Jerry Rudibaugh
Municipal Tax Hearing Officer

DECISION OF MUN1CIPAL TAX HEARING OFFICER

Decision Date: June 28, 2004
Decision: MTHO #137
Tax Collector: City of Phoenix
Hearing Date: January 9, 2004

DISCUSSION

Introduction

On August 14, 2003, the ***Taxpayer*** ("Taxpayer") filed a protest of a denial by the City of Phoenix ("City") of a tax refund request. After review, the City concluded on August 18, 2003 that the protest was timely and in the proper form. On August 21, 2003, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to provide a response to the protest on or before October 6, 2003. The City filed a response on September 26, 2003. On September 29, 2003, the Hearing Officer ordered the Taxpayer to file a reply on or before October 20, 2003. On October 2, 2003, a Notice of Tax Hearing ("Notice") scheduled the matter for hearing commencing on October 24, 2003. On October 14, 2003, another Notice was issued rescheduling the matter for hearing commencing on November 21, 2003. On October 20, 2003, the Taxpayer filed a reply. On November 18, 2003, the Hearing Officer granted the City's request to continue the hearing. On November 18, 2003, a Notice was issued continuing the hearing until January 9, 2004. Both parties appeared and presented evidence at the January 9, 2004 hearing. On January 12, 2004, the Hearing Officer ordered the Taxpayer to file an opening brief on or before March 1, 2004, the City to file a response brief on or before March 31, 2004, and the Taxpayer to file a reply brief on or before April 30, 2004. The Taxpayer filed an opening brief on March 1, 2004. On March 31, 2004, the Hearing Officer granted an extension for the response and reply briefs until April 9, 2004 and May 12, 2004, respectively. The City filed its response brief on April 9, 2004 and the Taxpayer filed the reply brief on May 12, 2004, On May 14, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before June 28, 2004.

City Position

1. Refund Claims

The Taxpayer filed City tax refund claims on April 19, 2002 and April 17, 2003 in the Amounts of $428,602.85 and $218,080.51, respectively. The April 19, 2002 refund request consisted of the following: A refund request of $33,262.17 for the period May 1998 through September 2001 for tax paid on room service and honor bar gratuity revenue; a refund request of $27, 743.71 for the period August 2000 through September 2001 for tax paid on bell gratuity revenue; and a refund request of $367,596.97 for the period March 1998 through February 2002 for tax paid on attrition, cancellation and no-show revenue.

The April 17, 2003 refund request was in the amount of $218,080.51 for the period of March 1998 through March 2002 for tax paid for audio/visual services provided in meeting rooms and banquet areas of the resort. From March 1999 through September 1999, the Taxpayer owned the audio/visual equipment and its employees provided the services. From October 1999 through March 2002, the Taxpayer contracted with ***ABC Company*** to supply equipment to the hotel.

2. Excess Tax Collected

The City argued there were two issues covered by the protest in this matter in which the Taxpayer has failed to comply with City Code Section 14-560(c) ("Section 560 (c)") and is, therefore, not entitled to a refund. According to the City, the Taxpayer charged and collected taxes on the room cancellation charges and on the audio/visual services. Section 560(c) provides that no refund will be paid where the taxpayer has collected, by separately stated itemization, the amount of tax. There is an exception that permits a refund when a taxpayer can demonstrate that any taxes refunded will be remitted to the customers from whom the excess taxes were collected. In this case, the City asserted the Taxpayer has not met the prerequisite to refund on the taxes charged to customers for audio/visual equipment or the cancellation charge.

3. Equitable Estoppel

The City asserted that the doctrine of equitable estoppel may be invoked against a taxing entity when misrepresentations made by administrative officials about factual matters have injured a taxpayer. According to the City, the Supreme Court of Arizona ("Court") set forth in Valencia Energy Company v. Arizona Department of Revenue, 191 Ariz. 565, 959 p.2d 1256 (1998), circumstances under which a taxpayer is not precluded from establishing an equitable estoppel defense against a taxing entity. The Court analyzes the applicability of the doctrine based on four issued: 1) affirmative acts by the taxing entity inconsistent with a claim later relied on; 2) action by a party reasonably relying on such conduct; 3) injury to the taxpayer resulting from reliance on the taxing entity's conduct; and, 4) the public interest. In this case, the City argued that the Taxpayer has failed to meet any of the four established criteria to invoke the equitable estoppel doctrine.

4. Bellman Gratuity

The Taxpayer argued that bellman gratuities should not be included in the business of operating a hotel. According to the City, the Taxpayer did not provide any records or evidence at the hearing to describe the structure of the transactions involving the bellmen. As a result, the City asserted the refund request should be denied, or at the very least, the hearing should be reconvened to allow the Taxpayer to submit evidence on this issue. The City indicated that City Code Section 14-400 (c) ("Section 400 (c)") provides that it shall be presumed that all gross income is subject to the tax until the contrary is established by the taxpayer. Further, the City Code Section 14-350 (a) ("Section 350 (a)") imposes a duty on the Taxpayer to keep and preserve suitable records as may be necessary. The City argued that the Taxpayer's reliance on City Regulation 14-455.1 ("Regulation 455.1") is not appropriate for bellman gratuities.

According to the City, Regulation 455.1 allows exclusion for gratuities related to the restaurant activity. In this ease, the bellmen gratuities are related to the hotel activity.

5. Attrition, Cancellation and No-Show Charges

The no-show charges arise when a guest does not cancel their reservation within a specified time or does not show by the designated time. Attrition and cancellation charges occur when groups contract with the hotel for a block of rooms and fail to cancel by an agreed upon time in order to avoid the charge or when groups only use a portion of the rooms agreed upon and held. The City disagrees with the Taxpayer's argument that the attrition, cancellation, and no-show charges were for guaranteeing lodging and not charges for providing lodging. The City argued that the code definitions of "business," "hotel," and "occupancy" set forth in City Code Section 14-100 ("Section 100") supports the City's argument that the charges are taxable under the hotel activity pursuant to City Code Section 14-444 ("Section 444"). Section 444 imposes a tax on the "business of operating a hotel charging for lodging and or lodging space . The definition of "occupancy" includes "one night to occupy or use." Further, City Code Section 14-200 ("Section 200") defines "gross income" to include all receipts. The City argued that when hotel patrons were billed by the Taxpayer and the patrons then paid the Taxpayer for cancellation fees, there was a receipt of income by the Taxpayer. Further, the City argued that these fees are an integral part of the business of operating a hotel and thus taxable.

6. Audio/Visual Services

The Taxpayer offers its guests as part of its services, the use of audio/visual equipment. During the period March 1999 through September 1999, the Taxpayer leased the equipment directly to hotel guests. From October 1999 through May 2002, the Taxpayer contracted with ***ABC Company*** to provide the audio/visual services for its guests. The City disagrees with the Taxpayer's position that this is a non-taxable service. According to the City, the Taxpayer's provision of audio/visual services was taxable pursuant to City Code Section 14-450 ("Section 450") as licensing for use of tangible personal property. City Code Regulation 14-450.3 ("Regulation 450.3") provides that any charge for an operation of the equipment can be excluded from gross income if the charge is separately itemized. According to the City, the Taxpayer charged the tax on the total invoice amount and thus the taxes on the full amount are due pursuant to City Code Section 14-250 (a) (1) ("Section 250 (a) (1)"). The City argued that during the period October 1999 through March 2002, the Taxpayer acted as a broker for ***ABC Company*** pursuant to Phoenix Code Regulation 14-100.1 (a) ("Regulation 14-100.1 (a)"). According to the City, the Taxpayer billed over 90 percent of the audio/visual charges to guests. In addition, the invoices to the guests included the Taxpayer logo and name. The city also disputed the Taxpayer's assertion that the commissions received by the Taxpayer were not taxable. According to the City, City Code Section 14-445 (a) ("Section 445 (a)") provides for a tax on the licensing for use of real property for a consideration. In this case, the Taxpayer is receiving a commission to allow ***ABC Company*** to conduct their business on the Taxpayer's premises. The City also argued that the audio/visual services provided to the Taxpayer's hotel guests were an indispensable part of the services offered to t he guests. As a result, the City asserted that all of the audio/visual services are taxable as part of the business of running a resort.

Taxpayer Position

1. Equitable Estoppel

The Taxpayer asserted that it met the four-prong test set forth in Valencia as discussed by the City. According to the Taxpayer, the City has published a brochure for the hotel and motel industry that identifies twenty-six different activities performed at hotels and motels. Only one of the activities listed was taxed under the hotel classification. Based on statements at the hearing and in the City's closing brief, the City is now changing its interpretation as to the scope of the activities subject to the hotel classification. The Taxpayer argued that if the City is to adopt a new interpretation, City code Section 14-542 (b) ("Section 542 (b)") provides it can only apply prospectively.

2. Excess Tax Collected

The Taxpayer asserted that many of the statements by the City regarding excess tax collected are unsupported. The Taxpayer has a policy, in the event of cancellation, to charge for a one-night deposit penalty. According to the Taxpayer, there is no separate tax component. According to the Taxpayer, their invoices for audio/visual services also did not separately state any tax. The City incorrectly utilized work orders prepared by ***ABC Company***, which were not intended to be treated as a billing invoice by the Taxpayer.

3. Bellmen Gratuities

The Taxpayer argued that the bell gratuities should not be included in the business of operating a hotel. According to the Taxpayer, City Code Section 14-444 ("Section 444") imposes a tax on the gross income from the business activity of persons engaging in "the business of operating a hotel charging for lodging and or lodging space furnished to any person". The Taxpayer asserted that it distributes all gratuities collected from its customers to its employees and the Taxpayer merely acts as a conduit. The Taxpayer indicated that the City agreed at the hearing that the gratuities were separately stated and fully distributed to the employees that performed the services. The Taxpayer also asserted that it has provided documentation to the City to demonstrate that the Taxpayer is in the business and is reporting tax under the restaurant classification pursuant to City Code Section 14-455 ("Section 455"). As a result, the gratuities are not taxable pursuant to Regulation 455.1. Regulation 455.1 refers to gratuities charged or collected by persons subject to the tax imposed by Section 455. Those gratuities may be excluded from gross income if: the charges are separately stated and the amounts are maintained separately in the books and records; and the gratuities are distributed to the employees. The Taxpayer argued that it had met these requirements and as such, the gratuities are not taxable.

4. Attrition, Cancellation and No-Show Charges

According to the Taxpayer, these charges are not from providing occupancy or the use of lodging space but were imposed because a reservation was not kept. The Taxpayer argued that the charges were for guaranteeing lodging, not charges for providing lodging. The Taxpayer further argued that a guest must actually use and possess a dwelling space at a hotel to be subject to the

hotel tax pursuant to Section 444. The Taxpayer asserted that non-lodging activities, such as cancellation charges are not specifically enumerated in Section 444 or City Code Section 447 ("Section 447") (additional hotel tax on transients), and thus such activities are not taxable.

5. Audio/Visual Services

The Taxpayer argued that they had erroneously paid taxes under the retail classification for audio/visual services. During the period March 1999 through September 1999, the Taxpayer employees provided the audio/visual services in the banquet and meeting rooms. The Taxpayer asserted that control of the equipment was not extended to the patrons of the facility. According to the Taxpayer, its employees set up and controlled the equipment. As a result, the Taxpayer argued the audio/visual services were not taxable as rental or leasing of tangible personal property. In response to the City's argument that the activity is taxable as a "license for use", the Taxpayer asserted that licensing was also not applicable. According to the Taxpayer, City Code Section 14-100 ("Section 100") defines "licensing" as an agreement between the user and the owner or the owner's agent for the use of the owner's property. The Taxpayer indicated no agreements are extended to its customers to use Taxpayer's property. Even if the Hearing Officer were to conclude the Taxpayer was a lessor or licensor, the Taxpayer argued the separately stated operation charges would be exempt.

During the period October 1999 through March 2002 the Taxpayer utilized ***ABC Company*** to provide the audio/visual services to patrons of the facility. ***ABC Company*** either billed the patrons directly or billed the patrons through their master accounts with the Taxpayer and the Taxpayer remitted monies to ***ABC Company***. The Taxpayer received commissions from ***ABC Company***. ***ABC Company*** maintained control and exclusive use of the audio/visual equipment. The commissions received by the Taxpayer were for referrals to Presentations Services, providing of billing services, and cooperating with ***ABC Company***. The Taxpayer argued that it does not act for or conduct taxable activities for ***ABC Company*** and is not a "broker" as defined in Section 100. The Taxpayer also argued that audio/visual services are not taxable under the hotel classification. According to the Taxpayer, City Code Sections 14-444 ("Section 444") and 14-447 ("Section 447") are limited to charges for lodging and lodging space. The Taxpayer asserted that audio/visual services are not defined in the scope of the hotel classification.

ANALYSIS

1. Bellman Gratuities

We disagree with the Taxpayer's argument that the bellman gratuities would not be taxable pursuant to Regulation 455.1. Regulation 455.1 clearly refers to gratuities under the restaurant classification and we find the bellman gratuities would be more appropriately aligned with the hotel classification. However, we do not find the bellman gratuities are part of the gross income of the hotel. Based on the evidence, we find that the Taxpayer simply acts as a conduit for the bellmen and the Taxpayer never has any claim for the gratuities. Accordingly, we find the Taxpayer's request for a refund of taxes paid on bellman gratuities should be granted.

2. Attrition, Cancellation and No-Show Charges

We concur with the City that these charges are properly taxable. Whether or not a customer uses a room or not, they have paid for the right to have lodging space available. We find that these charges would fall under Section 444. In addition, we also find that these charges are an integral part of the business of operating a hotel and as such, would be taxable. We are unaware of the City informing the Taxpayer at any time that these charges would not be taxable. As such, we do not find that the doctrine of equitable estoppel would apply. The Taxpayer's request for refund of these taxes should be denied.

3. Audio/Visual Services

We concur with the Taxpayer that these services would not be taxable as rental of tangible personal property because the patron of the hotel does not operate the equipment. During the period the Taxpayer operated the audio/visual services, we find such services would fall under the definition of "licensing" set forth in Section 100. As to the argument there was no agreement, we find the invoice would act as an agreement for the patron to pay for the use of the equipment. While we would agree with the Taxpayer that separately stated operation charges would not be taxable, we do find the evidence supports the contention that taxes were charged on the operation charges. Further, there was no evidence that the Taxpayer has complied with Section 560 (c) for any refunds.

After ***ABC Company*** took over the audio/visual services for the Taxpayer, we find the appropriate income to be taxed to the Taxpayer would be the commissions. We concur with the City's argument that the commissions were for the use of the City's real property and would be taxable pursuant to Section 445 (a). We also concur with the City that taxes were charged on the full amount of the invoice. While the patron's bill may not show the tax, the back-up support demonstrates taxes were collected on the full amount. We again find there was no evidence to demonstrate that the Taxpayer has complied with Section 560 (c) for any refunds. Based on all the above, we find the Taxpayer's request for a refund for audio/visual services should be denied.

FINDINGS OF FACT

1. On August 14, 2003, Taxpayer filed a protest of a denial by the City of a tax refund request.

2. After review, the City concluded on August t 8, 2003 that the protest was timely and in the proper form.

3. On August 21, 2003, the Hearing Officer ordered the City to provide a response to the protest on or before October 6, 2003.

4. The City filed a response to the protest on September 26, 2003.

5. On September 29, 2003, the Hearing Officer ordered the Taxpayer to file a reply on or before October 20, 2003.

6. On October 2, 2003, a Notice scheduled the matter for hearing commencing on October 24, 2003.

7. On October 14, 2003, another Notice was issued rescheduling the mailer for hearing commencing on November 21, 2003.

8. On October 20, 2003, the Taxpayer filed a reply.

9. On November 18, 2003, the Hearing Officer granted the City's request to continue the hearing.

10. On November 18, 2003, a Notice was issued continuing the hearing until January 9, 2004.

11. Both parties appeared and presented evidence at the January 9, 2004 hearing.

12. On January 12, 2004, the Hearing Officer ordered the Taxpayer to file an opening brief on or before March 1, 2004, the City to file a response brief on or before March 31, 2004, and the Taxpayer to file a reply brief on or before April 30, 2004.

13. The Taxpayer filed an opening brief on March 1, 2004.

14. On March 31, 2004, the Hearing Officer granted an extension for the response and reply briefs until April 9, 2004 and May 12, 2004, respectively.

15. The City filed its response brief on April 9, 2004 and the Taxpayer filed the reply brief on May 12, 2004.

16. On May 14, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before June 28, 2004.

17. The Taxpayer filed two City tax refunds on April 19, 2002 and April 17, 2003 in the amounts of $428,602.85 and $218,080.51 respectively.

18. The City denied the refund claims and the Taxpayer filed a protest petition.

19. The $428,602.85 consists of $367,596.97 for attrition, cancellation and no-show revenue and $61,005.88 for gratuities.

20. The $218,080.51 amount is for audio/visual equipment provided to guests.

21. From March 1999 through September 1999, the Taxpayer owned the audio/visual equipment and its employees provided the services.

22. From October 1999 through March 2002, the Taxpayer contracted with ***ABC Company*** to supply equipment to the hotel.

23. There was not sufficient evidence to demonstrate that taxes were charged on one night deposits/penalties.

24. There was sufficient evidence to demonstrate that taxes were charged by ***ABC Company***.

25. The bellman gratuities are paid to the bellmen.

26. No-show charges arise when a guest does not cancel their reservation within a specified time or does not show by the designated time.

27. Attrition and cancellation charges occur when groups contract with the hotel for a block of rooms and fail to cancel by an agreed upon time in order to avoid the charge or when groups only use a portion of the rooms agreed upon and held.

28. The Taxpayer charged taxes on the full amount of audio/visual charges including operator charges.

29. While the patron's bill may not show a tax on audio/visual services, the back-up support demonstrates that ***ABC Company***/Taxpayer collected tax on the full amount of the services provided.

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. Bellman gratuities are not part of the gross income of the Taxpayer.

3. Attrition, Cancellation and No-Show Charges would be included within the provision of Section 444.

4. Attrition, Cancellation and No-Show Charges are an integral part of the business of operating a hotel.

5. There was no evidence to demonstrate that the doctrine of equitable estoppel would apply to Attrition, Cancellation, and No-Show Charges.

6. The audio/visual services provided by the Taxpayer would be taxable under the definition of "licensing" set forth in Section 100.

7. The invoice would act as an agreement for the patron to pay for the use of the equipment.

8. Separately stated operation charges would not be taxable.

9. There was no evidence that the Taxpayer has complied with Section 560 (c) for any refunds.

10. The commissions received by the Taxpayer from ***ABC Company*** would be taxable pursuant to Section 445 (a).

11. The Taxpayer's request for refund of taxes paid on bellman gratuities should be granted.

12. The Taxpayer's request for refund of taxes paid on Attrition, Cancellation, and No-Show Charges should be denied.

13. The Taxpayer's request for refund of taxes paid on audio/visual services should be denied.

ORDER

It is therefore ordered that the August 14, 2003 protest of ***Taxpayer*** of a denial of refund claims by the City of Phoenix is hereby granted in part and denied in part consistent with the Discussion herein and Conclusion of Law Nos. 11, 12, and 13.

It is further ordered that the City of Phoenix shall refund the taxes protested on the bellman gratuities.

It is further ordered that this Decision shall be effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer