DECISION OF MUNICIPAL TAX HEARING OFFICER

December 1, 2011

Taxpayer Taxpayer's Address

Taxpayer MTHO # 662

Dear Taxpayer:

We have reviewed the evidence submitted for redetermination by *Taxpayer* and the City of Mesa (Tax Collector or City). The review period covered was January 2009 through September 2010. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

The Tax Collector assessed Taxpayer for its sale of vehicles through auction. Taxpayer's transactions within the City were done through a charitable organization. Vehicles owned and sold by a non-profit organization are not subject to sales tax liability. Even if Taxpayer were subject to the City's tax, the assessment included periods of time Taxpayer was not actively conducting business, the gross income estimated by the Tax Collector is overstated and resale deductions were not allowed.

Tax Collector's Response

Taxpayer is in the business of car auction sales. Taxpayer itself is not a non-profit organization. Taxpayer is a taxable person under the Mesa Tax Code (MTC). The Tax Collector requested records from Taxpayer to determine gross income, but Taxpayer has not responded or supplied the requested books and records. The Tax Collector therefore based its assessment on an estimate of income. It is the Taxpayer's responsibility to prove the City's estimate is not correct. Taxpayer has not presented records or other documents that would allow the Tax Collector to modify the assessment.

Discussion

Taxpayer is in the business of selling vehicles through auction. Taxpayer moved its operations to the City in January 2009. Taxpayer's application for a Mesa tax license was dated November 25, 2008 and indicated a business start date of January 2009. During the period January 2009 through September 2010 Taxpayer's privilege tax returns listed no tax liability.

The Tax Collector sent Taxpayer a letter to schedule an audit appointment. Taxpayer did not respond to the Tax Collector and did not provide records on which the Tax Collector could base

Taxpayer did not submit a Reply Memorandum.

its assessment. The Tax Collector issued an estimated jeopardy assessment dated November 17, 2010 for the period January 2009 through September 2010 (audit period) for additional City privilege tax of \$42,440.85, penalties of \$10,309.29 and interest through October 31, 2010 of \$1,430.93.

The Tax Collector had obtained information that Taxpayer held auctions every other Saturday, had sold over 12,000 vehicles since April 2001 and had 14 vehicles available for sale at an auction scheduled for October 1, 2010. The Tax Collector estimated that Taxpayer sold 525 vehicles during the audit period and valued each vehicle at \$5,000. Taxpayer protested the assessment stating that:

- Taxpayer's transactions within the City were done through a charitable organization not subject to sales tax liability,
- The assessment included periods of time Taxpayer was not actively conducting business,
- The gross income estimated by the Tax Collector is overstated, and
- Resale deductions were not allowed.

Whether Taxpayer is an exempt charitable organization.

MTC 5-10-270 excludes from the City privilege tax transactions conducted entirely by a federally exempt organization. Taxpayer submitted with its protest a copy of an Internal Revenue Service federal income tax exemption letter for *ABC Community Automobile Resource Services*. *ABC Community Automobile Resource Services* is not the Taxpayer here. It is a separate legal entity. Taxpayer is a for-profit corporation not exempt from federal income tax under I.R.C. § 501(c)(3). Taxpayer is a taxable person subject to the City privilege tax.

Whether the assessment included periods Taxpayer was not actively conducting business.

Taxpayer obtained a City privilege tax license showing a business start date of January 1, 2009. The Tax Collector reviewed Taxpayer's website and found 14 vehicles listed for sale at an auction scheduled for October 1, 2010. The Tax Collector used an audit period of January 1, 2009 through September 30, 2010 in its assessment.

Taxpayer contends in its protest that it moved its operations from Phoenix to Mesa in January 2009 and the months of January and February 2009 were spent completing the move and transferring predicated licensing, telephones and signage. Taxpayer did not conduct any business or sales during that period. Taxpayer then ceased operations in April 2010. Taxpayer requested that the assessment for the periods January and February 2009 and May through September 2010 be abated.

Taxpayers subject to the City privilege tax are required to maintain suitable records and such other books and accounts as may be necessary to determine the amount of tax for which such person is liable. MTC § 5-10-350(a). Taxpayer did not provide any suitable records and other books necessary to determine the amount of tax for which Taxpayer is liable.

In his response to the protest, the Tax Collector stated he determined the start of the audit period from the start date stated in Taxpayer's privilege license application and also attached to the response Taxpayer's website notice of an auction sale scheduled for October 1, 2011. While Taxpayer stated in its protest that it did not conduct business during January and February 2009 and May through September 2010, Taxpayer did not submit a reply addressing the Tax Collector's basis of determining the applicable audit period. The audit period of January 2009

through September 2010 is upheld. However, the Tax Collector's Exhibit 8.2 announces a new location for Taxpayer's auction and indicates that the next auction would be March 7, 2009. This lends credibility to Taxpayer's contention that it did not hold auctions during January and February 2009. Therefore, amounts assessed for January and February 2009 should be removed from the assessment.

The Tax Collector's Exhibit 8.1 indicates that an auction was scheduled for October 1, 2010. While Taxpayer stated it held no auctions during May through September, no corroborating documents have been submitted. Taxpayer contends in its protest that its website remained active and would automatically post the next scheduled auction using data from Taxpayer's data base. That information is not sufficient to overcome the presumption that the scheduled auctions were held.

The gross income estimated by the Tax Collector is overstated.

Not only are taxpayers required to maintain suitable books and records, Regulation § 5-10-350.1(g) requires taxpayers to maintain books and records that indicate both individual transaction amounts and totals for each reporting period for each category of taxable, exempt, and excluded income. Taxpayer did not provide the necessary records to permit the Tax Collector to ascertain Taxpayer's gross receipts and any applicable deductions or exemptions.

If a taxpayer does not maintain or provide books and records the Tax Collector considers necessary to determine the Taxpayer's tax liability, the Tax Collector is authorized to use estimates, projections, or samplings, to determine the correct tax. MTC § 5-10-555(e). Because Taxpayer did not have the required records, the Tax Collector was authorized to use estimates to determine the correct tax.

MTC § 5-10-545(b) requires that any estimate made by the Tax Collector be made on a reasonable basis. The Tax Collector estimated that Taxpayer sold 25 vehicles per month during the audit period. To support the estimate, the Tax Collector relied on Taxpayer's website stating that Taxpayer held auctions every other Saturday, had sold over 12,000 vehicles since April 2001 and had 14 vehicles available for sale at an auction scheduled for October 1, 2010. Tax Collector's Exhibits 8.1 and 8.2 Based on this information, the Tax Collector's estimate of 25 vehicle sales per month was made on a reasonable basis.

If the Tax Collector's estimate is reasonable, it is the responsibility of the taxpayer to prove that the Tax Collector's estimate is not reasonable and correct by providing sufficient documentation of the type and form satisfactory to the Tax Collector. Taxpayer has submitted no documentation and has failed to prove that the Tax Collector's estimate of 25 vehicle sales per month was not reasonable and correct.

The Tax Collector also estimated that each vehicle had a value and sold for \$5,000. The Tax Collector did not provide the basis of his estimate of \$5,000 per vehicle. We cannot conclude that the Tax Collector's estimate of the value of each vehicle was made on a reasonable basis. Taxpayer argued that the average selling price of a donated vehicle was \$475 and the average value of a salvage vehicle was \$375. Taxpayer did not provide a basis for its contention.

The only information in the record regarding the nature of the vehicles sold by Taxpayer is the Tax Collector's Exhibit 8.1 listing 14 vehicles for the October 1, 2010 auction. One vehicle was a 2008 Ford Taurus X, likely worth more than \$5,000. Four of the vehicles were between 10 and 15 years old. The rest of the vehicles were more than 15 years old. Logic and experience would indicate that those vehicles would be worth significantly less than \$5,000. Given the age and

general type of vehicles included in Exhibit 8.1, an estimate of \$1,500 for each vehicle is more appropriate.

Resale deductions were not allowed.

Taxpayer contended that most of the vehicles were resale sales to dealers and salvage yard operators. Taxpayer asked for the opportunity to provide actual reports of vehicles sold in retail transactions and in wholesale transactions to licensed dealers and salvage yard operators. Taxpayer has however provided no reports or other documentation of actual sales.

The burden of proving that a sale of tangible personal property is not a taxable retail sale is on the person who made the sale. MTC § 5-10-460(b). Taxpayer has provided no proof to show that any of the sales included in the assessment were not sales at retail.

Based on the foregoing, Taxpayer's protest of the Tax Collector's assessment for the period January 2009 through September 2010 is granted in part and denied in part. The Tax Collector shall reduce his estimate used in the assessment to \$1,500 for each vehicle for an estimated monthly gross income of \$37,500 for the months of March 2009 through September 2010.

Findings of Fact

- 1. Taxpayer was in the business of selling vehicles through auction.
- 2. Taxpayer moved its operations to the City in January 2009.
- 3. Taxpayer began selling vehicles in the City in March of 2009. Tax Collector's Exhibit 8.2.
- 4. Taxpayer ceased its operations in the City in October 2010.
- 5. During the period January 2009 through September 2010 Taxpayer's privilege tax returns listed no tax liability.
- 6. The Tax Collector conducted an audit assessment of Taxpayer for the period January 2009 through September 2010.
- 7. The Tax Collector asked Taxpayer to provide records to determine Taxpayer's gross receipts and available deductions and exemptions for the audit period.
- 8. The Tax Collector attempted to schedule an audit appointment with Taxpayer but Taxpayer did not respond.
- 9. Taxpayer has not met with the Tax Collector and did not provide any records or other information relating to Taxpayer's gross receipts or available deductions or exemptions.
- 10. The Tax Collector obtained information that Taxpayer held auctions every other Saturday, had sold over 12,000 vehicles since April 2001 and had 14 vehicles available for sale at an auction scheduled for October 1, 2010. Tax Collector's Exhibits 8.1 and 8.2.
- 11. The Tax Collector issued a jeopardy assessment dated November 17, 2010 for the period January 2009 through September 2010 for additional city privilege tax of \$42,440.85, penalties of \$10,309.29 and interest through October 31, 2010 of \$1,430.93.
- 12. The Tax Collector estimated that Taxpayer sold 525 vehicles during the audit period and valued each vehicle at \$5,000.

