DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: June 30, 2009
Decision: MTHO # 411
Taxpayer: ***Taxpayer***
Tax Collector: City of Phoenix
Hearing Date: February 9, 2009

DISCUSSION

Introduction

On January 18, 2008, ***Taxpayer*** filed a protest of a tax assessment made by the City of Phoenix ("City"). After review, the City concluded on January 24, 2008 that the protest was timely but not in the proper form. On January 26, 2008, the Municipal Tax Hearing Officer ("Hearing Officer") ordered Taxpayer to correct the form on or before March 11, 2008. On March 5, 2008, Taxpayer requested an extension to correct the form. On March 7, 2008, the Hearing Officer granted Taxpayer an extension until April 10, 2008. On April 8, 2008, Taxpayer sent an email requesting another extension until April 18, 2008. On April 10, 2008, the Hearing Officer granted Taxpayer an extension until April 18, 2008. On April 18, 2008, Taxpayer corrected the form of the protest. On April 24, 2008, the Hearing Officer ordered the City to file a response to the protest on or before June 9, 2008. On May 20, 2008, the City filed a response to the protest. On May 23, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before June 13, 2008. On June 11, 2008, a Notice of Tax Hearing ("Notice") scheduled the matter for hearing commencing on July 17, 2008. On June 23, 2008, a Notice rescheduled the hearing to commence on or before August 11, 2008. On August 7, 2008, Taxpayer requested the hearing be rescheduled. On August 8, 2008, the Hearing Officer indicated the August 11, 2008 hearing was continued. On August 13, 2008, a Notice rescheduled the hearing to commence on September 2, 2008. On August 27, 2008, a Notice rescheduled the hearing to commence on September 2, 2008. On August 27, 2008, Taxpayer requested another continuation of the hearing. On August 27, 2008, the Hearing Officer continued the September 2, 2008 hearing. On January 7, 2009, a Notice rescheduled the hearing to commence on February 9, 2009. Both parties appeared and presented evidence at the February 9, 2009 hearing. On February 11, 2009, the Hearing Officer set forth the post hearing schedule as follows: Taxpayer would submit additional documentation to the City on or before February 23, 2009; the City would review the documentation and provide any recommendations on or before March 2, 2009; the Taxpayer would file any response to the City recommendations as well as an initial brief on or before March 16, 2009; the City would file any response brief on or before March 30, 2009; and, Taxpayer would file any reply brief on or before April 6, 2009. On February 26, 2009, Taxpayer sent an email requesting an extension to provide documentation to the City. On March 2, 2009, the Hearing Officer granted Taxpayer an extension until March 6, 2009. On March

6, 2009, Taxpayer filed a supplemental memorandum. On March 27, 2009, the City filed recommendations regarding documentation received from Taxpayer on March 13, 2009. On March 20, 2009, the Hearing Officer revised the post hearing schedule as follows: Taxpayer would file any response to the City recommendations as well as an initial brief on or before April 13, 2009; the City would file any response brief on or before April 27, 2009; and, Taxpayer would file any reply brief on or before May 4, 2009. On April 22, 2009, the Hearing Officer indicated Taxpayer had filed no initial brief and as a result the record was closed and a written decision would be issued on or before May 7, 2009. On April 24, 2009, Taxpayer telephoned the Hearing Officer and indicated it had never received the City's recommendations. On April 25, 2009, the Hearing Officer reopened the record and revised the post hearing schedule as follows: Taxpayer would file any response to the City's recommendations as well as an initial brief on or before May 5, 2009; the City would file any response brief on or before May 19, 2009; and, Taxpayer would file any reply brief on or before May 26, 2009. Taxpayer filed an initial brief on May 11, 2009. On June 2, 2009, the Hearing Officer revised the briefing schedule as follows: the City would file any response brief on or before June 16, 2009 and Taxpayer would file any reply brief on or before June 23, 2009. On June 15, 2009, the City filed a response brief. On June 23, 2009, Taxpayer filed a reply brief. On June 25, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before July 9, 2009.

City Position

The City conducted an audit of Taxpayer for the period of April 2005 through July 2007. As a result, the City assessed Taxpayer for additional taxes in the amount of $89,029.37, and interest up through October 2007 in the amount of $7,573.44. The City indicated the assessment came from two primary sources: unreported retail sales of $1,074,670.08 and over-reported deductions of $3,871,404.76. The City noted that Taxpayer's protest concerned the City's disallowance of out-of-state sales and the related tax assessment of $69,685.29.

The City asserted that City Code Section 14-465(1) ("Section 465") provides for an exemption from tax imposed by City Code Section 14-460 ("Section 460") for sales of motor vehicles to nonresidents of the State of Arizona ("State") if the vendor ships or delivers the motor vehicle to a destination outside the State. As a result, the City indicated Taxpayer must establish the following three facts: (1) the sale of the motor vehicle was to a nonresident of the State; (2) the use of the motor vehicle would be outside of the State; and, (3) the vendor shipped or delivered the motor vehicle to a destination outside the State.

The City asserted that Taxpayer was given many months to produce documentation to support a Section 465 exemption claim but has failed to provide adequate documentation. According to the City, the majority of the claimed exempt sales were disallowed because Taxpayer failed to ship the vehicle outside of the State. Subsequent to the hearing, Taxpayer provided documentation consisting of a copy of the purchaser's driver's license

and an affidavit for a 30-day nonresident permit for the State for the disallowed out-of-State deductions. The City determined the documentation had value in establishing whether the purchaser is a non-resident of the State but did not prove the motor vehicle was shipped or delivered outside the State. As a result, the City concluded Taxpayer failed to meet its burden of proof of establishing the sales were exempt pursuant to Section 465.

The City disputed Taxpayer's argument that the City's position will lead to double taxation. The City asserted that "double taxation" occurs when the same property is taxed twice for the same purpose for the same taxing period by the same taxing authority (See Miami Copper Company Division, Tennessee Corp. v. State Tax Commission, 121 Ariz. 150, 589 p. 2d 24, 28 (1978)). The City argued that this did not occur in this matter.

The City disputed Taxpayer's claim that it was entitled to a use tax exemption on all disallowed out-of-State sales. The City asserted that Taxpayer engaged in taxable retail activity in the State during the audit period and thus subject to the privilege tax. The City argued that the use tax has no relevance since Taxpayer was clearly not an out-of-State retailer during the audit period. The City noted the use tax is imposed upon the purchaser of tangible personal property which is used, stored or consumed in the State when the sale in not subject to privilege tax.

The City disagreed with Taxpayer's claims that the application of the law as written is unfair and illegal. The City argued that no authority was provided to show the law is illegal. The City asserted there is nothing inequitable about requiring a taxpayer to provide clear evidence of the applicability of a clearly-stated exemption to his business.

In response to Taxpayer, the City indicated the Hearing Officer is not being asked to construe a taxing statute. Instead, the City argued the issue in this case relates to the meaning of a tax exemption. According to the City, the law requires tax exemptions to be strictly construed against taxpayers (See State ex. Rel Arizona Dept. of Revenue v. Capitol Castings, Inc., 207 Ariz. 445, 88 p. 3d 159 (2004)). Based on all the above, the City requested the tax assessment be upheld in its entirety.

Taxpayer Position

Taxpayer indicated it is a "wholesale to the "public" online car dealership. According to Taxpayer, its operations involve both in-State and out-of-State residents. Taxpayer argued that the tax assessment made by the City is too high because: (1) Numerous out-of-State sales were not excluded from the calculations of the total gross receipts; and (2), the tax amount that the out-of-State buyer paid in their home state was not deducted from tax base when the City ultimately calculated transaction privilege tax liability. Taxpayer asserted there was no factual dispute as the parties were in agreement as to what sales were in-State and what were to out-of-State residents.

According to Taxpayer, the out-of-State sale involves a purchase of a motor vehicle by a non-Arizona resident who then registers the vehicle in the purchaser's home state.

Taxpayer indicated the out-of-State purchaser can either have the vehicle sent to them or, alternatively, pick it up in Arizona and drive it to their home state. Taxpayer disputes the City's disallowance of an out-of-State exemption for the out-of-State purchaser that chooses to personally transport/drive the vehicle to the purchaser's home state. Taxpayer argued that the City's position that the imposition of transaction privilege tax depends on who called the transporter of the vehicle out-of-State confounds common logic. Taxpayer asserted that when construing a tax statue, the statue must be construed liberally in favor of the taxpayer and strictly against the taxing authority. In support of its position, Taxpayer provided (1) the out-of-State purchaser's out-of-State driver's license; and, (2) the "Affidavit for Arizona 30-Day Non-Resident Permit" ("Affidavit").

Taxpayer indicated the Affidavit provided that: (1) the purchaser was not a resident of the State; (2) the vehicle was purchased to be registered out-of-State; (3) the vehicle is not being purchased for an Arizona resident; and (4) the purchaser is liable for all taxes and interest if the purchaser registers the vehicle within 365 days after issuance of the Affidavit.

Taxpayer asserted that the City did not dispute that the sales were to out-of-State purchasers. Taxpayer indicated that the City's entire position rests on the argument that only the retailer can exclusively contact the transporter and make arrangements to have the vehicle delivered out-of-State. Taxpayer argued that the City's position is purely technical, non-equitable, and without a valid legal basis. According to Taxpayer the applicable Arizona Revised Statutes ("ARS") reflect that the delivery/transportation element of the motor vehicle sold to the out-of-State buyer is not a State statutory requirement. While the City relies on Section 465, Taxpayer asserted the law is clear that the ARS provisions control should there be any conflict between it and a City ordinance. In addition, Taxpayer argued that Section 465 does not say that the vendor must make the arrangements for delivery of the vehicle to the out-of-State purchaser.

Alternatively, Taxpayer asserted Arizona has a transaction privilege tax and a use tax which are complementary. According to Taxpayer many of the out-of-State purchasers paid use tax in their home state for which Taxpayer should receive a tax credit to the City's assessment. To do otherwise, Taxpayer argued would result in double taxation.

Taxpayer asserted that it has demonstrated the vehicles were sold to an out-of-State purchaser, the vehicles were going to be used out-of-State, and the vehicles were shipped/delivered out-of-State. As a result, Taxpayer argued the City's assessment should be disallowed.

ANALYSIS

There was no dispute that Taxpayer had taxable retail sales during the audit period pursuant to Section 460. Section 460 makes it clear that the burden of proof that a sale was not a taxable retail sale is on the person who made the sale. This is reinforced in Section 360 that provides that all claims for exemptions are conditional upon adequate proof and documentation being provided. Section 465(l) provides for an exemption for

retail sales for "sales of motor vehicles to nonresidents of this state for use outside this state if the vendor ships or delivers the motor vehicle to a destination outside this state."

In this case, the City disallowed many of the sales claimed by Taxpayer to be exempt out-of-State sales. They were disallowed by the City because Taxpayer was unable to demonstrate that the vendor (Taxpayer) shipped or delivered the motor vehicles to a destination outside this State. Taxpayer acknowledged the vendor did not ship or deliver the vehicles to a destination outside this State. While Taxpayer did not know previously how the disallowed vehicles were delivered, Taxpayer provided sworn testimony that the vehicles were either picked up by the purchaser, or by a hired third party, or by a friend or employee. In each case, Taxpayer did not have control over the delivery outside the State but instead the purchaser had control over the delivery outside the State. Based on the above, we must conclude that Taxpayer failed to meet its burden of proof of demonstrating the sales were exempt pursuant to Section 360, 460, and 465(l). As to the double taxation argument, we note there is a provision in City Code Section 14-650 ("Section 650") that allows a tax credit to the use tax if the sale has already been taxed with a transaction privilege tax. There are no tax credit provisions on the transaction privilege tax if a use tax has been paid to another jurisdiction. Based on all the above, Taxpayer's protest should be denied.

FINDINGS OF FACT

1. On January 18, 2008, Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on January 24, 2008 that the protest was timely but not in the proper form.

3. On January 26, 2008, the Hearing Officer ordered Taxpayer to correct the form on or before March 11, 2008.

4. On March 5, 2008, Taxpayer requested a continuance to correct the form.

5. On March 7, 2008, the Hearing Officer granted Taxpayer an extension until April 10, 2008.

6. On April 8, 2008, Taxpayer sent an email requesting another extension until April 18, 2008.

7. On April 10, 2008, the Hearing Officer granted Taxpayer an extension until April 18, 2008.

8. On April 18, 2008, Taxpayer corrected the form of the protest.

9. On April 23, 2008, the Hearing Officer ordered the City to file a response to the

protest on or before June 9, 2008.

10. On May 20, 2008, the City filed a response to the protest.

11. On May 23, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before June 13, 2008.

12. On June 23, 2008, a Notice scheduled the matter for hearing commencing on July 17, 2008.

13. On June 23, 2008, a Notice rescheduled the hearing to commence on or before August 11, 2008.

14. On August 7, 2008, Taxpayer requested that the hearing be rescheduled.

15. On August 8, 2008, the Hearing Officer indicated the August 11, 2008 hearing was continued.

16. On August 13, 2008, a Notice rescheduled the hearing to commence on September 2, 2008.

17. On August 27, 2008, Taxpayer requested another continuance of the hearing.

18. On August 27, 2008, the Hearing Officer continued the September 2, 2008 hearing.

19. On January 7, 2009, a Notice rescheduled the hearing to commence on February 9, 2009.

20. Both parties appeared and presented evidence at the February 9, 2009 hearing.

21. On February 11, 2009, the Hearing Officer set forth the following post hearing schedule: Taxpayer would submit additional documentation to the City on or before February 23, 2009; the City would review the documentation and provide any recommendations on or before March 2, 2009; Taxpayer would file any response to the recommendations as well as an initial brief on or before March 16, 2009; the City would file any response brief on or before March 30, 2009; and Taxpayer would file any reply brief on or before April 6, 2009.

22. On February 26, 2009, Taxpayer sent an email requesting an extension to provide documentation to the City.

23. On March 2, 2009, the Hearing Officer granted Taxpayer an extension until March 6, 2009.

24. On March 27, 2009, the City filed recommendations regarding documentation

received from Taxpayer on or before March 13, 2009.

25. On March 30, 2009, the Hearing Officer revised the post hearing schedule as follows: Taxpayer would file any response to the City comments as well as an initial response to the City comments as well as an initial brief on or before April 13, 2009; the City would file any response brief on or before April 27, 2009; and, Taxpayer would file any reply brief on or before April 27, 2009; and, Taxpayer would file any reply brief on or before May 4, 2009.

26. On April 22, 2009, the Hearing Officer indicated Taxpayer had filed no initial brief and as a result the record was closed and written decision would be issued on or before May 7, 2009.

27. On April 24, 2009, Taxpayer telephoned the Hearing Officer and indicated it never received the City's recommendations.

28. On April 25, 2009, the Hearing Officer indicated the record was reopened and revised the post hearing schedule as follows: Taxpayer would file any response to the City recommendations as well as an initial brief on or before May 5, 2009; the City would file any response brief on or before May 19, 2009; and, Taxpayer would file any reply brief on or before May 26, 2009.

29. Taxpayer filed an initial brief on May 11, 2009.

30. On June 2, 2009, the Hearing Officer revised the post hearing briefing schedule as follows: the City would file any response brief on or before June 16, 2009; and Taxpayer would file any reply brief on or before June 23, 2009.

31. On June 15, 2009, the City filed a response brief.

32. On June 23, 2009, Taxpayer filed a reply brief.

33. On June 25, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before July 9, 2009.

34. The City conducted an audit of Taxpayer for the period April 2005 through July 2007.

35. The City assessed Taxpayer for additional taxes in the amount of $89,029.37, and interest up through October 2007 in the amount of $7,573.44.

36. The assessment came primarily from the two sources: unreported retail sales of $1,074,620.08 and over-reported deductions of $3,871,404.76.

37. Taxpayer's protest concerned the City's disallowance of out-of-State sales and the related tax assessment of $69,685.29.

38. Taxpayer was given many months to provide documentation to support a Section 465 exemption claim but failed to provide adequate documentation.

39. Taxpayer provided Affidavits to show purchasers were not residents of the State and that the motor vehicle was to be registered out-of-State.

40. Taxpayer was unable to demonstrate that the vendor (Taxpayer) shipped or delivered the motor vehicle to a destination outside the State.

41. Some of the purchasers paid a use tax to another state when the motor vehicle was moved there.

42. For the disallowed claimed out-of-State sales, the motor vehicles were either picked up by the purchaser, or by a hired third party, or by a friend or employee.

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 had taxable retail sales during the audit period pursuant to Section 460.

3. Section 460 makes it clear that the burden of proof that a sale was not a taxable retail sale is on the person who made the sale.

4. Section 360 makes all deductions, exclusions, and exemptions conditional upon adequate proof and documentation being provided by the taxpayer.

5. Section 465(l) provides for an exemption for retail sales for "sales of motor vehicles to nonresidents of this state for use outside this state if the vendor ships or delivers the motor vehicle to a destination outside this state."

6. For many of the claimed exempt out-of-state sales, Taxpayer was unable to demonstrate the vendor (Taxpayer) shipped or delivered the motor vehicle to a destination outside the State.

7. For the sales disallowed, the purchaser had control over the delivery to outside-the-State.

8. Taxpayer has failed to meet its burden of proof of demonstrating the sales were exempt pursuant to Sections 360, 460, and 465(l).

9. There are no provisions that allow a tax credit on the City transaction privilege tax if a use tax has been paid to another jurisdiction.

10. Taxpayer has not demonstrated that the City's position would result in double taxation.

11. Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the January 16, 2008 protest by ***Taxpayer*** of a tax assessment by the City of Phoenix is hereby denied.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer