DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: September 26 2006
Decision: MTHO #232
Taxpayer: ***Taxpayer 1***; ***Taxpayer 2***
Tax Collector: City of Peoria
Hearing Date: October 25, 2005 & June 15, 2006

DISCUSSION

Introduction

On February 4, 2005, ***Taxpayer 1*** filed a protest of a tax assessment made by the City of Peoria ("City"). After review, the City concluded on March 1, 2005 that the protest was timely and in the proper form. On March 4, 2005, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before April 18, 2005. On May 2, 2005, the Hearing Officer extended the City's response deadline to May 18, 2005. On May 13, 2005, the City filed a response to the protest of ***Taxpayer 1*** and a response to a protest filed on February 4, 2005 by ***Taxpayer 2***. On May 18, 2005, the Hearing Officer ordered ***Taxpayer 1*** to file any reply to the City on or before June 1, 2005. On June 8, 2005, a Notice of Tax Hearing ("Notice") scheduled the matter for hearing commencing on July 26, 2005. On June 24, 2005, the City requested clarification as to the consolidation of the two protests for hearing purposes. On June 27, 2005, the Hearing Officer consolidated the two protests and extended the ***Taxpayer 1***'s reply deadline until July 11, 2005. On July 2, 2005, the Hearing Officer requested the City provide a copy of the protest filed by ***Taxpayer 2***. On July 7, 2005, the City provided a copy of ***Taxpayer 2***'s protest. On July 20, 2005, a Notice rescheduled the hearing to commence on October 24, 2005. Both parties appeared and presented evidence at the October 24, 2005 hearing. On October 26, 2005, the Hearing Officer indicated the City and ***Taxpayer 1*** would file simultaneous post-hearing briefs on or before November 7, 2005; ***Taxpayer 2*** would file additional information for the City to review on or before December 5, 2005; the City would file any comments/recommendations to the information on or before January 16, 2006; and ***Taxpayer 2*** would file any reply on or before February 6, 2006. On November 4, 2005, the City filed a closing brief and on November 7, 2005, ***Taxpayer 1*** filed a closing brief. On December 5, 2005, ***Taxpayer 2*** filed additional information. After review, the City on January 13, 2006, filed comment/recommendations. On February 14, 2006, the Hearing Officer indicated ***Taxpayer 2*** did not file a reply to the City's recommendation that the hearing be reconvened and as a result the hearing was going to be reconvened. On March 8, 2006, a Notice scheduled the matter for hearing on March 29, 2006. On March 20, 2006, ***Taxpayer 2*** requested the hearing be rescheduled. On March 21, 2006, the Hearing Officer continued the hearing. On March 28, 2006, a Notice rescheduled the hearing for May 23, 2006. On May 24, 2006, another Notice rescheduled the hearing for June 15, 2006. The parties appeared and presented evidence at the June 15, 2006 hearing. On June 16, 2006, the Hearing Officer indicated the parties would file simultaneous closing briefs

on July 7, 2006. On July 5, 2006, the parties requested an extension until July 28, 2006 for the closing briefs. On July 7, 2006, the Hearing Officer extended the deadline for the closing briefs until July 28, 2006. On July 28, 2006, the City filed a closing brief and on August 2, 2006, ***Taxpayer 2*** filed a closing brief. On August 8, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before September 25, 2006.

City Position

TAXPAYER 1

The City audited ***Taxpayer 1*** for the period January 1, 2000 through December 21, 2003. The City assessed ***Taxpayer 1*** for additional taxes in the amount of $62,297.03 plus interest of $19,550.30 up through December 2004. The City also assessed a failure to pay penalty totaling $6,229.70. The City argued the ***Taxpayer 1*** was a residential rental facility which provided meals to its tenants. The City taxed the meals at the 2.5 percent restaurant rate. The City relied on Model Tax Code Regulation 9A-445.3 ("Regulation 445") which provided as follows:

> (a) Room and board
>
> (1) Rooming houses, lodges, or other establishments providing both lodging and meals, shall maintain a record of the separate charges made for the lodging and the meals.
>
> (2) The charges for lodging shall be subject to the tax imposed by Section 9A-444 or Section 9A-445. The charge for meals is subject to the tax upon restaurants and bars prescribed by Section 9A-455.

