DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: May 23, 2006
Decision: MTHO #246
Tax Collector: City of Phoenix
Hearing Date: December 2, 2005

DISCUSSION

Introduction

On March 7, 2005, ***Company A*** filed a protest of a tax payment made by the City of Phoenix ("City"). After review, the City concluded on July 7, 2005, that the protest was timely and in the proper form. On July 18, 2005, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response on or before September 1, 2005. On July 29, 2005, the City filed a response to the protest. On August 2, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before August 23, 2005. On August 22, 2005, the Taxpayer requested an extension. On August 23, 2005, the Hearing Officer granted the Taxpayer an extension until September 12, 2005. On September 12, 2005, the Taxpayer filed a reply. On September 15, 2005, a Notice of Tax Hearing ("Notice") scheduled the matter for hearing commencing on October 12, 2005. On September 22, 2005, a Notice rescheduled the matter for hearing commencing on December 2, 2005. Both parties appeared and presented evidence at the December 2, 2005, hearing. On December 3, 2005, the Hearing Officer indicated the City would file a closing brief on or before January 17, 2006, and, the Taxpayer would file a reply brief on or before March 3, 2006. On January 12, 2006, the City sent an email requesting an extension. On January 13, 2006, the Hearing Officer extended the City's deadline until February 17, 2006, and the Taxpayer's deadline until April 3, 2006. On February 17, 2006, the City filed its post hearing brief. On April 3, 2006, the Taxpayer filed its reply brief. On April 8, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before May 23, 2006.

City Position

The City assessed the Taxpayer for tax for licensing for use of real property in the amount of $144,087.99. The assessment was on the commission revenue that the Taxpayer received from ***Company B***. The audit period was October 1999 through November 2004. The City asserted that the Hearing Officer had previously concluded in MTHO No.137 that "The audio/visual services provided by the Taxpayer would be taxable under the definition of "licensing" set forth in Section 100." In addition to protesting the assessment, the Taxpayer also requested a refund in the amount of $165,958.47 for taxes paid during the period March 2001 through December 2004.

The City assessed tax on the commission revenue that the Taxpayer received from ***Company B*** as discussed in their agreement and which the Hearing Officer had concluded in MTHO No. 137 was taxable pursuant to City Code Section 14-455 ("Section 455").

The City asserted the fact that the Taxpayer had reported the revenue and paid the tax on behalf of ***Company B*** for the licensing for use of tangible personal property pursuant to City Code Section 14-450 ("Section 450") would not constitute double taxation.

The City disputed the Taxpayer's argument that the difference between the commissions received and a fair market value rent of $9,360 per month represents a referral fee. The City noted that the Taxpayer and ***Company B*** have an exclusive agreement which provides that the Taxpayer is prohibited from renting audio/visual equipment from anyone other than ***Company B***. According to the City, ***Company B*** paid the Taxpayer a commission for the use of the property based on the value of the audio/visual services. The City argued the total commission revenue is subject to tax.

In response to the Taxpayer's argument that they should be given an offset for "excess tax collected", the City asserted the taxes were separately charged and collected and the Taxpayer has not demonstrated they would refund the taxes. The City opined that the Taxpayer is liable for the tax on the total commission revenue.

The City agreed with the Taxpayer that portions of the original audit period of October 1999 through November 2004 was partly out of the statute pursuant to City Code Section 14-550 (a) (1) and 550 (a) (4) ("Section 550 (a) (1) and (a) (4)"). The City recommended the audit period be adjusted to August 2000 through November 2004. While the Notice of Tax Assessment was received by the Taxpayer on January 19, 2005, the City asserted the assessment was delayed by five months at the request of the Taxpayer.

In response to the Taxpayer's argument, the City indicated they did not change their position with regard to the taxability of audio visual activity. According to the City, the Courts have generally been consistent in holding 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. The City asserted that the Courts have also consistently held that the doctrine does not apply in tax cases concerning misrepresentations or mistakes of law. The City argued that the Taxpayer did not provide any evidence that anyone associated with the City ever stated or implied that the transactions in question were not taxable. Since there was no communication from the City informing the Taxpayer that the transactions were not taxable, the City asserted there could be no reliance by the Taxpayer on any City communications. The City asserted there was no injury to the Taxpayer in this case since the taxes were legitimately owed.

The City argued that the provisions of City Code Section 14-546 ("Section 546") is completely discretionary by the City. In order to trigger the application of Section 546, the City indicated there must be a determination that over 60 percent of the affected taxpayers in a class have failed to properly account for their taxes because of the same

misunderstanding or misapplication of the tax laws. The City also noted that before Section 546 can be applied, the City must make certain public declarations and hold a public hearing. The City asserted none of these requirements have occurred.

Taxpayer Position

The Taxpayer indicated it was in the business of operating a 250 acre destination resort in the City. According to the Taxpayer, it conducted numerous activities, including : transient lodging; food and beverage; golf; tennis; Centre for Well-Being spa; meeting room and convention facilities; business center; concierge services; and Funicians Club kid club. The Taxpayer also indicated that, during the audit period, the Taxpayer had contracted with ***Company B*** to provide audio visual services as requested by its guests. The Taxpayer asserted that if a guest requested audio visual services, the Taxpayer's policy was to refer the guest to ***Company B***. According to the Taxpayer, its guests could also pursue audio visual rentals and services from unrelated third-party providers. The Taxpayer indicated they provided billing services for ***Company B*** by including ***Company B*** charges on Taxpayer's master billings to its guests. The Taxpayer would retain a portion of the fee for its referral and billing services. The Taxpayer emphasized that the retained fees were not commissions. During the audit period, the Taxpayer reported tax on the full amount of audio visual gross receipts.

The Taxpayer argued that the City's policy to assess tax on the commission portion of the gross receipts when tax had already been reported to the City on the full amount of gross receipts creates an egregious result. The Taxpayer noted that City Code Section 14-100 ("Section 100") defines "Licensing for Use" to be "any agreement between the user ("licensee') and the owner or the owner's agent ("licensor") for the use of the licensor's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement.

The Taxpayer asserted there was no evidence that the Taxpayer received consideration in exchange for a license to use the Taxpayer's real property. According to the Taxpayer, the agreement with ***Company B*** merely provided that the Taxpayer would receive a commission for referring guests to ***Company B*** and for billing the guests for the audio visual activities provided. The Taxpayer indicated it is the guest who determines who provides the audio visual services and in what room.

The Taxpayer noted that City Code Section 14-542 (b) ("Section 542 (b)") provides as follows:

If the Tax Collector adopts a new interpretation or application of any provision of this Chapter or determines that any provision applies to a new or additional category or type of business and the change in interpretations or application is not due to a change in the law:

1) The change in interpretation or application applies prospectively only unless it is favorable to taxpayers.

2) The Tax Collector shall not assess any tax, penalty or interest retroactively based on the change in interpretation or application.

The Taxpayer argued that the City has changed its interpretation and application of the law and cannot retroactively apply such changes to the detriment of the Taxpayer. The Taxpayer indicated they did not learn of the determination to tax the commissions under City Code Section 14-455 until June 28, 2004, when the Hearing Officer issued Decision MTHO No. 137.

According to the Taxpayer, ***Company B*** was authorized to use roughly 4,500 square feet of office and storage space. ***Company B*** was also allowed to perform its rentals and services on the Taxpayer's premises. The Taxpayer noted that its guests could have used third-party audio visual providers to provide services on the Taxpayer's premises. The Taxpayer asserted that since any audio visual service provider was allowed to use the facility to perform audio visual rentals and services, the Taxpayer is not licensing the use of the facility to any such audio visual providers.

The Taxpayer argued that the City was incorrect when they stated ***Company B*** paid the Taxpayer a commission. According to the Taxpayer, they paid ***Company B*** for the entire gross receipts collected from guests less a commission which varied from 20 percent to 50 percent of the gross receipts. The Taxpayer asserted the City was incorrect to claim the Taxpayer was aware of the City's position on the commission issue in June 2003. The Taxpayer indicated the City's position at that time was that the entire gross receipts were subject to tax under either the rental of tangible personal property or under the hotel classification.

The Taxpayer asserted that the Hearing Officer in MTHO No. 137 distinguished between audio visual activities performed by the Taxpayer and audio visual activities performed by ***Company B***. The following was extracted from MTHO No. 137: "The audio visual services provided by the Taxpayer would be taxable under the definition of 'licensing' set forth in Section 100." As to the activity performed by ***Company B***, the Hearing Officer stated that "we concur with the Taxpayer that these services would not be taxable as rental of tangible personal property because the guest of the hotel does not operate the equipment." The Taxpayer noted that the Hearing Officer also concluded as a matter of law that "separately stated operation charges would not be taxable." The Taxpayer asserted that a large portion of the commission retained by the Taxpayer is derived from non-taxable services performed by ***Company B***.

The Taxpayer disputed the City's extension of the audit period. The Taxpayer indicted that City Code Section 14-550 (a) (1) ("Section 550 (a) (1)") provides that "the Tax Collector may assess additional tax due at any time within four (4) years after the date on which the return is required to be filed, or within four (4) years after the date on which the return is filed, whichever period expires later." Further, Section 550 (a) (4) provides "Any assessment of additional tax due by the Tax Collector shall be deemed to have been made by mailing a copy of a notice of audit assessment by certified mail to the taxpayer's

address of record with the Tax Collector." The Taxpayer argued that because the Notice of Assessment was not received until January 19, 2005, the City may not pursue tax for periods prior to December 1, 2000. While Section 550 (a) (3) provides a bases to waive the statutes, the Taxpayer noted that it requires a delay to be "requested or agreed to in writing by the taxpayer." The Taxpayer asserted they made every effort to provide timely documentation to the City and did not agree to any waiver of the statute of limitations ("SOL").

If the Hearing Officer were to determine the Taxpayer underpaid tax for the commissions received from ***Company B***, the Taxpayer requested they be included in a class of similarly situated taxpayers pursuant to Section 546. The Taxpayer opined they were not alone in the "misunderstanding" and should not be penalized for the City's change in position.

In response to the City's arguments, the Taxpayer asserted they met all four requirements of the four prong test set forth in Valencia. According to the Taxpayer, the City engaged in affirmative conduct inconsistent with a position the City later adopted that was adverse to the Taxpayer. The Taxpayer indicated the City had published a brochure for the hotel and motel industry that provided that audio visual rentals are taxable under the tangible personal property classification pursuant to Section 450. The Taxpayer asserted it relied on the City's position and reported all gross receipts from the audio visual activity pursuant to Section 450. According to the Taxpayer, the City took the position in January 2004 that the audio visual gross receipts were taxable pursuant to City Code Section 14-444 ("Section 444") as receipts from operating a hotel. While the Taxpayer acknowledged the City always believed the Taxpayer's activities were subject to tax, the Taxpayer asserted the City's changes in position would give rise to equitable estoppel.

The Taxpayer argued that it actually and reasonably relied on the City's prior conduct and reported tax on the gross receipts from the audio visual activity. According to the Taxpayer, it had no reason to believe the City would change their position and require the Taxpayer to begin reporting additional tax to the City on the commission portion of the gross receipts. The Taxpayer asserted there was no communication that stated 100 percent of the Taxpayer's gross receipts were taxable under one classification and that an additional tax would be due on forty percent of the same gross receipts under a different classification.

The Taxpayer argued that the City's repudiation of a prior position caused the Taxpayer to suffer a substantial detriment because of the change in position. The Taxpayer indicated it was harmed because the City's new found position requires the Taxpayer to pay additional tax on the same previously taxed gross receipts without any credit for taxes already reported on such receipts.

The Taxpayer argued that applying estoppel against the City would neither unduly damage the public interest nor substantially and adversely affect the exercise of governmental powers. According to the Taxpayer, the City's erroneous audit assessment of $144,087.99 would not substantially and adversely affect the exercise of government

powers. As a result, the Taxpayer asserted it met the fourth prong of the Valencia test.

The Taxpayer argued that it has been assessed taxes twice on the same gross receipts pursuant to the audio visual business activity. The Taxpayer noted that double taxation occurs when the same person is taxed twice during the same taxing period for the same purpose. According to the Taxpayer, the City requested the Taxpayer report tax on the gross receipts to the City and later the City assessed the Taxpayer on the same gross receipts under a different classification. The Taxpayer asserted there was only one event that the City taxed twice. As a result, the Taxpayer concluded it had been subject to double taxation.

ANALYSIS

Audio/Visual Services

As we concluded in Decision MTHO No. 137, the commissions received by the Taxpayer from ***Company B*** would be taxable pursuant to Section 445 (a). In consideration for the commissions, the Taxpayer provided office space, storage space, and a ***Company B*** area for ***Company B***. Even though the Taxpayer had already paid taxes on the entire gross receipts on behalf of ***Company B***, we do not find there was any double taxation. There are two separate taxpayers with gross receipts under different taxing classifications. ***Company B*** had gross receipts that would be taxable pursuant to Section 450. The burden of proof would be on ***Company B*** to demonstrate there should be any exemptions/deductions from the gross receipts. While ***Company B*** was not a party to this proceeding, the Taxpayer was acting on the behalf of ***Company B*** in paying taxes on the gross receipts pursuant to Section 450.

Estoppel Argument

The primary issue is whether or not the City has changed its position such that the Taxpayer was injured by relying on the City's conduct. We don't think so. While the City has modified/changed its position over time, the City has always argued that the Taxpayer was liable for tax on the full amount of gross receipts from the audio visual services. In Decision MTHO No. 137, we concluded that the Taxpayer was only liable for tax on the commissions received from ***Company B***. These are two separate and distinct taxing activities. ***Company B*** was providing audio visual services which would be taxable pursuant to Section 450 as licensing for use. If the Taxpayer had been providing the visual services, the Taxpayer would have been taxable pursuant to Section 450. In this case, the Taxpayer pursuant to City Regulation 100.1 ("Regulation 100.1") acted as a broker for ***Company B*** and paid taxes for ***Company B*** pursuant to Section 450. In addition the Taxpayer received commissions from ***Company B*** that would be taxable pursuant to Section 445 (a). There was no evidence of any separately charged operator services that could have been deducted from the taxable gross receipts of ***Company B***. We want to make it clear that if ***Company B*** has also paid taxes to the City on its gross income then an assessment on the Taxpayer, as a broker, for the same gross income would not be proper. Further, our conclusion that the Taxpayer was acting as a broker for ***Company B*** was based on the evidence in this proceeding and is not meant to decide any

dispute(s) between the Taxpayer and ***Company B***.

Excess Tax Collected
The Taxpayer has filed a request for a refund of excess tax collected. Since the City has not acted on the refund request at the time of the hearing, the Hearing Officer concluded the issued was not ready to be heard at this time.

Statute of Limitations
Section 550 provides for a normal four year SOL. Pursuant to subsection 550 (a) (3), the period can be extended for any delay in completion of an examination which has been requested or agreed to in writing by the Taxpayer. While the City alleged the Taxpayer had requested a delay in completion of the assessment, the Taxpayer disputed the City's claim. We find that the burden of proof is on the City to demonstrate that the Taxpayer had requested a delay in the assessment. We conclude that the City has failed to meet their burden of proof and the SOL cannot be extended beyond the four year period. The appropriate audit period would be December 2000 through November 2004.

Misapplication Under Section 546
Section 546 provides that the City may abate some of all of the penalties, interest, and tax when there has been a determination that more than sixty percent of the person in the affected class have failed to properly account for their taxes owning to the same misunderstanding or misapplication of the tax laws. While the Taxpayer opined it believed it was not alone in the "misunderstanding" of the tax laws, we do not find there was evidence in the record to support such a finding.

FINDINGS OF FACT

1. On March 7, 2005 the Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on July 7, 2005, that the protest was timely and in the proper form.

3. On July 18, 2005, the Hearing Officer ordered the City to file a response on or before September 1, 2005.

4. On July 29, 2005, the City filed a response to the protest.

5. On August 2, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before August 23, 2005.

6. On August 22, 2005, the Taxpayer requested an extension.

7. On August 23, 2005, the Hearing Officer granted the Taxpayer an extension until September 12, 2005.

8. On September 12, 2005, the Taxpayer filed a reply.

9. On September 15, 2005, a Notice scheduled the matter for hearing commencing on October 12, 2005.

10. On September 22, 2005, a Notice rescheduled the hearing commencing on December 2, 2005.

11. Both parties appeared and presented evidence at the December 2, 2005 hearing.

12. On December 3, 2005, the Hearing Officer indicated the City would file a closing brief on or before January 17, 2006, and, the Taxpayer would file a reply brief on or before March 3, 2006.

13. On January 12, 2006, the City sent an email requesting an extension.

14. On January 13, 2006, the Hearing Officer extended the City's deadline until February 17, 2006, and the Taxpayer's deadline until April 3, 2006.

15. On February 17, 2006, the City filed its post hearing brief.

16. On April 3, 2006, the Taxpayer filed its reply brief.

17. On April 8, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before May 23, 2006.

18. The City assessed the Taxpayer for tax for licensing for use of real property in the amount of $144,087.99.

19. The assessment was on the commission revenue that the Taxpayer received from ***Company B***.

20. The audit period was October 1999 through November 2004.

21. The Taxpayer was in the business of operating a 250 acre destination resort in the City.

22. The Taxpayer conducted numerous activities including: transient lodging; food and beverage; golf; tennis; Centre for Well-Being spa; meeting room and convention facilities; business center; concierge services; and Funicians Club kid club.

23. During the audit period, the Taxpayer had contracted with ***Company B*** to provide audio visual services as requested by its guests.

24. The Notice of Tax Assessment was received by the Taxpayer on January 19, 2005.

25. During the audit period, if a guest requested audio visual services, the Taxpayer's policy was to refer the guest to ***Company B***.

26. The guests could also pursue audio visual rentals and services from unrelated third-party providers.

27. The Taxpayer provided billing services for ***Company B*** by including ***Company B*** charges on Taxpayer's master billings to its guests.

28. During the audit period, the Taxpayer paid taxes to the City on the gross amount charged customers by ***Company B***.

29. During the audit period, the City position was that the Taxpayer owed taxes on the gross amount received for audio visual services.

30. Pursuant to their agreement, the Taxpayer provided roughly 4,500 square feet of office and storage spare for use by ***Company B***.

31. ***Company B*** utilized the Taxpayer facilities to provide audio visual services to customers.

32. There was no evidence that the Taxpayer agreed to any extension of the SOL.

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

3. ***Company B*** was providing audio visual services that would be taxable as licensing for use pursuant to Section 450.

4. The Taxpayer was acting as broker on behalf of ***Company B*** pursuant to Regulation 100.1 in paying taxes.

5. The City did not change positions on the taxation of audio visual services that resulted in detrimental harm to the Taxpayer.

6. There was no evidence of any separate operator charges for the audio visual

services provided by ***Company B***.

7. Since the City has not made a decision on the Taxpayer's request for a refund of excess taxes collected, the issue is not ready to be heard by the Hearing Officer.

8. Section 550 provides for a four year SOL.

9. The City has not demonstrated that the Taxpayer had requested a delay in the assessment.

10. The appropriate audit period would be December 2000 through November 2004.

11. There was no evidence to support a conclusion that sixty percent of the persons in the Taxpayer's affected class have failed to properly account for their taxes owing to the same "misunderstanding" of the tax laws.

12. The Taxpayer's protest, with the exception of the SOL, should be denied.

ORDER

It is therefore ordered that the March 7, 2005 protest of ***Company A*** of a tax assessment made by the City of Phoenix is hereby denied with the exception of the statue of limitations.

It is further ordered that the City of Phoenix shall revise the assessment to reflect an audit period of December 2000 through November 2004.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer