DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: July 22, 2005
Decision: MTHO #206
Taxpayer:
Tax Collector: City of Phoenix
Hearing Date: November 15, 2004

DISCUSSION

Introduction

On August 30, 2005, ***Taxpayer*** filed a protest of a tax assessment made by the City of Phoenix ("City"). After review, the City concluded on September 2, 2004 that the protest was timely and in the proper form. On September 3, 2004, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before October 18, 2004. On October 12, 2004, the City filed a response to the protest. On October 18, 2004, the Hearing Officer ordered the Taxpayer to file a reply on or before November 8, 2004. On October 22, 2004, a Notice of Tax Hearing ("Notice") scheduled this matter for hearing commencing on November 15, 2004. Both parties appeared and presented evidence at the November 15, 2004 hearing. On November 24, 2004, the Hearing Officer indicated the parties agreed to the following briefing schedule: Taxpayer's opening brief would be filed on or before December 15, 2004; the City's response brief would be filed on or before January 14, 2005; and, the Taxpayer's reply brief would be filed on or before January 28, 2005. On December 9, 2004, the Taxpayer sent an email requesting an extension of the briefing schedule. On December 10, 2004, the Hearing Officer modified the briefing schedule as follows: Taxpayers opening brief would be filed on or before January 28, 2005, the City's response brief would be filed on or before February 28, 2005; and, the Taxpayer's reply brief would be filed on or before March 14, 2005. The Taxpayer filed an opening brief on January 28, 2005. Subsequently, the City sent an email requesting an extension to file its response brief. On February 18, 2005, the Hearing Officer extended the City's deadline to March 28, 2005 for the City's response brief and the Taxpayer's deadline for a reply brief to April 11, 2005 The City sent an email requesting another extension for its brief. On March 28, 2005,the Hearing Officer extended the City's deadline for its brief to April 28, 2005 and the Taxpayer's reply brief deadline to May 12, 2005. The City filed a response brief on April 28, 2005. On May 10, 2005, the Taxpayer sent an email requesting an extension for its reply brief. On May 11, 2005, the Hearing Officer extended the Taxpayer's reply deadline to June 13, 2005. On June 13, 2005, the Taxpayer filed its reply brief. On June 24, 2005, the Hearing Officer indicated the record was now closed and a written decision would be issued on or before August 8, 2005.

City Position

The City conducted an audit of the Taxpayer for the period June 2000 through March 2004. The City assessed the Taxpayer for additional taxes of $50,223.43 plus interest. The Taxpayer protested tax and interest totaling $31,508.20. According to the City, the Taxpayer sold office furniture during the audit period to ***Trucking Company ("Trucking")***. The City indicated that ***Trucking*** is a national trucking company with headquarters in the City. According to the City, when furniture is needed in any of ***Trucking's*** offices, anywhere in the country, the branch office orders the goods from the Taxpayer. The Taxpayer then orders the goods from the manufacturer for delivery to the ordering ***Trucking*** office. The City disputed the Taxpayer's claim that these sales were exempt out-of-State sales. The City Code Section 100 ("Section 100") provides the following four-part test for exemption for out-of State sales:

> 1. The order must be placed from without the State of Arizona; 2. The order must be placed by other than a resident of the State; 3. The property is delivered to the buyer at a location outside the State; 4. The property is purchased for use outside the State.

The City argued that test no. 2 is not met because ***Trucking*** is an Arizona company. While the Taxpayer argued the sales orders in question were placed from outside of Arizona, the City asserted the Taxpayer failed to provide documentation to support its claim. The City asserted the invoices for the sales in question showed the furniture was sold to a City address with an out-of-State installation location. The City argued that the burden of proof to provide supporting documentation is on the Taxpayer pursuant to City Code Sections 14-350, 14-360, and 14-370 ("Sections 350, 360, and 370") and City Regulation 14-350.1 ("Regulation 350.1"). Further, City Code Section 14-460 (b) ("Section 460 (b)") provides that the burden of proving a sale of tangible personal property is not a taxable retail sale shall be upon the person who made the sale.

In response to the cases cited by the Taxpayer, the City asserted the cases are from 1938, 1939, 1951, and 1972. The City argued the cases are either distinguishable from this case or have been undermined as to the issue presented here by subsequent cases. The City relied on Complete Auto [Transit, Inc. v. Brady, 430 U.S. 274 (1977]. The City asserted that the Supreme Court in Complete Auto determined that state taxation of business engaged in interstate commerce complies with the requirements of the Due Process Clause and The Commercial Clause if:

> (1) The tax is applied to an activity that has substantial nexus with the taxing jurisdiction; (2) The tax is fairly apportioned; (3) The tax does not discriminate against interstate commerce; and (4) The tax is fairly related to the services provided by the taxing jurisdiction.

The City asserted the following: the Taxpayer has a business location in the City; there is a fair apportionment because there is a credit provided by the City for any similar tax; the tax does not prefer in-State businesses over out-of-State

businesses; and, there is a fair relationship between the services provided by the City and the tax burden on the Taxpayer.