- 13. The Tax Collector's jeopardy assessment was based on an estimate of gross income of \$125,000 per month for the audit period.
- 14. Taxpayer protested the assessment stating that:
 - a. Taxpayer's transactions within the City were done through a charitable organization not subject to sales tax liability,
 - b. The assessment included periods of time Taxpayer was not actively conducting business,
 - c. The gross income estimated by the Tax Collector is overstated, and
 - d. Resale deductions were not allowed.
- 15. Taxpayer submitted with its protest a copy of an Internal Revenue Service federal income tax exemption letter for *ABC Community Automobile Resource Services*.
- 16. *ABC Community Automobile Resource Services* is not the Taxpayer here. It is a separate legal entity. Tax Collector's Exhibit 6.1
- 17. Taxpayer has not submitted any additional documents addressing the Tax Collector's estimate of Taxpayer's gross receipts for the audit period.

Conclusions of Law

- 1. The City imposes a privilege tax on selling tangible personal property at retail. MTC § 5-10-460.
- 2. Taxpayer was in the business of selling tangible personal property at retail.
- 3. Taxpayer is a for-profit corporation not exempt from federal income tax under I.R.C. § 501(c)(3). Tax Collector's Exhibits 2, 3, 5.1 and 6.1.
- 4. Taxpayer is a taxable person subject to the City privilege tax.
- 5. Every person subject to the City privilege tax is required to keep and preserve suitable records and such other books and accounts as may be necessary to determine the amount of tax for which such person is liable. MTC § 5-10-350(a).
- 6. Taxpayer is required to maintain books and records that indicate both individual transaction amounts and totals for each reporting period for each category of taxable, exempt, and excluded income. Regulation § 5-10-350.1(g).
- 7. The Tax Collector may require Taxpayer to provide and may examine any books, records, or other documents of Taxpayer that in the Tax Collector's opinion might be liable for any privilege tax. MTC § 5-10-555(a).
- 8. Taxpayer did not provide necessary records to permit the Tax Collector to ascertain the amount of tax for which Taxpayer was liable.
- 9. If a taxpayer does not maintain or provide books and records the Tax Collector considers necessary to determine the taxpayer's tax liability, the Tax Collector is authorized to use estimates, projections, or samplings, to determine the correct tax. MTC § 5-10-555(e).
- 10. The Tax Collector was authorized here to use estimates to determine the correct tax owed by Taxpayer.

- 11. The Tax Collector's estimate is required to be made on a reasonable basis. MTC § 5-10-545(b).
- 12. The Tax Collector's estimated sales of 25 vehicles per month was made on a reasonable basis. MTC § 5-10-545(b).
- 13. It is the responsibility of the taxpayer to prove that the Tax Collector's estimate is not reasonable and correct by providing sufficient documentation of the type and form satisfactory to the Tax Collector. MTC § 5-10-545(b).
- 14. Taxpayer failed to prove that the Tax Collector's estimate of 25 vehicle sales per month was not reasonable and correct.
- 15. The Tax Collector did not provide the basis of his estimate that each vehicle sold during the audit period had a value of and sold for \$5,000.
- 16. Tax Collector's estimate of the value of \$5,000 for each vehicle was not made on a reasonable basis.
- 17. Taxpayer argued that the average selling price of a donated vehicle was \$475 and the average value of a salvage vehicle was \$375.
- 18. Taxpayer did not provide a basis for its contention.
- 19. The Hearing Officer may use logic and experience as guidance in making a decision. Municipal Tax Hearing Office Policies, Guidelines, and Procedures For Privilege and Use Tax Protests, p. 2.
- 20. Given the age and general type of vehicles included in Tax Collector's Exhibit 8.1, an estimate of \$1,500 for each vehicle is more appropriate.
- 21. The burden of proving that a sale of tangible personal property is not a taxable retail sale is on the person who made the sale. MTC § 5-10-460(b).
- 22. Taxpayer has not shown that any of the sales included in the assessment were not sales at retail.
- 23. The Tax Collector's privilege tax assessment against Taxpayer for the period January 2009 through September 2010 shall be adjusted by reducing the estimated sales price of each vehicle included in the assessment to \$1,500 and remove from the assessment receipts for the months of January and February 2009.

Ruling

Taxpayer's protest of an assessment made by the City of Mesa for the period January 2009 through September 2010 is granted in part and denied in part.

The Tax Collector shall reduce his estimate used in the Notice of Assessment to Taxpayer dated November 17, 2010 to \$1,500 for each vehicle for an estimated monthly gross income of \$37,500 for the months of March 2009 through September 2010. The Tax Collector shall also remove from the assessment amounts assessed for the months of January and February 2009.

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

Sincerely,

Hearing Officer

HO/7100.doc/10/03

c: *Tax Administrator*Municipal Tax Hearing Office