The City estimated the value of meals included in residential rent charges based on amounts reported by similar establishments. The City indicated they had requested records from ***Taxpayer 1*** but there were no records provided.

In response to ***Taxpayer 1***'s claim that some or all of its activities are tax exempt, the City asserted ***Taxpayer 1*** did not provide sufficient information to support their claim. The City noted that City Code Section 445 (q) ("Section 445 (q)") provides the following exemption:

> Charges to patients receiving "personal care" or "directed care", by any licensed assisted living facility, licensed assisted living center or licensed assisted living home as defined and licensed pursuant to Chapter 4 Title 36 Arizona Revised Statutes and Title 9 of the Arizona Administrative Code are exempt.

Further, "personal care services" and "directed care services" are defined in ARS Section 36-401 ("Section 401") as follows:

> **"Directed care services"** means programs and services, including personal care services, provided to persons who are incapable of

recognizing danger, summoning assistance, expressing need or making basic care decisions.

"Personal care services" means assistance with activities of daily living that can be performed by persons without professional skills or professional training and includes the coordination or provision of intermittent nursing services and the administration o medications and treatments by a nurse who is licensed pursuant to Title 32, Chapter 15 or as otherwise provided by law.

The City indicated that because "personal care services" are included in the definition of "direct care services", the exemption can be read to apply to any charges for "directed care services" provided to patients. The City asserted that if the exemption does not apply to certain charges at a licensed business, then general charges are subject to a sales tax of 1.5 percent pursuant to Section 445 (a). According to the City, if the exemption does not apply and the charges are for meals at the facility, then the meals are subject to a sales tax of 2.5 percent pursuant to City Code Section 12-455 ("Section 455").

The City noted that in order to obtain an exemption, the taxpayer must provide "adequate proof and documentation" pursuant to City Code Section 12-360 (a) ("Section 360 (a)"). The City indicated ***Taxpayer 1*** was a licensed Assisted Living Center-Directed under State law. According to the City, ***Taxpayer 1*** offered lodging, meals, and other services to its residents. The City asserted the meal packages that ***Taxpayer 1*** provided to residents as a "basic amenity package" included three meals per day served each resident in the common dining room. The City argued the exemption in Section 445 (q) does not apply to an assisted living "facility", "center" or "home". The City asserted the exemption applies to those locations for "charges to patients receiving" directed care. The City noted that if the City Council had intended to exempt the entire facility instead of specific services therein, the terms "personal care" or "directed care" would be unnecessary surplusage. In this case, the City argued the Taxpayer has not provided adequate evidence to demonstrate which of its services would fall under the category of "directed care."

The City indicated they had provided ***Taxpayer 1*** with countless opportunities to provide the "substantial" evidence necessary to exempt some or all of its activities from taxation. The City asserted that they had repeatedly requested both orally and in writing for the Taxpayer to provide records to determine appropriate amount of tax. According to the City, no such records were provided. The City noted that Section 445.3 (a) (1) states that any establishment that provides both lodging and meals "shall maintain a record of the separate charges made for the lodging and the meals." In addition, City Code Section 12-370 ("Section 370") provides as follows:

In the event the records provided by the taxpayer are considered by the Tax Collector to be inadequate or unsuitable to determine the amount of the tax for which such taxpayer is liable under the provisions of this Chapter, it is the responsibility of the taxpayer either:

1) to provide such other records required by this Chapter or Regulation; or

2) to correct or to reconstruct his records, to the satisfaction of the Tax Collector.

Because of the lack of necessary records, the City indicated they estimated meal charges based on the 2003 dietary expense operating budget at three meals per day which equaled $5.99 per meal. The City used $5.50 per meal times the number of residents to get dining room revenue, which came to 20.3 percent of total revenue. The City indicated the percentage was consistent with the auditor's experience in prior audits of care facilities conducted by the auditor.

The City noted that pursuant to Section 12-540 (b) ("Section 540 (b)") a taxpayer is subject to a penalty of ten percent of any unpaid tax "unless the taxpayer shows that the failure to timely pay is due to reasonable cause and not due to willful neglect." The City further noted that Section 540 (h) defines "reasonable cause" as "the taxpayer exercised ordinary business care and prudence, i.e., had a reasonable basis for believing that the tax did not apply to the business activity or the storage or use of the taxpayer's tangible personal property in this City." The City argued that the ***Taxpayer 1*** did not have reasonable cause for failing to pay its taxes. According to the City, the Taxpayer completely changed its arguments from the time of its protest to the date of the hearing as it jettisoned all three of its substantive arguments about the imposition of the taxes and replaced them with one brand new claim. The City asserted that substantial and reliable evidence exists in support of the City's imposition of a civil penalty in this matter.

TAXPAYER 2

The City audited ***Taxpayer 2*** for the period December 1, 2000 through November 30, 2004. As a result of the audit, the City assessed ***Taxpayer 2*** for taxes in the amount of $35,875.74 and interest up through December 2004 in the amount of $8,321.50. The City also assessed the Taxpayer for penalties for failure to pay and failure to furnish records totaling $12,556.51. The City argued that ***Taxpayer 1*** was a residential rental facility which provided meals to its tenants. The City relied on Regulation 445.

According to the City, ***Taxpayer 2*** opened a retirement complex in the City in 1999. The City indicated the residents of the retirement complex can order meals in a facility dining room. The City opined that in July 1999, ***Taxpayer 2*** entered into a management agreement with ***Management ABC*** which designated ***Management ABC*** as the "Agent" of ***Taxpayer 2*** (the "Owners"). The City noted that ***Individual ABC*** signed the agreement as "President" of the "Owner" and ***Individual XYZ*** signed the agreement as "Manager" of the "Agent".

According to the City, ***Taxpayer 2*** was owned by ***Entity 1*** and ***Entity 2***. The principal shareholder of ***Entity 1*** was ***Individual ABC*** and ***Individual XYZ*** was one of two owners of ***Entity 2***. ***Management ABC*** was owned by ***Individual ABC*** and ***Entity 2***. Based on the above, the City concluded that ***Individual ABC*** and ***Individual XYZ*** were the principal owners of both ***Taxpayer 2*** and ***Management ABC***. The City noted that prior to a resident's occupancy of an apartment unit, ***Management ABC*** provides each resident with an amenity agreement which describes the services to be provided along with the fee

to be charged. In the amenity agreement, ***Management ABC*** referred to itself as "an affiliate of the general partner of the ***Project 123***, ***Entity 1***. Based on a December 5, 2005 letter from ***Taxpayer 2***, ***Management ABC*** began paying ***Taxpayer 2*** monthly kitchen rent for its usage of ***Taxpayer 2*** facilities in January 2005. The City indicated no kitchen rent was paid from July 1999 through December 2004.

The City opined that agency may be proven in four different ways, "By contract, by facts which raise the implication of agency, by ratification, and by estoppel." The City argued that ***Management ABC*** and ***Taxpayer 2*** entered a principal-agent relationship based on their July 1999 management agreement which designated ***Taxpayer 2*** as "Owner" and ***Management ABC*** as "Agent." The City asserted an agency relationship was also proven by implication. The City indicated the financial relationship between the two companies shows that ***Management ABC*** was ***Taxpayer 2***'s agent. The City noted that ***Management ABC*** paid no kitchen rent to ***Taxpayer 2*** for over five years. The City opined the estimated amount of unpaid rent was over $600,000. The City argued that an agency relationship was further evidenced by the overlapping ownership of ***Management ABC*** and ***Taxpayer 2***. The City indicated that City Regulation 12-300.1 ("Regulation 300.1") provides as follows:

> [A] person shall be deemed to be "engaged in or continuing in business" within the City, if he meets any of the following conditions: … (2) He has or maintains within the City directly, or if a corporation by a subsidiary, an office, … or other place of business, or any agent or other representative operating within this City under the authority of such person … (3) He is soliciting sales, orders, contracts, leases and other similar forms of business relationships, within the City from customers, consumers, or users located within the City, by means of salesmen, solicitors, agents, representatives, brokers, and other similar agent or by means of catalogs or other advertising, whether such orders are received or accepted within or without this City.

The City asserted that Regulation 300.1 provides that a principal is engaged in business where either the principal or its agent maintains a place of business within the City. Additionally, the City asserted the principal is engaged in business activity where the principal or its agent solicits sales within the City. The City indicated it was uncontroverted that the ***Taxpayer 2*** dining facility was located in the City and thus ***Taxpayer 2*** was responsible for the taxes regardless whether the business was conducted by ***Taxpayer 2*** or ***Management ABC***.

The City argued the Hearing Officer should not accept jurisdiction to review the City's assessment on sales taxes related to rent because ***Taxpayer 2*** failed to timely protest that portion of the assessment. The City noted that ***Taxpayer 2*** submitted a December 23, 2004 protest of the City's assessment but did not protest the assessment on rental income. The City indicated ***Taxpayer 2*** did not mention any protest at the October 24, 2005 hearing. According to the City, the hearing was recessed while the parties exchanged information. The hearing was reconvened on June 14, 2006. The City asserted that ***Taxpayer 2*** raised the issue of the accuracy of the assessment pertaining to the rental

income for the first time near the end of the reconvened hearing. The City noted that City Code Section 12-570 ("Section 570") provides that a taxpayer may seek to amend its petition before it rests its case at hearing but the Hearing Officer may require the amendment to be in writing. If the amendment is required to be writing, the City will have a reasonable period of time to review and respond to the amendment. The City asserted the Hearing Officer did not require a written amendment and ***Taxpayer 2*** has not even provided a written statement explaining its challenge to the rental income assessment or the amount being challenged. The City argued that ***Taxpayer 2*** has not shown any reasonable cause for a sixteen month delay in raising the rental income issue and has been involved in stonewalling and obstructionist tactics throughout the process. The City requested the Hearing Officer not allow ***Taxpayer 2*** to amend its petition concerning an entirely new issue and conclude ***Taxpayer 2*** waived and abandoned its right to challenge the rental income assessment.

Taxpayer 1 Position

Taxpayer 1 argued that it was exempt from Section 455 since it was not in the business of preparing food in a "bar, cocktail lounge, restaurant or similar establishment …". ***Taxpayer 1*** asserted that "residential dining" charges are deminimus and that no sales tax was due. According to ***Taxpayer 1***, the City's calculation of charges for "residential dining" was inaccurate. ***Taxpayer 1*** argued that its failure to pay any proposed assessment was due to reasonable cause. Similarly, ***Taxpayer 1*** argued its failure to provide records was due to reasonable cause.

Taxpayer 1 indicated it was licensed by the Arizona Department of Health Service ("DHS") to provide its residents "Directed Care". ***Taxpayer 1*** provided testimony that under the arrangement with HUD, the portion of the monthly payment allocated to "Rent" is $900.00. According to ***Taxpayer 1***, DHS requires assisted living facilities license for "Directed Care" to provide three meals per day plus two snacks. ***Taxpayer 1*** noted that the expense of the meals to the residents was not separately allocated. However, ***Taxpayer 1*** asserted the meals are one small component of the monthly charge.

Taxpayer 1 argued that it was clearly providing "directed care" services and "personal care" services of a nature that would exempt it pursuant to Section 445 (q).

TAXPAYER 2 Position

Taxpayer 2 argued that it was exempt from Section 455 since it was not in the business of preparing food in a "bar, cocktail lounge, restaurant or similar establishment …". At the October 24, 2005 hearing ***Taxpayer 2*** asserted that it was not liable for the meal charges because ***Management ABC*** was the entity providing the meals to the residents. ***Taxpayer 2*** argued that ***Management ABC*** was not an agent for ***Taxpayer 2*** for purposes of the sale of amenities to ***Taxpayer 2***'s residents.

Taxpayer 2 acknowledged that where an agency relationship is found to exist, the principal is liable for the sales tax on the principal's goods sold to them agent. ***Taxpayer***

2 argued that it and ***Management ABC*** did not expressly or impliedly enter into an agency relationship and ***Taxpayer 2*** did not exert control over or benefit from ***Management ABC***'s relationship with the residents. According to ***Taxpayer 2***, the only relevant express agreement between ***Taxpayer 2*** and ***Management ABC*** was the management agreement. ***Taxpayer 2*** indicated the management agreement states that ***Management ABC*** is to be employed as an agent "for the purpose of operating and managing the complex," including the collection of monthly rents. ***Taxpayer 2*** asserted that ***Management ABC*** never represented it was acting as ***Taxpayer 2***'s agent. ***Taxpayer 2*** opined that the resident's contract for amenities clearly states the amenities will be provided by ***Management ABC***, who is an affiliate of ***Entity 1***. ***Taxpayer 2*** indicated that the residents receive a bill from ***Management ABC*** in addition to the bill from ***Taxpayer 2***. ***Taxpayer 2*** argued that, at most, the evidence provides that ***Management ABC*** was acting as an implied agent of ***Entity 1***, not ***Taxpayer 2***. ***Taxpayer 2*** asserted that it never benefited from, financed, staffed, controlled, or otherwise represented that it was involved in the transaction between ***Management ABC*** and the residents. Accordingly, ***Taxpayer 2*** concluded that the City can not tax ***Taxpayer 2*** for any sale of food.

ANALYSIS

Taxpayer 1

The evidence supports that ***Taxpayer 1*** was a licensed facility that received income for providing "personal care" or "directed care" to resident patients. As noted by both parties, Section 445 (q) provides that charges for patients receiving "personal care" or "directed care" by a licensed faculty are exempt from taxes. While Section 445 (q) provides for an exemption for charges for "direct care" or "personal care" services, we do not find that the definition would include all charges by a licensed facility.

In this case, the question is whether or not meal charges to the residents would fall under the definitions for "directed care" or "personal care". We find that if the City had intended to exempt all income by a directed care facility, they could have clearly stated that in Section 445 (q). That was not done, instead the exemption is only for charges to patients receiving "personal care" or "directed care". City Code Section 360 ("Section 360") makes it clear that all exemptions are conditional upon adequate proof and documentation being provided. As a result, the burden of proof was on ***Taxpayer 1*** to demonstrate that meal charges to the residents would fall under the definitions for "directed care" or "personal care". Additionally, Regulation 445.3 makes it clear that establishments providing both lodging and meals must maintain a record of the separate charges. ***Taxpayer 1*** did not maintain any record of separate charges. Based on all the above, we conclude ***Taxpayer 1*** failed to meet its burden of proof of demonstrating the exemption contained in Section 445 (q) would apply to the meal charges. We also conclude that the City was authorized to use an estimation for the meal charges since ***Taxpayer 1*** provided no records to determine the amount of meal charges. ***Taxpayer 1*** failed to provide sufficient evidence to demonstrate the City's estimation was not reasonable. Accordingly, we conclude the City's estimation was reasonable and proper under the circumstances.

The City was authorized to assess a penalty for failure to timely pay taxes pursuant to Section 540. The only issue on the penalties was whether or not ***Taxpayer 1*** provided "reasonable cause" to have the penalties waived. We do find that it would have been reasonable for a business person to conclude the income from the meals would be exempt pursuant to Section 445 (q). As a result, we shall waive the penalties in this matter.

Taxpayer 2

The primary issue was whether ***Management ABC*** was acting as an agent for ***Taxpayer 2*** for the purpose of selling meals to the residents of ***Taxpayer 2***. Consistent with our analysis for ***Taxpayer 1***, we do find pursuant to Regulation 445.3 that the charge for meals would be subject to the restaurant tax as prescribed by Section 455. The remaining issue was whether ***Taxpayer 2*** was the appropriate taxpayer.

