

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: June 21, 2010

Decision: MTHO # 521

Taxpayer:

Tax Collector: City of Mesa

Hearing Date: April 6, 2010

DISCUSSION

Introduction

On April 29, 2009, a letter of protest was filed by ***Taxpayer*** of a tax assessment made by the City of Mesa (“City”). A hearing was commenced before the Municipal Tax Hearing Officer (“Hearing Officer”) on April 6, 2010. Appearing for the City were the Assistant City Attorney; Tax Administrator, Tax Audit Supervisor, and the Tax Auditor. Appearing for Taxpayer were his ***representatives***, his ***CPA***, and another ***associate***. At the conclusion of the April 6, 2010 hearing, the record was closed. On May 7, 2010, the Hearing Officer indicated a written decision would be issued on or before June 21, 2010.

DECISION

On March 16, 2009, the City issued an audit assessment of Taxpayer. The assessment was for the period of April 2000 through June 2004. The assessment was for additional taxes in the amount of \$18,136.66, interest up through February 2009 in the amount of \$9,726.04, and penalties in the amount of \$1,813.67. During the audit period, Taxpayer was engaged in the business of selling telecommunications equipment at retail. Taxpayer also acted as an agent for ***Big-Time Phone*** who provided telecommunication network services to end users. Taxpayer received commissions for marketing ***Big-Time Phone’s*** services. The City assessed Taxpayer on the commissions. Taxpayer argued the commissions did not constitute taxable business activities. At the commencement of the hearing, the City agreed to remove the commission income from the assessment.

During the audit period, Taxpayer had a business location at ***12345 W. Phoneville*** (“***Phoneville***”) in the City. Taxpayer argued the ***Phoneville*** location was “solely a service facility”. Taxpayer asserted it would meet with customers at their business locations and sign agreements for the sale of equipment and other services that all took place at the customer’s location. Taxpayer argued that it only owed taxes on the sale of equipment to customers located in the City. According to Taxpayer, the total of City sales during the audit period was \$116,046.75. Since the sales consisted of both taxable and

non-taxable business activities, Taxpayer concluded only \$44,421.12 represented revenues from taxable sales of equipment.

During the audit period, Taxpayer had a home office in *Water Canyon* until October 2003. At the same time, Taxpayer opened the *Phoneville* business office in April 2000. After the *Phoneville* office was opened, Taxpayer's invoices, tax documents, and phone numbers were based on the *Phoneville* office. The administrative work for Taxpayer was primarily done at the *Phoneville* office. Some appointments with customers were made from the *Phoneville* office. During the audit period, Taxpayer was in the business of selling, installing, and servicing *Very High End ("VHE")* telephone systems. Taxpayer would have to visit the customer location to determine the needs of the customer. Taxpayer would design the system at the customer location and have an invoice written up and signed by the customer at the customer's location. The necessary equipment was ordered from out-of-State and shipped to the *Phoneville* office where it would be picked up by an installer and taken to the customer's location for installation.

Both parties relied on the following language from City Code Section 5-10 460 ("Section 460"): "When the City and another Arizona city or town with an equivalent excise tax could claim nexus for taxing a retail sale, the city or town where the permanent business location of the seller at which the order was received shall be deemed to have precedence, and for the purposes of this Chapter shall be at the tax rate of the city or town of such seller's location." The City noted that City Code Section 5-10-400 ("Section 400") provides that all gross income is subject to tax until the contrary is established by the taxpayer. The City asserted that Taxpayer did not qualify for the out-of-City exemption set forth in City Code Section 5-10-100 ("Section 100"). Section 100 requires the following three conditions to be met for the exemption: 1) Transference of title and possession occur without the City; and 2) The stock from such personal property was taken was not within the corporate limits of the City; and, 3) The order is received at a permanent business location of the seller located outside the City which location is used for the substantial and regular conduct of such business sales activity. In no event shall the place of business of the buyer be determinative of the situs of the receipt of the order.

We conclude that Taxpayer was selling tangible personal property at retail during the audit period. Section 460 imposes a tax on the gross income from the business activity of selling tangible personal property at retail. As a result, Taxpayer's audit period sales were taxable pursuant to Section 460. Subsection 460(b) provides that the burden of proof that a sale was not a taxable sale is upon the person who made the sale. We conclude that there was sufficient nexus with the City to tax the disputed sales since Taxpayer had an administrative office in the City with full time employees. In addition, Taxpayer had sales representatives visiting other city locations of customers on a regular basis to establish and maintain a market for Taxpayer. As a result, we conclude there was sufficient nexus with those cities to tax transactions by Taxpayer. As a result, for most of Taxpayer's transactions, there were two cities (the City and the customer's city) which could possibly impose a tax on the transaction. Subsection 460(e) attempts to provide guidance on which of the two cities has precedence on the taxing of the retail sale.

Unfortunately, Subsection 460(e) is ambiguous in this situation. Subsection (e) provides that the city in which the business location where the sales order is received is the situs of the tax. While Taxpayer had a business location in the City, the sales orders were received at the customer's location. Taxpayer argued that as a result there is an ambiguity relating to the meaning of the statute imposing the tax which must be resolved in favor of Taxpayer and against the City. We concur with Taxpayer's conclusion that any ambiguity relating to the meaning of the statute imposing the tax must be construed in favor of Taxpayer. However, we don't reach the same conclusion that the transactions in dispute are not subject to tax. There is no ambiguity that the business activity of selling tangible personal property at retail is taxable pursuant to Section 460. Clearly, Taxpayer had such business activity during the audit period. The ambiguity arises because more than one city may claim the tax. We would agree that the ambiguity of which city may claim the tax must be resolved in favor of Taxpayer. It is not the responsibility of Taxpayer to resolve any disputes between the cities as the cities will have to resolve any dispute among them. In this case, we shall require the City to provide credits to Taxpayer for all taxes paid to other cities on the disputed transactions. Based on all the above, we uphold the City's tax assessment on retail sales with any adjustments for tax credits as discussed above.

Pursuant to City Code Section 5-10-540 ("Section 540"), the City assessed Taxpayer penalties for failure to timely pay taxes. Those penalties may be waived when a taxpayer demonstrates reasonable cause. We conclude that Taxpayer has demonstrated a reasonable basis for believing the tax was not due to the City. Accordingly, we conclude Taxpayer has demonstrated reasonable cause to have all penalties waived. Based on all the above, Taxpayer's protest should be partially granted and partially denied, consistent with the Discussion, Findings, and Conclusions, herein.

FINDINGS OF FACT

1. On April 29, 2009, Taxpayer filed a protest of a tax assessment made by the City.
2. The City conducted an audit of Taxpayer for the period of April 2000 through June 2004.
3. On March 16, 2009, the City issued an assessment for additional taxes in the amount of \$18,136.66, interest up through February 2009 in the amount of \$9,726.04, and penalties totaling \$1,813.67.
4. During the audit period, Taxpayer was in the business of selling telecommunications equipment at retail.

5. Taxpayer also acted as an agent for ***Big-Time Phones*** who provided telecommunication network services to end users.
6. Taxpayer received commissions for marketing ***Big-Time Phone's*** services.
7. The City assessed Taxpayer on the commissions.
8. At the commencement of the hearing, the City agreed to remove the commission income from the assessment.
9. During the audit period, Taxpayer had a business location at ***Phoneville*** in the City.
10. Taxpayer would meet with customers at their business locations and sign agreements for the sale of equipment and other services that all took place at the customer's location.
11. During the audit period, Taxpayer had a home office in ***Water Canyon*** until October 2003.
12. Taxpayer opened the ***Phoneville*** business office in April 2000.
13. Taxpayer's invoices, tax documents, and phone numbers were based on the ***Phoneville*** address.
14. The administrative work for Taxpayer was done primarily at the ***Phoneville*** address.
15. Some appointments with customers were made from the ***Phoneville*** address.
16. During the audit period, Taxpayer was in the business of selling, installing, and servicing ***Very High End ("VHE")*** telephone systems.
17. Taxpayer would have to visit the customer location to determine the needs of the customer.
18. The necessary equipment was ordered from out-of-State and shipped to the ***Phoneville*** office where it would be picked up by an installer and taken to the customer's location for installation.

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. Section 460 imposes a tax on the gross income from the business activity of selling tangible personal property at retail.
3. During the audit period, Taxpayer sold tangible personal property at retail.
4. Section 460 imposes the burden of proving that a sale of tangible personal property is not a taxable retail sale upon the person who made the sale.
5. There was sufficient nexus with the City to tax the disputed sales since Taxpayer had an administrative office in the City with full time employees.
6. There was sufficient nexus with the city locations of Taxpayer's customers to tax the disputed sales since Taxpayer had sales representatives visiting the cities on a regular basis to establish and maintain a market for Taxpayer.
7. Subsection 460(e) provides guidance on which city should have precedence for taxing a retail sale when more than one city can claim nexus.
8. Subsection 460(e) is ambiguous as to which city should have precedence for taxing retail sales of Taxpayer during the audit period.
9. It is not the responsibility of Taxpayer to resolve any disputes between the cities regarding the proper city to tax the disputed sales.
10. The City shall provide credits to Taxpayer for any taxes paid by Taxpayer to other cities on the disputed sales.
11. The City has withdrawn its assessment on the commissions received for marketing *Big-Time Phone's* services.
12. Taxpayer has failed to meet its burden of proving the disputed sales of tangible personal property were not taxable sales pursuant to Subsection 460(b).
13. The City was authorized pursuant to Section 540 to assess penalties for failure to timely pay taxes.
14. Taxpayer has demonstrated reasonable cause to have all penalties waived in this matter.
15. 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 April 29, 2009 protest by *Taxpayer* of a tax assessment made by the City of Mesa should be should be partly granted and partly denied consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Mesa shall remove all taxes, penalties, and interest associated with the assessment of the commissions from *Big-Time Phone Services*.

It is further ordered that the City of Mesa shall provide credits on the assessment for any taxes paid to other cities on the disputed sales.

It is furthered ordered that the City of Mesa shall remove all penalties assessed in this matter.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer