DECISION OF MUNICIPAL TAX HEARING OFFICER

August 3, 2010

President/Owner
Taxpayer.
Taxpayer Address

Taxpayer
MTHO # 577

Dear ***President/Owner***:

We have reviewed the evidence presented by ***President/Owner*** of ***Taxpayer*** and the City of Tucson (Tax Collector or City) at the hearing on June 23, 2010. The review period covered was October 2005 through September 2009. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer was assessed City of Tucson privilege tax under the restaurant classification for Taxpayer's catering business. As a convenience to his customers, Taxpayer will rent equipment or purchase alcoholic beverages and disposable goods for the customer's use at the catered event. Taxpayer provides a single billing instead of having the customer pay different vendors. Taxpayer pays the privilege tax when he rents equipment or purchases alcoholic beverages and disposable items. Taxpayer should not be taxable on the reimbursement he receives for providing equipment, alcoholic beverages and disposable items. Taxpayer also charges set-up and clean-up fees. The time Taxpayer spends on set-up can be determined from Taxpayer's records and clean-up time can be estimated. Those fees should not be included as income from catering activity.

Tax Collector's Response

Taxpayer operates a catering business. The City privilege tax is measured by the income from the business. The City code allows a deduction of separately charged delivery, set-up, and clean-up charges, provided that the charges are also maintained separately in Taxpayer's books and records. Taxpayer did not separately charge or account for set-up and clean-up fees. Delivery and other non-taxable charges that were separately billed and accounted for were allowed as a deduction. In addition, the City code does not allow a deduction for the equipment, alcohol and disposable items provided by Taxpayer or for the amount of privilege tax charged to Taxpayer by vendors.

Discussion

Taxpayer operates a catering business. Catering is subject to the City privilege tax under the restaurant classification and the tax is measured by the gross income from the business. The Tax Collector conducted an audit assessment of Taxpayer for the period October 2005 through September 2009 and issued an assessment. The assessment included as a part of Taxpayer's

gross income from its catering business receipts characterized as disposables, event fees, administrative charges, rentals, linens/floral and bar/beverage. Penalties were not assessed.

Taxpayer timely protested the assessment. Taxpayer primarily objected to not allowing an exclusion for set-up and clean-up charges and to taxing payments Taxpayer received for providing rental equipment, alcohol and disposable goods at the request of the customer.

Set-up and Clean-up Charges:

The City code imposes a privilege tax on persons engaging in certain businesses, including restaurant activities. Catering is specifically included under the restaurant classification. Taxpayer is in the catering business and is therefore subject to the City privilege tax.

The tax is measured by gross income from the business. The code allows an exclusion for separately charged delivery, set-up, and clean-up fees, provided that the charges are also maintained separately in Taxpayer's books and records. Taxpayer did separately charge and account for deliver fees. The separately charged and itemized delivery charges were allowed as an exclusion in the assessment.

However, Taxpayer did not separately charge and account for set-up and clean-up fees. Taxpayer provided four sample "Confirmation of Services" agreements that were provided to the customer. The Confirmation of Services charged a line item for the total staffing charge, provided the number of persons, estimated number of hours, the hourly rate, staff arrival time and event start time. Taxpayer argued it would be possible to calculate a set-up charge per event from that information. However, it would not be possible to calculate the charges for clean-up and Taxpayer did not separately maintain charges for set-up and clean-up in its books and records. From the evidence presented it appears staffing charges were lumped together either under general administrative charges (October 2005 thru May 2008, except May and September 2006) or event fees (May and September 2006 and June 2008 through September 2009). The charges for set-up and clean-up were not separated.

Deductions and exclusions from tax are a matter of legislative grace, and the burden is on the Taxpayer to show he is entitled to a deduction or exclusion from tax. The code specifically requires taxpayers to both separately charge the customer and to separately maintain the charges in the taxpayer's books and records. The code also provides that all deductions, exclusions, exemptions, and credits are conditional upon adequate proof and documentation as may be required either by the code or regulation. Taxpayer has not met its burden to shown it is entitled to an exclusion for set-up and clean-up charges.

Providing Equipment, Alcohol and Disposables:

Taxpayer obtained rental equipment (such as tables and chairs) alcohol and disposable goods (such as paper plates, utensils, cups, napkins) at the request of the customer to be used at a catered occasion. Taxpayer obtains these items at retail paying the vendor tax at that time. Taxpayer contends it was obtaining these items as a convenience to the customer and it would amount to double taxation to again impose the tax on the amount billed by Taxpayer.

The sample forms of Confirmation of Services do not indicate that Taxpayer is acting on behalf of or as the agent of the customer in renting equipment or providing disposable items.[1] The agreements only state whether Taxpayer or the customer will provide certain items and

[1] The sample Confirmation of Services did not address alcohol.

Taxpayer's charge, if any, for the items. In some instances Taxpayer provided disposable wares for no charge. Equipment and disposable items used by a caterer at an event is property used by the caterer in conducting his catering activity. They are integral parts of the business of serving food.

The code does not allow a deduction or exclusion from gross income on account of the cost of the property sold, the time value of money, expense of any kind or nature, losses, materials used, labor or service performed, interest paid, or credits granted. Taxpayer invoices his customers for charges and costs incurred in renting equipment, purchasing alcohol and disposable items. Taxpayer also charges its customers a fee for obtaining these items. The charges for such items are a part of Taxpayer's gross income from its catering business and are a part of Taxpayer's taxable income.

This is true whether or not the items are obtained at retail or a tax is paid to the vendor.[2] The privilege tax charged by the vendor is part of Taxpayer's cost of the item. The fact Taxpayer purchases these items at retail and is charged tax by the vendor does not authorize a deduction.

Assessing Taxpayer the privilege tax on its charges for renting equipment, purchasing alcohol and disposable items does not result in double taxation. The tax the vendor charges Taxpayer is a privilege tax imposed on the vendor, not on Taxpayer. The vendor is simply passing the cost of his tax to Taxpayer. Double taxation only occurs when the same property or person is taxed twice for the same purpose for the same taxing period by the same taxing authority. That is not the case here.

Findings of Fact

1. Taxpayer operates a catering business.
2. Taxpayer provides its customers a Confirmation of Services showing Taxpayer's charges for its catering activities.
3. Taxpayer will on certain occasions provide equipment such as tables, chairs, china and linens.
4. Taxpayer will sometime rent the equipment it furnishes for the catered event.
5. Taxpayer invoices the customer its cost for the rental plus a twenty percent fee for the service.
6. Taxpayer does not separately invoice the twenty percent service fee.
7. Taxpayer's Confirmation of Services states that Taxpayer is providing the equipment, either for a fee or on a complimentary basis.
8. The Confirmation of Services does not state that Taxpayer is renting equipment on behalf of or as agents for its customers.
9. Taxpayer will at times purchase alcoholic beverages to be used at the catered occasion.
10. Taxpayer does not hold a liquor license.

[2] The question whether Taxpayer could lease equipment or purchase disposable items without paying a tax is not before the Hearing Officer. The parties are directed to the decision in MTHO # 403 and Arizona Department of Revenue Transaction Privilege Ruling (TPR) 93-30.

11. Taxpayer will on occasion provide disposable items such as napkins, plates, utensils and cups.

12. Taxpayer rents equipment and purchases alcoholic beverages and disposable goods at retail.

13. Taxpayer is charged privilege tax by the vendor when it rents equipment and purchases alcoholic beverages and disposable goods.

14. Taxpayer supplies the staff needed to conduct the catering services.

15. The Confirmation of Services shows a line item charge for the total staffing costs, provides the number of persons, estimated number of hours, the hourly rate, staff arrival time and event start time.

16. The Confirmation of Services does not show the estimated duration of the event or clean-up time.

17. Taxpayer does not separately charge the customer for set-up or clean-up.

18. Taxpayer's books and records do not separately show charges for set-up or clean-up.

19. Total staffing charges were included in Taxpayer's books and records either under general administrative charges (October 2005 thru May 2008, except May and September 2006) or event fees (May and September 2006 and June 2008 through September 2009).

20. The Tax Collector conducted an audit assessment of Taxpayer for the period October 2005 through September 2009 and issued an assessment for additional city privilege tax and interest under the restaurant classification.

21. No penalties were assessed.

22. The assessment included as gross income from Taxpayer's catering business receipts characterized as disposables, event fees, administrative charges, rentals, linens/floral and bar/beverage.

23. Taxpayer timely protested the assessment and requested a hearing.

24. Taxpayer primarily objects to including in the assessment payments Taxpayer received for providing rental equipment, alcohol and disposable goods at the request of the customer and not allowing an exclusion for set-up and clean-up charges.

Conclusions of Law

1. The City privilege tax is imposed on the activity of catering. Tucson City Code Section (TCC) § 19-455(a).

2. The privilege tax is measured by Taxpayer's gross income from the taxable business activity. TCC § 19-455(a).

3. Gross income includes the total amount of the value proceeding or accruing from the sale of property and the providing of a service. TCC § 19-200(a)(1).

4. No deduction or exclusion is allowed from gross income on account of the cost of the property sold, the time value of money, expense of any kind or nature, losses, materials used, labor or service performed, interest paid, or credits granted. TCC § 19-200(c).

5. Exclusions are conditional upon adequate proof and documentation of such as may be required either by Chapter 19 or Regulation.

6. A caterer may only exclude set-up and clean-up charges if the caterer separately charged for set-up and clean-up and the charges are also maintained separately in its books and records. TCC § 19-455(b).

7. The books and records of the taxpayer is required to indicate both individual transaction amounts and totals for each reporting period for each category of taxable, exempt, and excluded income. Regulation 350.1(g).

8. Taxpayer did not have adequate support to exclude set-up and clean-up fees.

9. Taxpayer's total charges for staffing costs were subject to the privilege tax.

10. When the state statutes and model city tax code are the same and where the department of revenue has issued written guidance, the department's interpretation is binding on cities and towns. A.R.S. § 42-6005.D.; TCC § 19-500(e)(2).

11. State statutes impose the transaction privilege tax on catering activities. A.R.S. § 42-5074.A.

12. The state privilege tax is measured by the gross income derived from the business of catering. A.R.S. § 42-5074.B.

13. The department of revenue has issued Transaction Privilege Ruling (TPR) 93-30 addressing the taxation of income received from catering services.

14. TPR93-30 provides that charges for the use of dishes, silverware, glasses, chairs, tables, and other property used by the caterer in connection with serving meals is part of the gross income from the caterer's business.

15. Taxpayer may not exclude charges for providing equipment, purchasing alcohol and disposable items.

16. The tax the vendor charges Taxpayer is a privilege tax imposed on the vendor, not on Taxpayer. TCC §§ 19-450 and 19-460; *Carriage Trade Management Corporation v. Arizona State Tax Comm'n*, 27 Ariz.App. 584, 557 P.2d 183 (1976).

17. The vendor is simply passing the cost of his tax to Taxpayer. *Carriage Trade Management Corporation v. Arizona State Tax Comm'n*, *supra*.

18. Double taxation only occurs when the same property or person is taxed twice for the same purpose for the same taxing period by the same taxing authority. *Miami Copper Co. v. State Tax Comm'n,* 121 Ariz. 150, 589 P.2d 24 (App.1978).

19. There is no double taxation involved in this case.

20. The City's privilege tax assessment against Taxpayer was proper.

Ruling

Taxpayer's protest of an assessment made by the City of Tucson for the period October 2005 through September 2009 is denied.

The Tax Collector's Notice of Assessment to Taxpayer for the period October 2005 through September 2009 is upheld.

The Taxpayer has timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section –575.

Sincerely,

Frank L. Migray
Hearing Officer

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c: ***Senior Auditor***
Municipal Tax Hearing Office