The City also disputed the Taxpayer's argument that sales to defense contractors were exempt. According to the City, the Taxpayer sold furniture to defense contractors during the audit period but there was no evidence presented that the Taxpayer ever passed title of the furniture to the federal government. Further, the City asserted that the Taxpayer's reliance on Arizona Revised Statutes 42-506 (A) (39) and 42-5159 (A) (39) and Arizona Court of Appeals decision in Motorola, Inc. v. Arizona Department of Revenue, 196 Ariz. 137, 993 P.2d 1101 (App. 1999)are not relevant to this matter. According to the City, the City has no comparable exemption to the State and the Taxpayer has provided no evidence to establish the transactions in question were comparable to the transactions in the Motorola, supra, case. Based on all the above, the City requested the Taxpayer's protest be denied.

Taxpayer Position

The Taxpayer protested tax and interest in the amount of $31,508.20 for exempt sales and/or sales made out-of-State. The Taxpayer asserted that sales to defense contractors during the audit period were exempt because they were sales for resale rather than retail sales. The Taxpayer argued that while the City has not yet conformed its tax code to State Sections 5061 and 5159, the sales are nonetheless exempt pursuant to the Motorola case. According to the Taxpayer, the Court in Motorola held that sales of this type are not subject to tax because title for the items passes to the federal government pursuant to the defense contractor's contracts with the federal government. In reply to the City's argument that there was no evidence to demonstrate the title to the furniture ever passed to the federal government, the Taxpayer provided Arizona Form 5000 exemption certificates from ***Company A*** and ***Company B.*** The Taxpayer also provided a letter from ***Company A*** claiming that title to office supplies/furniture was transferred to the federal government.

The Taxpayer asserted that the office furniture sold to ***Trucking*** is not subject to State or City tax because they are subject to sales or use tax in the state where they are delivered. According to the Taxpayer, all of these sales were delivered out-of-State. The Taxpayer argued that imposing a State or City tax on these sales would unduly burden interstate commerce in violation of the Commerce Clause of the U. S. Constitution. The Taxpayer cited several Supreme Court cases to support its argument. The Taxpayer argued that even if the Complete Auto analysis argued by the City is used the Taxpayer is not subject to City tax on sales that were delivered to out-of-State customers. The Taxpayer asserted that the City clearly fails this third prong of the test because applying its tax to these sales would discriminate against interstate commerce.

The Taxpayer also argued the sales would be exempt out-of-State sales. The Taxpayer provided with its Reply Brief a June 23, 2004 letter from ***Trucking*** that asserted all orders are placed directly with the Taxpayer from the out-of-State offices of ***Trucking***.

The Taxpayer asserted that the State examined the Taxpayer's books and records for all but four months of the City's audit period and accepted the Taxpayer's returns as filed. The Taxpayer' asserted that when the State and City statutes are the same and the State has issued written guidance, the State's interpretation is binding on the City. The Taxpayer argued that the letters from the State that approved the Taxpayer's returns constitutes written guidance from the State which should be binding on the City.

ANALYSIS

We concur with the Taxpayer that when furniture was sold to defense contractors who then passed title to the furniture to the federal government, the sale would be an exempt sale for resale. While the Taxpayer never provided the information until its reply brief, we find the Arizona Form 5000 from ***Company A*** located in Mesa, Arizona to be sufficient to exempt those sales as sales for resale. Similarly, we find the Arizona Form 5000 from ***Company B*** in Litchfield Park, Arizona to be sufficient to exempt those sales as sales for resale. We do not find the June 2, 2005 letter from ***Company A*** in Arlington, Texas to be sufficient to exempt those sales as sales for resale. We note the June 2, 2005 letter was after the audit period, there was no transaction privilege tax license number, and the letter appears to be referring to office supplies/furniture for which title remains with ***Company A*** but the cost was allocated to the federal government.

We concur with the City that the burden of proof is on the Taxpayer to demonstrate that the sales to ***Trucking*** were exempt from City tax. We also concur with the City that the sales to ***Trucking*** do not meet the criteria set forth in Section 100 for out-of-State sales. While the Taxpayer provided a June 23, 2004 letter from ***Trucking*** attached to its Reply Brief which claimed all orders were placed from out-of-State, the invoices presented at the hearing showed that the furniture was sold to the ***Trucking*** headquarters located in the City and installed out-of-State. The fact that the sale was invoiced to the ***Trucking*** headquarters in the City tells us that the order is being placed on behalf of the ***Trucking*** headquarters, which is a resident of the City.

As a result, we do not find the Taxpayer has met the out-of-State criteria set forth in Section 100. Further, there was no evidence that Section 100 has been found to be unlawful or that the State has an identical statute with written guidance that would be binding on the City. We are also not convinced that taxation of the sales to ***Trucking*** would be in violation of the Commerce Clause or any relevant Supreme Court case. While the Taxpayer has claimed the taxation of these sales would discriminate against interstate commerce, we can find no evidence of such discrimination. Certainly, there was no evidence that these sales were taxed by any other city for the identical tax. We must conclude that the sales meet the criteria set for the in Complete Auto and were properly taxed by the City.

FINDINGS OF FACT

1. On August 30, 2004, the Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on September 2, 2004 that the protest was timely and in the proper form.

3. On September 3, 2004, the Hearing Officer ordered the City to file a response to the protest on or before October 18, 2004.

4. On October 12, 2004, the City filed a response to the protest.

5. On October 18, 2004, the Hearing Officer ordered the Taxpayer to file a reply on or before November 8, 2004.

6. On October 22, 2004, a Notice scheduled this matter for hearing commencing on November 15, 2004.

7. Both parties appeared and presented evidence at the November 15, 2004 hearing.

8. On November 24, 2004, the Hearing Officer indicated the parties agreed to the following briefing schedule: Taxpayer's opening brief would be filed on or before December 15, 2004; the City's response brief would be filed on or before January 14, 2005; and, the Taxpayer's reply brief would be filed on or before January 28, 2005.

9. On December 9, 2004, the Taxpayer sent an email requesting an extension of the briefing schedule.

10. On December 10, 2004, the Hearing Officer modified the briefing schedule as follows: Taxpayer's opening brief would be filed on or before January 28, 2005; the City's response brief would be filed on or before February 28, 2005; and, the Taxpayer's reply brief would be filed on or before March 14, 2005.

11. The Taxpayer filed an opening brief on January 28, 2005.

12. The City sent an email requesting an extension to file its response brief.

13. On February 18, 2005, the Hearing Officer extended the City's deadline to March 28, 2005 for the City's response brief and the Taxpayer's deadline for a reply brief to April 11, 2005.

14. The City sent an email requesting another extension for its brief.

15. On March 28, 2005, the Hearing Officer extended the City's deadline for its brief to April 28, 2005 and the Taxpayer's reply brief deadline to May 12, 2005.

16. The City filed a response brief on April 28, 2005.

17. On May 10, 2005, the Taxpayer sent an email requesting an extension for its reply brief.

18. On May 11, 2005, the Hearing Officer extended the Taxpayer's reply deadline to June 13, 2005.

19. On June 13, 2005, the Taxpayer filed its reply brief.

20. On June 24, 2005, the Hearing Officer indicated the record was closed and a written decision would be issued on or before August 8, 2005.

21. The City conducted an audit of the Taxpayer for the period June 2000 through March 2004.

22. The City assessed the Taxpayer for additional taxes of $50,223.43 plus interest.

23. The Taxpayer protested tax and interest totaling $31,508.20.

24. The Taxpayer sold office furniture during the audit period to ***Trucking***.

25. ***Trucking*** is a national trucking company with headquarters in the City.

26. ***Trucking's*** out-of-State branch offices order the goods from the Taxpayer who then orders the goods from the manufacturer for delivery to the out-of-State branch offices of ***Trucking***.

27. The Taxpayer invoices the goods to the ***Trucking*** headquarters in the City and the ***Trucking*** headquarters pays the Taxpayer.

28. There was no evidence that the office furniture sold to ***Trucking*** was taxed by the City and also taxed by another entity for the identical tax.

29. The Taxpayer sold furniture to defense contractors during the audit period.

30. The Taxpayer provided Arizona Form 5000 from ***Company A*** located in Mesa, Arizona claiming the sales as exempt sales for resale.

31. The Taxpayer provided Arizona Form 5000 from ***Company B*** in Litchfield Park, Arizona claiming the sales as exempt sales for resale.

32. The Taxpayer provided a June 2, 2005 letter from ***Company A*** located in Arlington, Texas claiming the sales were exempt sales for resale.

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. The burden is on the Taxpayer pursuant to City Code Sections 14-350, 14-360, 14-370, 14-460, and City Regulation 14-350.1 to maintain and provide suitable books and records to prove that a sale of tangible personal property is not a taxable retail sale.

3. The Taxpayer provided documentation to demonstrate that the sales to ***Company A*** in Mesa, Arizona and ***Company B*** in Litchfield Park, Arizona were exempt sales for resale.

4. The sales to ***Trucking*** were placed on behalf of the ***Trucking*** headquarters, which is a resident of the City.

5. The Taxpayer has failed to meet its burden of proof that the sales to ***Trucking*** were exempt out-of State sales.

6. There was no evidence that the City's out-of-State definition set forth in Section 100 was unlawful.

7. There was no evidence that the State has an identical out-of-State definition with written guidance that would be binding on the City.

8. The Taxpayer has failed to demonstrate that the taxation of the ***Trucking*** sales by the City would discriminate against interstate commerce.

9. The ***Trucking*** sales meet the criteria set forth in Complete Auto and were properly taxed by the City.

10. The Taxpayer's protest should be denied with the exception of the sales to ***Company A*** in Mesa, Arizona and ***Company B*** in Litchfield Park, Arizona.

ORDER

It is therefore ordered that the August 10, 2004 protest by ***Taxpayer*** of a tax assessment made by the City of Phoenix is hereby denied with the exception of the sales to ***Company A*** in Mesa, Arizona and ***Company B*** in Litchfield Park, Arizona.

It is further ordered that the City of Phoenix shall revise its assessment by exempting the sales to ***Company A*** in Mesa, Arizona and ***Company B*** in Litchfield Park, Arizona.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer