The magazines were: *Magazine 1*; *Magazine 2*; and, *Magazine 3*. The City asserted Taxpayer’s editorial office was located in the City. According to the City, independent third parties printed the magazines in the City of Phoenix. All of the magazines contained advertising that was purchased from Taxpayer. The City indicated all of the publication were distributed for free and delivered by the United States Postal Service (“Post Office”). The City concluded that because all magazines were distributed by the Post Office and Taxpayer’s location of publication was located in the City that all gross income was subject to City tax pursuant to Section 435(d). Section 435(d) provides as follows:

“Circulation,” for the purpose of measurement of gross income subject to the tax shall be considered

to occur at the place of delivery of the published items to the subscriber or intended reader irrespective of the location of the physical facilities or personnel of the publisher. However, delivery by the United States mails shall be considered to have occurred at the location of publication.

The City indicated the gross income amount was obtained from revenue reports that were provided by the Taxpayer during the audit.

The City assessed Taxpayer for penalties for failure to file and failure to timely pay taxes pursuant to City Code Section 5-10-540(b)(1) and (2) (“Section 540(b)(1) and (2)”). The City also assessed Taxpayer for an additional fifty percent penalty for evasion of taxes pursuant to Section 540(b)(5). The City asserted that Taxpayer was well aware of the tax on its business activity since Taxpayer was previously assessed. In addition, the City noted that in September of 2003, Taxpayer plead guilty in Mesa Municipal Court (“Court”) for operating without a City license. The City argued that Taxpayer made a conscientious decision to not file tax returns nor pay taxes due. As a result, the City requested all penalties be up held by the Hearing Officer.

Taxpayer Position

Taxpayer argued that the tax assessment was invalid, unfair, and not equally enforced. Taxpayer asserted that Section 435 and as it related to advertising in City Code Section 5-10-405 (“Section 405”) are both poorly crafted tax codes and do not provide Taxpayer with a clear understanding of what the City is planning to tax. Taxpayer noted that Section 405 states that: “All delivery or disseminating of information directly to the public or a portion thereof for a consideration shall be considered ‘local advertising’” While Taxpayer admitted it used direct mail to deliver or disseminate its periodicals to a defined list of persons, Taxpayer questioned whether this defined list should be considered “public or a portion thereof.” Taxpayer indicated the publications were distributed free of charge and thus not delivered or disseminated for a consideration.

Even if the tax was proper, Taxpayer asserted the City erroneously based its assessment on all of Taxpayer’s revenues. According to Taxpayer, one of its publications was a City publication (*Magazine 1*), one was a *City of Y* publication (*Magazine 2*) and one was not defined by City (*Magazine 3*). Taxpayer indicated that Section 435(A)(1) provides for a tax on the business activity of: “Publication of newspapers, magazines, or other periodicals when published within the City, measured by the gross income derived from notices, subscription, and local advertising as defined in Section 5-10-405....” Taxpayer did not dispute that location of publication was in the City as set forth in Section 435(B). However, Taxpayer argued that when a publication is published/printed by a printer outside the City, that publication is not “published within the City”, as defined in Section 435(A)(1). Taxpayer noted that the City relied on Section 435(1) which provides that “circulation for the purpose of measurement of gross income subject to the tax, shall be considered to occur at the place of delivery of the published items to the subscriber or intended reader irrespective of the location of the physical facilities or personnel of the publisher.... However, delivery by the United States mails shall be considered to have occurred at the location of the publication.” Taxpayer argued that since Section 435 (D) is not tied to the other sub-sections of Section 435 in any meaningful manner that Section

435(D) is not effective to define the use of the mails as having occurred at the location of the publication.

Taxpayer asserted that Sections 405 and 435 were not being equally enforced. Taxpayer indicated it was unable to ascertain if any of its competitors are being taxed by the City pursuant to Sections 405 and 435. Taxpayer argued that the City did not have the right to choose to enforce the provisions of Sections 405 and 435 against Taxpayer and not enforce them against more powerful entities.

Even if the tax is found to be valid, Taxpayer requested the penalties be eliminated. Taxpayer opined that consideration should be given for the fact that *Owner* had severe medical conditions and related medical treatments during the audit period. While Taxpayer acknowledged he has previously been audited by the City for the same tax codes, Taxpayer asserted he was always of the opinion that the tax was not valid and enforceable under the circumstances. Taxpayer argued he did not willfully fail to file returns for a valid tax that was due. Taxpayer noted that his offices have continued to remain in the same suite and he has not attempted to flee the jurisdiction.

ANALYSIS

There was no dispute that Taxpayer was engaged in the business activity of publishing magazines during the audit period pursuant to Section 435(a). There was also no dispute that Taxpayer's editorial offices were located in the City and that the physical printing was done by independent third parties. As a result, we can conclude that the "location of publication" was Taxpayer's editorial offices in the City pursuant to Section 435(b). Based on the evidence, all three of Taxpayer's magazines were delivered by the Post Office. Section 435(d) provides that delivery by the Post Office shall be considered to have occurred at the "location of publication". Accordingly, we must conclude that all three magazines were delivered from the City pursuant to Section 435(d). Section 435(a) provides that the gross income from the publication of these magazines was measured by the gross income from notices, subscriptions, and local advertising as defined in Section 405. In this case, Taxpayer had no gross income from notices or subscriptions. As a result, Taxpayer's gross income would be measured solely from the gross income from local advertising as defined in Section 405. Section 405(a) provides that "All delivery or disseminating of information directly to the public or any portion thereof for a consideration shall be considered "local advertising," ...". In this case, we conclude that Taxpayer was disseminating local advertising directly to the public through his magazine publications for a consideration. The considerations received by Taxpayer were the monies received for the advertising set forth in the magazine publications. Based on all the above, we uphold the City's assessment of taxes pursuant to Sections 435 and 405.

Since Taxpayer failed to file returns or timely pay taxes, the City was authorized pursuant to Sections 540(b)(1) and (2) to impose penalties. While those penalties may be waived for good cause, we find Taxpayer has failed to demonstrate good cause. Because Taxpayer had previously been assessed taxes by the City for the same business activity,

Taxpayer had knowledge that he needed to file returns and timely pay taxes. As a result, we uphold the City's assessment of penalties pursuant to Sections 540(b)(1) and (2).

The City also assessed penalties pursuant to Section 540(b)(5) due to evasion of the tax. The City assessed the evasion penalties because of Taxpayer's history with assessments, a criminal conviction of Taxpayer on September 2, 2003 for operating a business without a license, and what the City referred to as a conscious decision by Taxpayer to not file reports or timely pay taxes. Taxpayer argued there was no willful attempt to evade taxes or willful failure to file returns since Taxpayer's offices remained in the same location. At a minimum, we would conclude that Taxpayer's failure to timely file reports and timely pay returns would be "negligence" pursuant to Section 540(h)(i). "Negligence" is defined as "characterized chiefly by inadvertence, thoughtlessness, inattention, or the like...." Two examples of "negligence" were "repeated failure to timely file returns," or "gross ignorance of the law." In this case we conclude that Taxpayer was aware of the law and made a conscious decision to not file any returns with the City. Taxpayer acknowledged that if there had been no assessment, the taxes would not have been paid to the City. Clearly, Taxpayer's actions were more than negligence. While we understand Taxpayer did not agree with the tax, there were avenues to pursue his disagreement such as appeals from previous assessments, filing tax returns under protest, and/or attempting to have the law changed by the City. Even with all that said, we are unable to conclude that Taxpayer's actions/inactions constituted fraud and/or evasion. While Taxpayer made a conscious decision to not file reports or pay taxes, Taxpayer did not provide any erroneous or misleading information to the City. Because of the previous City assessments, Taxpayer was also aware that the City knew of his business activity and location and would more than likely be assessed again if he failed to comply with the tax code provisions. Taxpayer's inactions were properly penalized pursuant to Section 540(b)(1) and (b)(2). Based on all the above, we do not find sufficient evidence to conclude Taxpayer committed fraud and/or evasion pursuant to Section 540(b)(5).

FINDINGS OF FACT

1. On July 9, 2007, Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded as July 26, 2007 that the protest was timely and in the proper form.
3. On August 2, 2007, the Hearing Officer ordered the City to file a response to the protest on or before September 17, 2007.
4. On September 13, 2007, the City filed a response to the protest.
5. On September 17, 2007, the Hearing Officer ordered Taxpayer to file any reply on or before October 8, 2007.
6. On September 20, 2007, a Notice scheduled the matter for hearing commencing

on October 17, 2007.

7. Taxpayer filed a reply on October 4, 2007.
8. Both parties appeared and presented evidence at the October 17, 2007 hearing.
9. On October 22, 2007, the Hearing Officer indicated the record was closed and a written decision would be issued on or before November 30, 2007.
10. The City conducted an audit of Taxpayer for the period April 15, 2004 through January 2007.
11. The City assessed Taxpayer for additional taxes for understated publishing activity income pursuant to Section 435.
12. The City's assessment was for taxes due in the amount of \$36,008.24, interest up through April 30, 2007, in the amount of \$3,693.77, and penalties totaling \$27,006.18.
13. Taxpayer was owned and operated by *Owner*, as an individual.
14. During the audit period, Taxpayer published three monthly magazines that were distributed in the *X Valley*.
15. The magazines were *Magazine 1*, *Magazine 2* and *Magazine 3*.
16. Taxpayer's editorial office was located in the City.
17. Independent third parties printed the magazines in the City of Phoenix.
18. All of the magazines were distributed for free and delivered by the Post Office.
19. All of the magazines contained advertising that was purchased from Taxpayer.
20. The gross income amount was obtained from revenue reports that were provided by Taxpayer during the audit.
21. Prior to this audit, Taxpayer had been previously audited by the City.
22. In September 2003, Taxpayer plead guilty in Court to operating without a license after the City revoked the tax license for failure to file returns and failure to timely pay taxes.
23. There was no evidence of the City being aware of any similar businesses to Taxpayer that were not reporting or paying taxes.

24. Taxpayer had severe medical conditions and related medical treatment during the audit period.
25. Taxpayer had always been of the opinion that the tax assessed in this matter was not valid and enforceable under the circumstances.
26. Taxpayer has continued to utilize the same business offices in the City.
27. While Taxpayer disputed previous assessments made by the City, Taxpayer has never appealed any assessments beyond the City appeal process.

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. During the audit period, Taxpayer was engaged in the business activity of publishing magazines pursuant to Section 435(a).
3. The “location of publication” was Taxpayer’s editorial offices in the City pursuant to Section 435(b).
4. All three of Taxpayer’s magazines were delivered by the Post Office and delivery was considered to have occurred from the City location of publication pursuant to Section 435(d).
5. Section 435(a) provided that the gross income from the publication of the magazines was measured by the gross income from notices, subscriptions, and local advertising as defined in Section 405.
6. Taxpayer was disseminating local advertising directly to the public through his magazine publications for a consideration.
7. The consideration received by Taxpayer was the monies received for the advertising set forth in the magazine advertising.
8. The City’s assessment of taxes pursuant to Sections 435 and 405 was proper.
9. Since Taxpayer failed to file returns or timely pay taxes, the City was authorized pursuant to Sections 540(b)(1) and (b)(2) to impose penalties.
10. Taxpayer failed to demonstrate good cause to have the penalties waived.

11. There was not sufficient evidence to conclude that Taxpayer committed fraud and/or evasion pursuant to Section 540(b)(5).
12. Taxpayer's protest should be partly granted and partly denied consistent with the Discussion, Conclusions, and Findings, herein.

ORDER

It is therefore ordered that the July 9, 2007 protest by *Taxpayer A* of a tax assessment made by the City of Mesa is hereby partly granted and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Mesa shall remove the penalties assessed pursuant to Section 540(b)(5).

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer