**DECISION OF MUNICIPAL TAX HEARING OFFICER**

Decision Date: March 29, 2013
Decision: MTHO #736
***Taxpayer:***
Tax Collector: City of Tucson
Hearing Date: February 19, 2013

## DISCUSSION

### Introduction

On or about July 26, 2012, the Taxpayer filed an undated letter of protest for a tax assessment made by the City of Tucson ("City"). A hearing was commenced before the Municipal Tax Hearing Officer ("Hearing Officer") on December 10, 2012. At that time, the hearing was continued at the request of Taxpayer. The hearing was reconvened on February 19, 2013. Appearing for the City was the ***Tax Auditor***, the ***Finance Manager***, and the ***Revenue Administrator***. Appearing for Taxpayer was the ***President*** of the facility. On February 20, 2013, the Hearing Officer indicated the record was closed and that a written decision would be issued to the parties on or before April 5, 2013.

## DECISION

The City had performed an audit of Taxpayer and issued a May 9, 2012 assessment to Taxpayer for additional taxes in the amount of $5,531.51, interest up through April 2012 in the amount of $354.28, and penalties in the amount of $1,117.22. Subsequently, the City waived the penalties. The audit period was from April 2008 through December 2011. The majority of the assessment was based on unreported amusement income pursuant to City Code Section 19-410 ("Section 410").

Taxpayer owns and operates a facility located within the City that was used for concerts during the audit period. There were door charges to attend the concerts. Taxpayer also sold food and drinks at the facility. In addition, third parties paid Taxpayer a percentage of the income from pinball machines and other games that were placed within the facility. Taxpayer had paid City taxes on the restaurant income but not on the income from the door charges or the income from the pinball machines and games. Taxpayer protested the tax imposed on the door proceeds. Taxpayer argued the door proceeds were for staff and services provided by Taxpayer for the concert providers. Taxpayer also protested the tax on the pinball/game income as being a double tax since the pinball/game provider also

pays taxes on the proceeds.

According to the City, promoters sell tickets at the door of Taxpayer's facility for particular concerts. A portion of the proceeds are distributed to Taxpayer based on informal verbal agreements. The City asserted the monies received by Taxpayer were for rent. The City asserted that Section 410 applies as Taxpayer is in "the business of providing amusement that…takes place entirely within the city which includes the following type or nature of businesses: (1) operating or conducting…concerts…games, billiard or pool parlors,…videogames, pinball machines, public dances,…or any other business charging admission for…amusement, or entertainment." While there is an exemption in Section 410c, the City argued it did not apply because Taxpayer was engaged in the business of operating or conducting an amusement themselves or through others.

The City noted that ***Big Fun Vending*** ("Vendor") pays Taxpayer a fee for allowing the Vendor's vending machines and games to be placed on Taxpayer's premises. According to the City, the fee meets the definition of "licensing for use" as set forth in City Code Section 100 ("Section 100"). 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.

It is clear to the Hearing Officer that the primary purpose of any fees being paid by the promoters to Taxpayer has to be payment for the use of Taxpayer's premises. To accept Taxpayer's argument that the fees were for staff and services provided by Taxpayer, we would have to conclude that any promoter that utilized its own staffing could utilize Taxpayer's premises for free. We cannot accept that conclusion as being reasonable. Accordingly, we conclude that the fees paid by the promoters to Taxpayer were properly assessed by the City as amusement income pursuant to Section 410. While we don't dispute Taxpayer's assertion that some of the proceeds may be for services Taxpayer provided for the promoters, we have no way of knowing how much, if any, should be allocated to those services. We have been provided no written agreements or reliable records to establish such allocation.

While at first blush, it appears the income from the vending machines are being taxed twice through the Vendor and Taxpayer, a closer look demonstrates these are two distinct taxes. The Vendor is being taxed on amusement income pursuant to Section 410 on the gross proceeds from the Vendor's equipment located on Taxpayer's premises. Taxpayer is being taxed not for providing amusement but for the business activity of the licensing for use or its real property by the Vendor pursuant to Section 100 and City Code Section 445 ("Section 445"). Based on all the above, we conclude Taxpayer's protest should be denied, consistent with the Discussion, Findings, and Conclusions, herein.

## FINDINGS OF FACT

1. On or about July 26, 2012, Taxpayer filed an undated letter of protest for a tax assessment made by the City.

2. On May 9, 2012, the City issued an assessment to Taxpayer for additional taxes in the amount of $5,531.51, interest up through April 2012 in the amount of $354.28, and penalties in the amount of $1,117.22.

3. Subsequently, the City waived the penalties.

4. The audit period was from April 2008 through December 2011.

5. Taxpayer owns and operates a facility located within the City that was used for concerts during the audit period.

6. There were door charges collected by third parties to attend the concerts.

7. The third parties paid Taxpayer for the use of its facilities.

8. Taxpayer sold food and drinks at the concerts.

9. Vendor paid Taxpayer a percentage of the income from pinball machines and games that Taxpayer permitted to be placed within the facility.

10. Taxpayer had paid City taxes on the restaurant income but not on the income from the door charges or the income from the pinball machines and games.

11. Taxpayer indicated its share of the door charges were for staff and services provided for the concert.

## 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. City Code Section 410 imposes a tax on the business activity of providing amusement within the City.

3. The primary purpose of any fees being paid by promoters to Taxpayer was for payment for the use of Taxpayer's premises.

4. The fees paid by the promoters to Taxpayer were properly assessed by the City as amusement income pursuant to Section 410.

5. There were no records to demonstrate how much, if any, of the fees paid to Taxpayer by the promoters were for services provided by Taxpayer for the promoters.

6. Taxpayer permitted Vendor to place its equipment on Taxpayer's premises for a share of the proceeds from the machines.

7. Taxpayer's agreement with the Vendor was the licensing for use of its real property for a consideration and properly taxed pursuant to Sections 100 and 445.

8. Taxpayers protest should be denied, consistent with the Discussion, Findings, and Conclusions, herein.

9. The parties have timely appeal rights pursuant to Model City Tax Code Section 575.

## ORDER

It is therefore ordered that the undated protest by the ***Taxpayer*** of a tax assessment made by the City of Tucson is hereby denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

***Municipal Tax Hearing Officer***