There was no dispute between the parties that if an agency relationship did exist the principal was liable for the sales tax on principal's goods sold by the agent. Based on the July 14, 1999 management agreement, ***Taxpayer 2*** hired ***Management ABC*** to act as its agent in operating and managing the complex. There was no mention in the management agreement about providing food services. It's also noted that the rental invoice to the residents of ***Taxpayer 2*** indicated it was from ***Management ABC*** on behalf of ***Taxpayer 2***. The invoice to ***Taxpayer 2***'s residents for the food package was clearly shown to be from ***Management ABC*** with no mention of ***Taxpayer 2***. While ***Management ABC*** and ***Taxpayer 2*** had similar ownership, they were clearly "separate persons" under the tax code for the purposes of the taxation of transactions. Based on all the above, we do not find sufficient evidence to conclude there was an agency relationship between ***Management ABC*** and ***Taxpayer 2*** regarding the sale of food to the residents of ***Taxpayer 2***.

While we share some of the concerns the City had regarding the lack of any invoices or payments for the use by ***Management ABC*** of ***Taxpayer 2***'s kitchen facilities, we find that to be an entirely different taxable transaction than the sale of food to the residents. If the City had taxed the transaction between ***Management ABC*** and ***Taxpayer 2*** for the rental of the kitchen facilities, the City could have determined the market value of that rent if the amount between the related companies was not indicative of the market value. Based on the above, we conclude ***Taxpayer 2*** was not liable for tax on food sales pursuant to Section 455 during the audit period. Accordingly, the City shall remove the tax on food sales and the associated penalties from the assessment of ***Taxpayer 2***. All other protests of ***Taxpayer 2*** are denied.

FINDINGS OF FACT

1. On February 4, 2005, the ***Taxpayer 1*** filed a protest of a tax assessment made by the City.

2. After review, the City concluded on March 1, 2005 that the protest was timely and in the proper form.

3. On March 4, 2005, the Hearing Officer ordered the City to file a response to the protest on or before April 18, 2005.

4. On May 2, 2005, the Hearing Officer extended the City's response deadline to May 18, 2005.

5. On May 13, 2005, the City filed a response to the protest of ***Taxpayer 1*** and a response to a protest filed on February 4, 2005 by ***Taxpayer 2***.

6. On May 18, 2005, the Hearing Officer ordered ***Taxpayer 1*** to file a reply to the City on or before June 1, 2005.

7. On June 8, 2005, a Notice scheduled the protest by ***Taxpayer 1*** for hearing commencing on July 26, 2005.

8. On June 24, 2005 the City requested clarification as to the consolidation of the two protests for hearing purposes.

9. On June 27, 2005, the Hearing Officer consolidated the two protests and extended the ***Taxpayer 1*** reply deadline until July 11, 2005.

10. On July 2, 2005, the Hearing Officer requested the City provide a copy of the protest filed by ***Taxpayer 2***.

11. On July 7, 2005, the City provided a copy of ***Taxpayer 2***'s protest.

12. On July 20, 2005, a Notice rescheduled the hearing to commence on October 24, 2005.

13. Both parties appeared and presented evidence at the October 24, 2005 hearing.

14. On October 26, 2005, the Hearing Officer indicated the City and ***Taxpayer 1*** would file simultaneous post-hearing briefs on or before November 7, 2005; ***Taxpayer 2*** would file additional information for the City to review on or before December 5, 2005; the City would file any comments/recommendations to the information on or before January 16, 2006; and, the ***Taxpayer 2*** would file any reply on or before February 6, 2006.

15. On November 4, 2005, the City filed a closing brief and on November 7, 2005, ***Taxpayer 1*** filed additional information.

16. On December 5, 2005, ***Taxpayer 2*** filed additional information.

17. After review, the City, on January 13, 2006, filed comments/recommendations.

18. On February 14, 2006, the Hearing Officer indicated ***Taxpayer 2*** did not file a reply to the City's recommendation that the hearing be reconvened and as a result the hearing was going to be reconvened.

19. On March 8, 2006, a Notice scheduled the matter for hearing on March 29, 2006.

20. On March 20, 2006, Taxpayer requested the hearing be rescheduled.

21. On March 21, 2006, the Hearing Officer continued the hearing.

22. On March 28, 2006, a Notice rescheduled the hearing for May 23, 2006.

23. On May 24, 2006, another Notice rescheduled the hearing for June 15, 2006.

24. The parties appeared and presented evidence at the June 15, 2006 hearing.

25. On June 16, 2006, the Hearing Officer indicated the parties would file simultaneous closing briefs on July 7, 2006.

26. On July 5, 2006, the parties requested an extension until July 28, 2006 for the closing briefs.

27. On July 7, 2006, the Hearing Officer extended the deadline for the closing briefs until July 28, 2006.

28. On July 28, 2006, the City filed a closing brief and on August 2, 2006, ***Taxpayer 2*** filed a closing brief.

29. On August 8, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before September 25, 2006.

30. The City audited ***Taxpayer 1*** for the period January 1, 2000 through December 31, 2003.

31. The City assessed ***Taxpayer 1*** for additional taxes in the amount of $62,297.03 plus interest of $19, 550.30 up through December 2004.

32. The City taxed the meals provided to the residents of ***Taxpayer 1*** at the 2.5 percent restaurant rate.

33. The City requested records from ***Taxpayer 1*** but no records were provided.

34. The City estimated the value of meals included in residential rent charges based on amounts reported by similar establishments.

35. ***Taxpayer 1*** was licensed by DHS to provide its residents "Directed Care".

36. The expense of meals to the residents of ***Taxpayer 1*** was not separately allocated.

37. ***Taxpayer 1*** offered lodging, meals, and other services to its residents.

38. ***Management ABC*** and ***Taxpayer 2*** entered into a principal-agent relationship in their July 14, 1999 management agreement.

39. ***Management ABC*** directly billed the residents of ***Taxpayer 2*** for the amenity food package.

40. During the audit period, ***Taxpayer 2*** failed to bill ***Management ABC*** for use of ***Taxpayer 2***'s kitchen.

41. ***Taxpayer 2*** was owned by ***Entity 1*** and ***Entity 2***.

42. The principal shareholder of ***Entity 1*** was ***Individual ABC***.

43. ***Individual XYZ*** was one of two owners of ***Entity 2***.

44. ***Management ABC*** was owned by ***Individual ABC*** and ***Entity 2***.

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. ***Taxpayer 1*** was a licensed facility that received income for providing "personal care" or "directed care" to resident patients.

3. Section 445 (q) provides that charges for patients receiving "personal care" or "directed care" by a licensed facility are exempt from taxes.

4. The Section 445 (q) exemption does not include all charges by a licensed facility.

5. Section 360 provides that all exemptions are conditional upon adequate proof and documentation being provided by the taxpayer.

6. Regulation 445.3 requires establishments providing both lodging and meals must maintain a record of the separate charges.

7. ***Taxpayer 1*** did not maintain any record of separate charges.

8. The City was authorized to use an estimation for the meal charges since ***Taxpayer 1***

provided no records to determine the amount of meal charges.

9. ***Taxpayer 1*** failed to provide sufficient evidence to demonstrate the City's estimation was not reasonable.

10. The City was authorized to assess a penalty for failure to timely pay taxes pursuant to Section 540.

11. ***Taxpayer 1*** provided reasonable cause to have the failure to timely pay taxes penalty waived.

12. ***Management ABC*** and ***Taxpayer 2*** were "separate persons" under the tax code for the purposes of the taxation of transactions.

13. There was not sufficient evidence to conclude there was an agency relationship between ***Management ABC*** and ***Taxpayer 2*** regarding the sale of food to the residents of ***Taxpayer 2***.

14. ***Taxpayer 2*** was not liable for tax on food sales pursuant to Section 455 during the audit period.

15. The City should remove the tax on food sales and associated penalties from the assessment of ***Taxpayer 2***.

ORDER

It is therefore ordered that the protests of ***Taxpayer 1*** and ***Taxpayer 2*** of tax assessments made by the City of Peoria are hereby granted in part, and, denied in part, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Peoria shall remove the penalties assessed on ***Taxpayer 1***.

It is further ordered that the City of Peoria shall remove the tax on food sales and the associated penalties assessed on ***Taxpayer 2***.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer