

**Jerry Rudibaugh
Municipal Tax Hearing Officer**

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: January 6, 2004
Decision: MTHO #60
Tax Collector: Town of Gilbert
Hearing Date: August 12, 2003

DISCUSSION

Introduction

On August 6, 2002, *Taxpayer* ("Taxpayer") filed a protest of a tax assessment made by the Town of Gilbert ("Town"). After review, on August 29, 2002, the Town concluded the protest was in proper form but not timely. On September 3, 2002, Municipal Tax Hearing Officer ("Hearing Officer") ordered the Taxpayer to file a response on the timeliness issue on or before October 18, 2002. On September 10, 2002 the Taxpayer filed a response on the timeliness issue. On September 12, 2002, the Hearing Officer ordered the Town to file a reply to the timeliness issue on or before October 10, 2002. After-review of the Town's reply, the Hearing Officer concluded the matter should proceed and on October 16, 2002, the Hearing Officer ordered the Town to file a response to the protest on or before December 2, 2002. On November 15, 2002, the Town filed a response. On December 6, 2002, the Hearing Officer ordered the Taxpayer to file a reply on or before December 27, 2002. On December 20, 2002, the Taxpayer filed a request for an extension. On December 23, 2002, the Hearing Officer granted the Taxpayer's request for an extension until January 20, 2003. On December 26, 2002, the Municipal Tax Hearing Office filed a letter indicating no hearing would be scheduled until an Intergovernmental Agreement was executed by the Town. On January 9, 2003, the Taxpayer filed a reply to the Town. On April 8, 2003, the Taxpayer filed a request for the hearing date in this matter. On April 21, 2003, the Hearing Officer filed a letter informing the Taxpayer that the hearing would be scheduled by the Municipal Tax Hearing Office after the Town had executed an Intergovernmental Agreement. On May 6, 2003, a Notice of Hearing ("Notice") was issued scheduling this matter for hearing commencing on June 3, 2003. On May 30, 2003, the Taxpayer requested the hearing be continued which was granted by the Hearing Officer. On July 28, 2003, a Notice was issued rescheduling the hearing for August 12, 2003. The Town and the Taxpayer both appeared and presented evidence at the August 12, 2003 hearing. On August 13, 2003, the Hearing Officer ordered the Taxpayer to file any additional information on or before August 26, 2003, the Town to file a response on or before September 9, 2003, and the Taxpayer to file any reply on or before September 23, 2003. The Taxpayer filed a legal memorandum on August 26, 2003. On September 2, 2003, the Taxpayer filed newly discovered information as a supplement to its memorandum. On September 3, 2003, the Town requested a thirty-day extension in which to file its response. On September 5, 2003, the Hearing Officer granted the Town an extension until October 20, 2003. On September 15, 2003, the Taxpayer filed a letter expressing concerns regarding the extension granted the Town. On September 30, 2003, the Hearing Officer responded to the Taxpayer's concerns by filing a letter of clarification. On October 3, 2003, the

Town filed a response. On October 9, 2003, the Taxpayer requested an extension to file a reply. On October 13, 2003, the Hearing Officer granted the Taxpayer an extension to file its reply on or before November 30, 2003. On October 14, 2003, the Taxpayer filed a reply. On November 3, 2003, the Taxpayer filed a request for more information from the Town. On November 24, 2003, the Hearing Officer closed the record and indicated a written decision would be issued on or before January 8, 2004.

The Taxpayer is an Arizona corporation in the business of leasing unimproved spaces to tenants within the Town. The Taxpayer has three business locations within the Town. The Town conducted an audit of the Taxpayer for the period February 1998 through March 2002 and in May of 2002 issued a tax assessment of \$13,782.33 plus interest.

Town Position

The Taxpayer is in the business of leasing unimproved lots within the Town to tenants, which is a taxable business pursuant to the Town Municipal Tax Code Section 58-445 (“Section 445”). Section 445 imposes a tax on the rental or leasing of real property. The Town asserts the Taxpayer would have been aware of the tax if they would have conducted due diligence upon entering the business within the Town. The Town also noted that the Taxpayer obtained a business license in June of 2001 but reported zero income. Additionally, the Town indicated that even after the tax assessment was issued in May of 2002 the Taxpayer still failed to remit the tax. While the Taxpayer may not have collected the tax from its tenants, the Town argued the tax obligation is on the Taxpayer and not the tenants. The Town asserted that it provided evidence that over three hundred businesses within the Town were remitting tax pursuant to Section 445. Further, the Town recently did a canvass of businesses within the Town and any found to be not paying taxes was subject to an audit. According to the Town, the Taxpayer was selected for an audit as a result of the canvass and at least one similar situated business was also selected for an audit as a result of the canvass. The Town also provided sworn testimony that it was unaware of any similar situated business as the Taxpayer, which was not paying the appropriate tax. According to the Town, all businesses are treated the same and the tax is not being selectively enforced against the Taxpayer. The Town acknowledged that there may be other similarly situated companies which the Town is not aware of that are not pay the tax. According to the Town, this is different than *Gosnell Development Corporation v. Department of Revenue*, 154 Ariz. 539, 744 P.2d 451 (1987) which was cited by the Taxpayer. In the *Gosnell* case, the Department of Revenue was found to have treated similarly situated taxpayers differently. The Town asserted they did not selectively treat similarly situated taxpayers differently than the Taxpayer.

Taxpayer Position

The Taxpayer argued that it is not liable for the tax because it was not aware of the tax and therefore never collected it from its tenants. After receiving the assessment in this matter, the Taxpayer has still not collected and remitted the tax because the Taxpayer believes the tax is not lawful. According to the Taxpayer, other similar situated businesses were not paying or collecting a rental tax and the Town was not requiring them to do so. While the Town has presented evidence that 300 other businesses were paying the rental tax, the Taxpayer asserts there was no evidence to demonstrate any of the 300 businesses were in the similar business as a

construction yard leasing lots. As a result, the Taxpayer asserts the Town has failed to meet its burden of proof that the Town is not selectively enforcing the tax by singling out the Taxpayer for audit and assessment. The Taxpayer cited several cases including the Gosnell case to support its argument that the Town has violated the constitutional rights of the Taxpayer. According to the Taxpayer, the Gosnell case was similar to this case since the Department of Revenue was found to have treated similarly situated taxpayers differently. The Taxpayer also expressed concerns that the Town would not provide them a list of similar situated businesses that were actually paying the tax.

ANALYSIS

Clearly, the Taxpayer was in the business of leasing unimproved property spaces to tenants within the Town. It is also undisputed that the Taxpayer received gross income from the leases during the audit period. The gross income is taxable by the Town pursuant to Section 445. While the Taxpayer may not have known of the tax, it is the Taxpayer's obligation to determine if their business is taxable. The only remaining issue is whether or not the Town was selectively enforcing the tax on the Taxpayer and not taxing similar situated businesses. The Hearing Officer concludes that there was no evidence to demonstrate that the Town was knowingly not taxing any similar situated businesses. As a result, we cannot conclude that the Town was selectively enforcing the tax on the Taxpayer. We also find this case differs from the Gosnell case since in Gosnell the Department of Revenue did not dispute that it was treating identically classified taxpayers differently. The Court also indicated in that case that if the Department's failure to collect taxes from competitors was due to oversight or negligence then a case could not be made that such conduct resulted in unequal treatment. Based on all the above, the Hearing Officer concludes the Taxpayer's protest should be denied.

FINDINGS OF FACT

1. On August 6, 2002, the Taxpayer filed a protest of a tax assessment made by the Town.
2. After review, on August 29, 2002, the Town concluded the protest was in the proper form but not timely.
3. On September 3, 2002, the Hearing Officer ordered the Taxpayer to file a response on the timeliness issue on or before October 18, 2002.
4. On September 10, 2002, the Taxpayer filed a response on the timeliness issued.
5. On September 12, 2002, the Hearing Officer ordered the Town to file a reply to the timeliness issue on or before October 10, 2002.
6. After review of the Town's reply, the Hearing Officer concluded the matter should proceed and on October 16, 2002, the Hearing Officer ordered the Town to file a response to the protest on or before December 2, 2002.

7. On November 15, 2002, the Town filed a response to the protest.
8. On December 6, 2002, the Hearing Officer ordered the Taxpayer to file a reply on or before December 27, 2002.
9. On December 20, 2002, the Taxpayer filed a request for an extension.
10. On December 23, 2002, the Hearing Officer granted the Taxpayer's request for an extension until January 20, 2002.
11. On December 26, 2002, the Municipal Tax Hearing Office filed a letter indicating no hearing would be scheduled until an Intergovernmental Agreement was executed by the Town.
12. On January 9, 2003, the Taxpayer filed a reply to the Town.
13. On April 8, 2003, the Taxpayer filed a request for the hearing date in this matter.
14. On April 21, 2003, the Hearing Officer filed a letter informing the Taxpayer that the hearing will be scheduled by the Municipal Tax Hearing Office after the Town has executed an Intergovernmental Agreement.
15. On May 6, 2003, a Notice was issued scheduling this matter for hearing commencing on June 3, 2003.
16. On May 30, 2003, the Taxpayer requested the hearing be continued and the request was granted by the Hearing Officer.
17. On July 28, 2003, a Notice was issued rescheduling the hearing for August 12, 2003.
18. The Town and the Taxpayer both appeared and presented evidence at the August 12, 2003 hearing.
19. On August 13, 2003, the Hearing Officer ordered the Taxpayer to file any additional information on or before August 26, 2003, the Town to file a response on or before September 9, 2003, and the Taxpayer to file any reply on or before September 23, 2003.
20. The Taxpayer filed a legal memorandum on August 26, 2003.
21. On September 2, 2003, the Taxpayer filed newly discovered information as a supplement to its memorandum.
22. On September 3, 2003, the Town requested a thirty-day extension in which to file its response.
23. On September 5, 2003, the Hearing Officer granted the Town an extension until October 20, 2003.

24. On September 15, 2003, the Taxpayer filed a letter expressing concerns regarding the extension granted the Town.
25. On September 30, 2003, the Hearing Officer responded to the Taxpayer's concerns by filing a letter of clarification.
26. On October 3, 2003, the Town filed a response.
27. On October 9, 2003, the Taxpayer requested an extension to file a reply.
28. On October 13, 2003, the Hearing Officer granted the Taxpayer an extension until November 20, 2003.
29. On October 14, 2003, the Taxpayer filed a reply.
30. On November 3, 2003, the Taxpayer filed request for more information from the Town.
31. On November 24, 2003, the Hearing Officer closed the record and indicated a written decision would be issued on or before January 8, 2004.
32. The Taxpayer is an Arizona corporation in the business of leasing unimproved spaces to tenants within the Town.
33. The Taxpayer has three business locations within the Town.
34. The Town conducted an audit of the Taxpayer for the period February 1998 through March 2002 and in May of 2002 issued a tax assessment of \$13,782.33 plus interest.
35. The Taxpayer obtained a business license in June of 2001 but reported zero income.
36. The Taxpayer was selected for an audit by the Town as a result of a Town canvas of businesses located within the Town.
37. The Town acknowledged there might be other businesses similarly situated as the Taxpayer, which the Town is not aware of that, are not paying the tax.
38. The Taxpayer was not aware of the tax and never collected it from its tenants.

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 Town imposes a tax on the business of leasing real property within the Town.

3. The Taxpayer was in the business of leasing unimproved lots within the Town.
4. The Taxpayer failed to remit taxes to the Town for the gross income from leasing unimproved lots.
5. There was insufficient evidence to conclude that the Taxpayer was being selectively treated differently than other similar situated taxpayers.
6. The Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the August 6, 2002 protest by *Taxpayer* of a tax assessment by the Town of Gilbert is hereby denied.

It is further ordered that this decision shall be effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer