DECISION OF MUNICIPAL TAX HEARING OFFICER

August 16, 2010

Taxpayer Representative

Taxpayer
MTHO # 553

Dear ***Taxpayer Representative***:

We have reviewed the evidence and arguments presented by ***Taxpayer*** and the City of Prescott (Tax Collector or City) at the hearing on April 23, 2010 and in post-hearing memoranda. The review period covered was January 2005 through December 2008. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer is in the business of boarding and kenneling cats and dogs (pets). Taxpayer was assessed City of Prescott privilege tax under the renting, leasing or licensing for use real property classification for Taxpayer's pet boarding business. Taxpayer does not rent or license the use of real property, but takes custody of and cares for his customer's pets while the customer is away. Taxpayer's boarding activity is a bailment, not the licensing of real property for use.

If Taxpayer is found taxable, the assessment overstates the amount of tax due. The assessment included non-taxable charges for ancillary services.

Taxpayer also requested that it be awarded its costs and attorney's fees.

Tax Collector's Response

The City assessed privilege taxes against Taxpayer for its boarding and kenneling business. Taxpayer's boarding and kenneling activities are taxable under the city code as a license. A license is an agreement for the use of real property. Taxpayer's customers use Taxpayer's property for boarding their pets. The definition of "license for use" in the city code is broad enough to encompass Taxpayer's activities. Therefore Taxpayer's boarding and kenneling activities are taxable under Prescott City Code (PCC) § 4-1-445.

The audit excluded 15% of the revenues as being for non-taxable activities. Taxpayer did not separately charge or account for receipts from ancillary services. Taxpayer has not demonstrated an entitlement to any additional exclusions.

Discussion

Taxpayer operates a pet boarding and kenneling business. The Tax Collector conducted an audit assessment of Taxpayer for the period January 2005 through December 2008 and issued an assessment. The assessment considered Taxpayer to be in the business of licensing real property for use. The assessment included Taxpayer's gross income from its boarding and kenneling business less a 15% exclusion for non-taxable services. Penalties were not assessed. Taxpayer timely protested the assessment.

Taxpayer first argues that its business is a non-taxable bailment and is not the licensing of real property for use. Taxpayer next argues that even if the business is subject to the City privilege

tax, the amount of the tax is overstated. Taxpayer charges for boarding, and for ancillary services such as feeding, exercising, giving medicine, cleaning etc. Those ancillary charges are not subject to the privilege tax and should be excluded.

If Taxpayer is correct that the boarding activity is not subject to the privilege tax, it is not necessary to reach the second issue. For the reasons that follow, we hold that Taxpayer's boarding and kenneling activities are not licenses for the use of real property subject to the privilege tax and the assessment must be abated.

Taxpayer offers boarding and kenneling for household pets. The agreement between Taxpayer and the customer provides that Taxpayer will feed and house the customer's pet in a clean and safe facility. Customers drop of their pets and Taxpayer cares for the pet until the customer picks up the pet. Custody of the pet is turned over to Taxpayer. The agreement does not describe the facility or assign a particular location within the facility for the customer's pet or allow the customers into the kennels.

A "license for use" is defined by the City code as any agreement between the user and the owner of the land for the use of the owner's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement. There is no mention in Taxpayer's agreement for the customer to use Taxpayer's property for any purpose. The purpose of the agreement is for the customer's pet to be cared for, not a customer's use of Taxpayer's real property.

The City argues that in a broad sense, by placing their pets in Taxpayer's custody at Taxpayer's facility, the customer is in effect using Taxpayer's property. The definition of license is broad enough to include a pet owner's use of Taxpayer's property for the purpose of boarding a pet. Therefore, Taxpayer's boarding and kenneling activities constitute a license for the use of real property.

A similar argument was advanced in *Wenner v. Dayton-Hudson Corp.* 123 Ariz. 203, 598 P.2d 1022 (App. 1979), where the question was whether an ordinance taxing leases and rentals was broad enough to tax a license.[1] In holding the ordinance did not apply to licenses for the use of real property, the court stated statutes imposing taxes are to be strongly construed against the government and in favor of the taxpayer. Any doubts as to their meaning are to be resolved against the tax authority. 123 Ariz. at 208, 598 P.2d at 1027. Taxpayer here is not claiming an exemption from a tax that clearly applies, but is claiming that the tax does not apply to its pet boarding and kenneling activities. Therefore, any doubts whether the tax applies to Taxpayer must be resolved in favor of the Taxpayer.

If the Tax Collector's argument were correct, then a taxable license would exist any time a person leaves property in another person's custody. This could arguably include a car repair facility, a dry cleaner or a pet grooming facility. In each case it could be argued the customer is using the facility's property by leaving their property at the facility. Such a broad reading is not contemplated under the code's definition of "license for use".

The code defines license for use as an agreement for the use of the owner's property where the agreement does not qualify as a sale, lease or rental agreement. The subject matter in a sale, lease, rental or license is the real property and its possession or use by the tenant or licensee. The subject matter of Taxpayer's agreement is the customer's pet, not Taxpayer's real property.

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[1] *Dayton-Hudson* involved a period before the ordinance included license as a taxable activity.

Taxpayer's agreement is not of the same character as an agreement for the sale, rental, lease or license of real property.

Because we hold that Taxpayer's boarding and kenneling activities do not fall within the scope of the privilege tax on the licensing of real property for use, it is not necessary to address whether the assessment was overstated.

Taxpayer also asked that it be awarded attorney's fees and costs incurred in these proceedings. PCC § 4-1-578(a) provides that a taxpayer who is a prevailing party may be reimbursed reasonable fees and costs. PCC § 4-1-578(c) requires the taxpayer to present an itemized claim for fees and costs to the City's Taxpayer Problem Resolution Officer (PRO) within 30 days after receipt by the taxpayer of a notice of recalculated assessment issued by the Tax Collector. The PRO determines the validity of the fees and other costs, and the PRO's decision may be appealed by either party to court. PCC § 4-1-578(c). The Hearing Officer does not have the jurisdiction to consider Taxpayer's request for fees and costs.

Findings of Fact

1. Taxpayer is in the business of boarding and kenneling cats and dogs (pets).
2. Taxpayer requires customers boarding their pets to sign an agreement.
3. The agreement provides that Taxpayer will feed and house the customer's pet in a clean and safe facility.
4. Taxpayer also provides other services such as grooming and exercising.
5. Taxpayer charges for boarding, and for services such as feeding, exercising, giving medicine, cleaning and grooming.
6. The agreement does not describe the facility or assign a particular location within the facility for the customer's pet.
7. Under the agreement the customer may tour the boarding facility, but only staff are permitted in the kennels.
8. The agreement does not give the customer the right to use Taxpayer's real property.
9. The Tax Collector conducted an audit assessment of Taxpayer for the period January 2005 through December 2008 and issued an assessment.
10. The assessment considered Taxpayer to be in the business of licensing real property for use.
11. The assessment included Taxpayer's gross income from its boarding and kenneling business less a 15% exclusion for non-taxable services.
12. Penalties were not assessed.
13. Taxpayer timely protested the assessment and requested a hearing.
14. Taxpayer timely amended its protest on the record during the hearing in this matter to contend that it was not in the business of licensing real property for use.

Conclusions of Law

1. PCC § 4-1-445 imposes the city privilege tax on the business activity of renting, leasing or licensing for use real property located in the city lo the final licensee.

2. "Licensing (for Use)" is defined as 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. PCC § 4-1-100.

3. Statutes imposing taxes are to be strongly construed against the government and in favor of the taxpayer. Any doubts as to the meaning of the statute are to be resolved against the tax authority. *Wenner v. Dayton-Hudson Corp.* 123 Ariz. 203, 208, 598 P.2d 1022, 1027 (App. 1979)

4. The burden is on the City to show that Taxpayer's boarding and kenneling activities are within the scope of the City privilege tax.

5. The City must show that there was an agreement between the customer and Taxpayer "for the use of" Taxpayer's property

6. The boarding agreement between Taxpayer and the customer does not provide for the use of Taxpayer's property by the customer.

7. Taxpayer's activity of boarding and kenneling pets does not constitute licensing real property for use under PCC § 4-1-445.

8. Taxpayer's activity of boarding and kenneling pets is not taxable under PCC § 4-1-445.

9. Taxpayer's protest that its boarding and kenneling activities are not taxable under PCC § 4-1-445 should be granted.

10. A taxpayer who is a prevailing party may be reimbursed reasonable fees and costs. PCC § 4-1-578(a).

11. The taxpayer is required to present an itemized claim for fees and costs to the City's Taxpayer Problem Resolution Officer (PRO) within 30 days after receipt by the taxpayer of a notice of recalculated assessment issued by the Tax Collector. PCC § 4-1-578(c).

12. The Tax Collector is required to issue the notice of recalculated assessment within sixty days of the issuance of the Hearing Officer's decision. PCC § 4-1-570(b)(8).

13. The PRO, not the Hearing Officer, determines the validity of the taxpayer's request for fees and other costs. PCC § 4-1-578(c).

14. The Hearing Officer does not have the jurisdiction to consider Taxpayer's request for fees and costs. PCC § 4-1-578(c).

Ruling

It is therefore ordered that Taxpayer's protest to the City's audit assessment for the period January 2005 through December 2008 is granted.

The Tax Collector is directed to abate the assessment and to remove all taxes assessed on Taxpayer ***Taxpayer*** for the period January 2005 through December 2008 pursuant to Conclusions of Law Numbers 7 through 9.

The Hearing Officer will not address Taxpayer's request for fees and costs.

Both parties have timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section –575.

Sincerely,

Frank L. Migray
Hearing Officer

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c: ***Tax and Licensing Supervisor***
Municipal Tax Hearing Office