DECISION OF MUNICIPAL TAX HEARING OFFICER

August 5, 2013

Taxpayer's Representative
Address of Taxpayer's Representative

Taxpayer
MTHO #741

Dear Taxpayer's Representative,

We have reviewed the evidence submitted by ***Taxpayer*** and the City of Chandler (Tax Collector or City) at the hearing held on June 24, 2013. The review period covered was February 1, 2007 through September 30, 2009. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer operates a facility that offers swimming lessons. Taxpayer was assessed City privilege tax under the amusement classification. Tax statutes should be strictly construed. Taxpayer charges separately for the use of its premises and for providing swimming lessons. Providing swim lessons is not an amusement and is not similar to a health club or a fitness center. Taxpayer is therefore not taxable under the amusement classification for its swim lessons.

Even if swim lessons were taxable, no penalties should be imposed.

Tax Collector's Response

Taxpayer offers swim lessons at its facility. The City taxes health spas, fitness centers, dance studios and other persons who charge for the use of premises for sports, athletic and other health-related activities or instruction. The swim lessons are a health-related instruction. The tax base is the gross income from the activity. Therefore all receipts Taxpayer receives for its swim lessons are subject to the City privilege tax.

Taxpayer has not demonstrated reasonable cause for the abatement of any penalties.

Discussion

Taxpayer offers swim lessons at its facility. Most of Taxpayer's lessons involve water survival instruction to children. Taxpayer also on occasion provides instruction to adults, such as instruction in triathlon techniques. Starting June 2009 Taxpayer began charging separately for admission to the facility (splash fee) and for the instruction. Taxpayer paid City privilege tax on the splash fee but not on its receipts from instruction. The question is whether Taxpayer's receipts from instruction are subject to the privilege tax under CTC § 62-410(a)(2).

CTC § 62-410(a), paragraph (2) provide:

> (a) The tax rate shall be at an amount equal to one and one-half (1.5) percent of the gross income from the business activity upon every person engaging or continuing in the business of providing amusement that begins in the City or takes place entirely within the City, which includes the following type or nature of businesses:
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> (2) Health spas, fitness centers, dance studios, or other persons who charge for the use of premises for sports, athletic, other health-related activities or instruction, whether on a per-event use, or for long-term usage, such as membership fees.

The code taxes activities which are defined to include specified types or nature of businesses such as health spas, fitness centers, dance studios, or other persons who charge for the use of premises for sports, athletic, other health-related activities or instruction. Where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class as those enumerated. *Wilderness World v. Department of Revenue,* 182 Ariz. 196, 895 P.2d 108 (1995); *White v. Moore,* 46 Ariz. 48, 53-54, 46 P.2d 1077, 1079 (1935).

In *Wilderness World* the Arizona supreme court held that river rafting was not of the same kind or nature as the activities specifically listed in the statute which included theaters, movies, operas, shows, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, pool parlors, bowling alleys, dances, and boxing and wrestling matches. The listed activities are mainly spectator events of short duration or participatory activities requiring no supervision. The court concluded that none of the listed activities resembled a river trip, which it characterized as a journey or expedition of extended duration covering hundreds of miles.

In *White v. Moore* the Arizona supreme court held that a person renting for mercantile and office purposes was not subject to the privilege tax imposed on various classes of businesses including hotels, guest houses, dude ranches and resorts, rooming houses, apartment houses, automobile rental services, automobile storage garages, parking lots, tourist camps or any other business or occupation charging storage fees or rents. The court held that the phrase "any other business or occupation charging storage fees or rents" only embraced businesses of the same kind, class, or nature as the listed businesses and therefore the tax was not intended to reach the income derived from renting office and mercantile buildings.

The question therefore is whether Taxpayer's swim lessons or instruction are of a similar type or nature of activity as health spas, fitness centers, dance studios, sports events or athletic activity or instruction. In determining whether an activity falls within the scope of the privilege tax, the statute imposing the tax must be strongly construed against the government and in favor of the taxpayer. Any doubts as to its meaning are to be resolved against the tax authority. *Wilderness World, supra,; Wenner v. Dayton-Hudson Corp.* 123 Ariz. 203, 598 P.2d 1022 (App. 1979). In addition, no clause, sentence, or word should be rendered superfluous, void, contradictory or insignificant. *State v. Superior Court for Maricopa County*, 113 Ariz. 248, 550 P.2d 626 (1976).

Survival Swimming Instruction

While swimming in general may offer health related benefits, the code does not simply tax health-related activities or instruction. Giving meaning to the words in the code, the tax is imposed on persons charging for the use of the premises for health-related activities or instruction that are of the type or nature as health spas, fitness centers, dance studios or other establishments that charge for the use of premises for sports or athletic activities or instruction.

The listed activities are not defined in the tax code. The following definitions from Webster's II New Riverside University Dictionary show that, unlike survival swimming instruction, the listed activities are primarily aimed at physical activity.

- Health spa is defined as a business establishment with equipment and facilities to help customers lose weight.
- While fitness center is not defined, fit includes one who is physically sound, healthy.
- While dance studio is not defined, dance is defined to move rhythmically to music using improvised or prescribed gestures and steps; to leap or skip about excitedly.
- Athletic is defined as physically strong, relating to or appropriate to athletics or athlete, and an athlete is one who participates in competitive sports.
- Sports is defined as an active pastime, a specific diversion usually involving physical exercise and having a set form and body of rules.

The core aim of Taxpayer's swimming instruction is to teach children to survive if they fall in a pool or other body of water. The ultimate aim is water safety. Taxpayer's survival instruction is not of a similar type or nature as health spas, fitness centers, dance studios or other establishments charging for the use of premises for sports or athletic activities or instruction. Taxpayer's survival swimming instruction for children is not subject to the City privilege tax under CTC § 62-410(a)(2).

Triathlon Training

Taxpayer also offers instruction geared to adults practicing for events such as a triathlon. A triathlon is a sport or athletic related event. The purpose there is to train the client to perform better at the event. Triathlon and other similar instruction is a taxable activity under paragraph (a)(2). The City privilege tax is measured by the gross receipts from the taxable activity. Taxpayer is therefore subject to the privilege tax on its gross receipts, both the splash fee and the instruction fee, from triathlon and other similar athletic or sport training or instruction.

Presumption That all Gross Receipts are Taxable

While we hold that Taxpayer's survival swimming instruction is not subject to the City privilege tax, the record here does not separately identify receipts for survival swimming instruction and for triathlon and other similar instruction. All gross income is presumed to be subject to the tax until the contrary is established by the taxpayer. Taxpayer has not established the amount of its receipts from survival swimming instruction. Therefore Taxpayer's gross receipts included in the assessment are taxable.

Penalty Abatement

The assessment issued by the City included penalties for failure to file and failure to pay tax in the total amount of $661.35. Taxpayer requested that the penalties be abated. Of the total

amount, $545.63 was imposed for late payment of tax for June, July, August and September 2009, after Taxpayer changed its method of reporting. The remaining penalties of $115.72 were imposed for late filing or late payment for various periods prior to June 2009. Taxpayer's request only addressed the penalties imposed for the months after the change in reporting. No information was provided regarding penalties for other months.

CTC § 62-540 authorizes the waiver of penalties if the Taxpayer can show reasonable cause for the failure to pay the tax. Reasonable cause includes a taxpayer demonstrating that it contacted a tax advisor who is competent on the specific tax matter and, after furnishing necessary and relevant information, the taxpayer was incorrectly advised that no tax was owed and/or the filing of a return was not required. CTC § 62-540(f)(3)(H). Penalties may also be abated if the taxpayer relied, in good faith, on a state exemption or interpretation. CTC § 62-540(f)(3)(I)

Taxpayer had a reasonable basis for believing that the tax did not apply to its receipts from the instruction activity. While the City argues it informed Taxpayer that the Tax Collector did not agree with Taxpayer's position, the City's letter was sent after the end of the review period.

Based on the forgoing, late payment penalties of $545.63 are abated. The City's privilege tax assessment is otherwise upheld.

Findings of Fact

1. Taxpayer operates a facility that offers swimming instruction or lessons.
2. Most of the lessons are for young children for survival in the water (survival lessons).
3. The purpose of these lessons is to prevent children from drowning if they fall into a pool or other body of water.
4. Most of the instruction is conducted at Taxpayer's facility. On occasion Taxpayer will conduct instruction at other locations.
5. Most of the instruction involved a small group of children. On occasion Taxpayer provided one-on-one instruction.
6. Taxpayer also offers some lessons for adults who will be participating in an event such as a triathlon.
7. Before June 2009 Taxpayer charged one fee for the instruction and paid the City privilege tax on the gross amount received for the instruction.
8. Starting with the report for June 2009, Taxpayer charged separately for various activities, including an admission charge (splash fee), fee for instruction, membership fee and registration fee.
9. Taxpayer asked its accountant to review the change in the method of charging for instruction. Taxpayer's accountant concluded that the City can only tax the charge for the use of the facility (splash fee) and not the charges for instruction.
10. The issue was presented to the Tax Collector.
11. The Tax Collector disagreed and sent Taxpayer a letter dated October 22, 2009 that the Tax Collector considered the entire charge, including for instruction, subject to tax.
12. After Taxpayer started charging separate fees, Taxpayer paid the City privilege tax on its splash fee receipts. Taxpayer did not pay the privilege tax on its receipts for instruction.

13. Taxpayer determined the amount of its splash fee by reviewing the amount other pools in the area charged for admission.

14. The record before the Hearing Office does not separately identify the receipts for survival lessons and the receipts for other lessons during the audit period.

15. The Tax Collector conducted an audit of Taxpayer for the period February 1, 2007 through September 30, 2009 and issued an assessment.

16. The Tax Collector determined that Taxpayer's receipts from swimming instructions provided at Taxpayer's location were taxable under the amusement classification.

17. The assessment included receipts for both survival swimming instruction and other instruction, such as triathlon training.

18. The assessment excluded receipts for instruction not conducted at Taxpayer's facility and also excluded one-on-one instruction at Taxpayer's facility.

19. Taxpayer timely protested the assessment stating that its instruction activities are not of the same type or nature as the taxable activities listed under the amusement classification because:

    a. The instruction fee pays for the skill and direction of the instructors. The ultimate aim of its instruction is child water safety.

    b. Taxpayer charges a splash fee for the use of the premises and pays the privilege tax on the splash fee.

    c. Instruction is not an activity taxable under the amusement classification.

20. The Tax Collector contends that Taxpayer charges for the use of the premises for health related instruction. Therefore all receipts are taxable under CTC § 62-410(a)(2).

21. Taxpayer further contends that even if the tax applies, penalties should be abated.

22. The assessment included penalties for failure to file and failure to pay tax in the total amount of $661.35. Of the total amount,

    a. $545.63 was imposed for late payment of tax for June, July, August and September 2009, after Taxpayer changed its method of reporting.

    b. The remaining penalties of $115.72 were imposed for late filing or late payment for various periods prior to June 2009.

Conclusions of Law

1. CTC § 62-410 taxes the business activity of providing amusements.

2. Amusements include businesses of a type or nature similar to health spas, fitness centers, dance studios, or other persons who charge for the use of premises for sports, athletic, or other health-related activities or instruction. CTC § 62-410(a)(2).

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. *Wilderness World, supra,; Wenner v. Dayton-Hudson Corp. supra.*

4. The Chandler Tax Code does not define the terms health spas, fitness centers, dance studios, sports or athletic events.

5. When construing a tax statute, words must be given their "plain and ordinary meaning." *Wilderness World, supra.*

6. The law will be given, whenever possible, such an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant. *State v. Superior Court for Maricopa County*, *supra.*

7. Under the doctrine of *ejusdem generis*, "where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class of those enumerated. *Wilderness World, supra,; White v. Moore, supra.*

8. Even if swimming instruction offers certain health related benefits, the activity has to be of the same type or nature as health spas, fitness centers, dance studios, sports events or athletic events.

9. Based on the evidence in the record.

    a. Taxpayer's survival swimming instruction is not similar to health spas, fitness centers or dance studios.

    b. Taxpayer's survival swimming instruction is not similar to businesses that charge for the use of premises for sports or athletic activities or instruction.

    c. Taxpayer's instruction for triathlon or other similar training constitutes sports or athletic instruction.

10. Taxpayer's survival swimming classes, including the splash fee, are not taxable under CTC § 62-410(a)(2).

11. Taxpayer's receipts from other classes such as for triathlon training, including the splash fee and the instruction fee, are taxable under CTC § 62-410(a)(2).

12. All gross income is presumed to be subject to the tax until the contrary is established by the taxpayer. CTC § 62-400(C).

13. Taxpayer has not established the amount of its receipts from survival swimming instruction.

14. Taxpayer's total gross receipts, whether derived from survival swimming instruction or other instruction, were properly taxed in the assessment.

15. The City's assessment of privilege tax and interest for the period February 1, 2007 through September 30, 2009 is upheld.

16. The Tax Collector is authorized to assess penalties pursuant to CTC § 62-540.

17. The tax collector is required to waive or adjust the late filing and late pay penalties if the taxpayer establishes through competent evidence that the taxpayer contacted a tax advisor who is competent on the specific tax matter and, after furnishing necessary and relevant information, the taxpayer was incorrectly advised that no tax was owed and/or the filing of a return was not required. CTC § 62-540(f)(3)(H).

18. Penalties may also be abated if the taxpayer relied, in good faith, on a state exemption or interpretation. CTC § 62-540(f)(3)(I)

19. Taxpayer had a reasonable basis for believing that the tax did not apply to taxpayer's receipts from instruction for the months of June through September 2009.

20. Taxpayer has demonstrated reasonable cause for its failure to pay the tax for the months of June through September 2009 the penalty in the amount of $545.63 is abated.

Ruling

Taxpayer's protest of an assessment made by the City of Chandler for the period February 1, 2007 through September 30, 2009 is granted in part and denied in part.

The Tax Collector shall remove from the assessment penalties in the amount of $545.63.

The Tax Collector's assessment is otherwise upheld.

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

Sincerely,

Hearing Officer

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c: ***Tax Audit Supervisor***
Municipal Tax Hearing Office