DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: July 27, 2006
Decision: MTHO #296
Tax Collector: City of Mesa
Hearing Date: June 26, 2006

DISCUSSION

Introduction

On January 20, 2006, and supplemented on February 7, 2006, ***Taxpayer ABC***. ("Taxpayer") filed a protest of a tax assessment made by the City of Mesa ("City"). After review, the City concluded on February 13, 2006 that the protest was timely and in the proper form. On February 16, 2006, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file any response to the protest on or before April 3, 2006. On March 29, 2006, the City filed a response to the protest. On April 3, 2006, the Hearing Officer ordered the Taxpayer to file a reply on or before April 24, 2006. On May 9, 2006, a Notice of Tax Hearing ("Notice") scheduled this matter for hearing commencing on June 13, 2006. On May 17, 2006, a Notice rescheduled the hearing for June 26, 2006. Both parties appeared and presented evidence at the June 26, 2006 hearing. On June 27, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before August 11, 2006.

City Position

The City audited the Taxpayer for the period November 1999 through July 2005. The City assessed the Taxpayer for additional taxes in the amount of $33,688.20 plus interest up through November 2005 in the amount of $11,664.83. The City indicated the Taxpayer was a homeowners association ("Association") that managed a 160 acre adult recreational vehicle resort in the City. According to the City, the resort consisted of 1,749 individually owned lots. The City also noted that the Taxpayer was also licensed with the Arizona Department of Real Estate ("ADRE") and six of the Taxpayer's employees were individually licensed. The City asserted the Taxpayer handled both sales and rental transactions on behalf of individual property owners.

The majority of the assessment was for understated rental of real property pursuant to City Code Section 5-10-445 ("Section 445"). The City asserted the Taxpayer collected rent on behalf of individual property owners for the rental of park models. The City provided copies of residential rental agreements ("Agreements") which listed the Taxpayer as the broker for the tenants and landlords. Pursuant to the Agreements, the Taxpayer collected the full amount of the rents and kept twelve percent for compensation. The City indicated the following definitions are found in City Code Section 5-10-100

("Section 100"):
"Broker" means any person engaged or continuing in business who acts for another for a consideration in the conduct of a business activity taxable under this Chapter, and who receives for his principal all or part of the gross income from the taxable activity.

"Business" means all activities or acts, personal or corporate, engaged in and cause to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, but not casual activities or sales.

"Person" means an individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, broker, the Federal Government, this State, or any political subdivision or agency of this State. For the purposes of this Chapter, a person shall be considered a distinct and separate person from any general or limited partnership or joint venture or other association with which such person is affiliated. A subsidiary corporation shall be considered a separate person from its parent corporation for purposes of taxation of transactions with its parent corporation.

"Sale" means any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, including consignment transactions and auctions, of property for a consideration. "Sale" includes any transaction whereby the possession of such property is transferred but the seller retains the title as security for the payment of the price. "Sale" also includes the fabrication of tangible personal property for consumers who, in who or in part, furnish either directly or indirectly the materials used in such fabrication work.

The City also noted that City Regulation 5-10-100.1 ("Regulation 100.0") provided as follows:

(a) For the purpose of proper administration of the Chapter and to prevent evasion of taxes imposed, brokers shall be wherever necessary treated as taxpayers for all purposes, and shall file a return and remit the tax imposed on the activity on behalf of the principal. No deduction shall be allowed for any commissions or fees retained by such broker, except as provided in Section 5-10-405, relating to advertising commissions.

(b) Brokers for vendors. A broker acting for a seller, lessor, or other similar persons deriving gross income in a category upon which this chapter imposes a tax shall be liable for such tax, even if his principal would not be subject to the tax if he conducted such activity in his own behalf, by reason of the activity being deemed a "casual" one. For example:
    (1) An auctioneer or other sales agent of tangible personal property is subject to the tax imposed upon retail sales, even if such sales would be deemed "casual" if his principal had sold such items himself.
    (2) A property manager is subject to the tax imposed upon rental, leasing, or licensing of real property, even if such rental, leasing, or licensing would be deemed "casual" if his principal managed such real property himself.

(c) Brokers for vendees. A broker acting solely for a buyer, lessee, tenant, or other similar persons who is a party to a transaction which may be subject to the tax, shall be liable for such tax and for filing a return in connection with such tax only to the extent his principal is subject to the tax.

While the Taxpayer had argued the City was precluded from assessing the tax pursuant to Regulation 100.1 (c), the City agued the Taxpayer would fall under Regulation 100.1 (b)

as a broker for a vendor (lessor). The City asserted that even if the Taxpayer acted as a broker for both parties, Regulation 100.1 (c) would not apply as that provision applies to brokers acting solely for a lessee/tenant. As a result, the City argued the tax assessment on the rental of real property was appropriate.

The City assessed the Taxpayer for understated retail sales pursuant to City Code Section 5-10-460 ("Section 460"). According to the City, the Taxpayer received income from the sales of badge clips, signs, greeting/post cards, badges, keys, trash cans and other miscellaneous items. While the Taxpayer argued these sales were "nothing more than a pass-through of costs" to Association members, the City asserted the payments constituted "gross income" and thus taxable pursuant to City Code Section 5-10-460 ("Section 460").

The City assessed the Taxpayer for understated telecommunications income pursuant to City Code Section 5-10-470 ("Section 470"). During the audit period, the Taxpayer charged fees for facsimile transmissions which are included as telecommunications income pursuant to Section 470. The City asserted the fees constituted "gross income" and thus taxable pursuant to Section 470.

Taxpayer Position

The Taxpayer asserted it did not consider itself as a broker while managing the homeowners association ("Association"). According to the Taxpayer the Association was owned and controlled by the owners of the Association . The Taxpayer argued that Regulation 100.1 (c) provides that the "broker" shall be liable for such tax "only to the extent his principal is subject to the tax." The Taxpayer noted that City Regulation 5-10-445 (F) ("Regulation 445") provides that the principals or owners were not subject to the tax since they do not own more than three properties for lease or rental at any one time. The Taxpayer also argued that similar owner controlled Associations of mobile home parks in the City have acted similarly and with the same understanding of the City Code.

The Taxpayer asserted the retail sales that were taxed were nothing more than a pass through of costs to the members of the Association. The Taxpayer claimed that taxing these "pass-through" costs would be double taxation since the Taxpayer paid tax when the items were purchased.

The Taxpayer asserted the telecommunication services taxed by the City were for income for the use of ink, supplies, and service provided to members. The Taxpayer argued it was only reimbursed for the actual costs with no mark up or profit. The Taxpayer claimed that taxing these "pass-through" costs would be double taxation since the Taxpayer paid tax when the items were purchased.

ANALYSIS

The Taxpayer was a 'person" pursuant to Section 100. Based on the Agreements, the Taxpayer acted as the broker for the tenants and landlords. Pursuant to the Agreements,

the Taxpayer acted on behalf of the lessors for consideration with the object of gain, benefit, or advantage. As the broker, the Taxpayer was taxable on the gross income received from the rental of real property pursuant to Section s 5-10-200 ("Section 200") and 445 as well as Regulation 100.1 (b). The Taxpayer's reliance on Regulation 100.1 (c) must fail because the Taxpayer was not acting solely for a lessee.

The Taxpayer did receive income from retail sales which were taxable pursuant to Section 460. We do not find it necessary under the Code to have a profit or markup in order for the sale to be taxable. Similarly, the Taxpayer received income from fees for facsimile transmissions to cover the costs of ink, supplies, and service. These fees would be taxable pursuant to Section 470. We do not find it necessary for there to be any profit or markup on these fees. In fact, for both the retail sales and fees for facsimile transmissions, the City could have, pursuant to City Code Section 5-10-210, determined the market value of transactions between affiliated companies or persons. That was not done and as a result the costs are the best measurements available in this case.

At the hearing, the Taxpayer raised the possibility of there being an extensive misunderstanding or misapplication of the tax laws by more than sixty percent of the affected class. Clearly, that issue must be resolved by the City pursuant to City Code Section 5-10-546. There was not sufficient evidence presented in this proceeding to reach such a conclusion.

FINDINGS OF FACT

1. On January 20, 2006, and supplemented on February 7, 2006, the Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on February 13, 2006, that the protest was timely and in the proper form.

3. On February 16, 2006, the Hearing Officer ordered the City to file any response on or before April 3, 2006.

4. On March 21, 2006, the City filed a response to the protest.

5. On April 3, 2006, the Hearing Officer ordered the Taxpayer to file a reply on or before April 24, 2006.

6. On May 9, 2006, a Notice scheduled the matter for hearing commencing on June 13, 2006.

7. On May 17, 2006, a Notice rescheduled the hearing for June 26, 2006.

8. Both parties appeared and presented evidence at the June 26, 2006 hearing.

9. On June 27, 2006, the Hearing Officer indicated the record was closed and a written decision would be issued on or before August 11, 2006.

10. The City audited the Taxpayer for the period November 1999 through July 2005.

11. The City assessed the Taxpayer for additional taxes in the amount of $33,688.20 plus interest up through November 2005 in the amount of $11,664.83.

12. The Taxpayer was an Association that managed a 160 acre adult recreational vehicle resort in the City.

13. The resort consisted of 1,749 individually owned lots.

14. The Taxpayer was licensed with the ADRE and six of the Taxpayer's employees were individually licensed.

15. Based on Agreements, the Taxpayer acted as the broker for the tenants and landlords.

16. Pursuant to the Agreements, the Taxpayer collected the full amount of the rents and kept twelve percent for compensation.

17. During the audit period, the Taxpayer received income from the sales of badge clips, signs, greeting/post cards, badges, keys, trash cans and other miscellaneous items.

18. During the audit period, , the Taxpayer charged fees for facsimile transmissions.

19. The Taxpayer paid taxes on items it purchased.

20. The Taxpayer had no mark up or profit on items sold to Association members.

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 Taxpayer was a "person" pursuant to Section 100.

3. Pursuant to the Agreements, the Taxpayer acted on behalf of the lessors for consideration with the object of gain, benefit, or advantage.

4. As the broker, the Taxpayer was taxable on the gross income received from the rental of real property pursuant to Sections 200 and 445 as well as Regulation

100.1 (b).

5. The Taxpayer's reliance on Regulation 100.1 (c) failed because the Taxpayer was not acting solely for a lessee.

6. The Taxpayer understated income from retail sales pursuant to Section 460.

7. The Code does not require a profit or mark up in order for a transaction to be taxable.

8. The Taxpayer understated income from fees for facsimile transmissions pursuant to Section 470.

9. There was not sufficient evidence presented in this proceeding to conclude there has been an extensive misunderstanding or misapplication of the tax laws by more than sixty percent of the Taxpayer's affected class.

10. The Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the January 20, 2006, as supplemented on February 7, 2006, protest of ***Taxpayer ABC***. of a tax assessment made by the City of Mesa is hereby denied.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer