

DECISION OF MUNICIPAL TAX HEARING OFFICER

January 30, 2012

Taxpayer's Representative
Address for Taxpayer's Representative

Taxpayer
MTHO # 664

Dear Taxpayer's Representative:

We have reviewed the evidence presented by *Taxpayer* and the City of Tucson (Tax Collector or City) at the hearing on December 21, 2011. The review periods covered were September through November 2003, May through October 2004 and December 2004 through March 2011. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer is in the catering business. Taxpayer also sells its products to customers (customers) that arrange events such as weddings. Those customers typically charge a per-person charge for the entire event. Those sales are sales for resale and not subject to the City privilege tax. The City privilege tax should be collected from those customers whether or not the customer provided an exemption certificate to Taxpayer. Penalties should be abated in any event because Taxpayer had reasonable cause to believe it was involved in non-taxable transactions.

Tax Collector's Response

Taxpayer operates a catering business. Taxpayer did not provide any exemption certificates from the customers whose transactions were included in the assessment. Taxpayer has the burden to show it is entitled to a deduction or exclusion from the tax. Taxpayer did not meet its burden regarding the sales that were disallowed. Taxpayer has been licensed with the City since August 1998 and was apparently aware of the requirement to file monthly tax returns. Since Taxpayer has numerous months of non-filed returns, penalty and interest on the assessed tax should be retained.

Discussion

Taxpayer operates a catering business. Taxpayer's customers include those who themselves hold events and customers that arrange events for others, such as weddings, at the customer's location. Catering is subject to the City privilege tax under the restaurant classification. The Tax Collector conducted an audit assessment of Taxpayer for the periods September through November 2003, May through October 2004 and December 2004 through March 2011 and issued an assessment. The assessment included in Taxpayer's gross income from its catering business both receipts from customers that arranged events for others that did not provide an exemption certificate acceptable to the City and receipts from customers who held events themselves. The assessment included interest and penalties.

Taxpayer timely protested the assessment. Taxpayer primarily objected to including in the assessment its receipts from transactions with customers that arranged events for others.¹ Taxpayer argues that those transactions are sales for resale not subject to the City's privilege tax.

Sale for Resale

In the assessment, the City allowed Taxpayer a resale exclusion under Tucson City Code (TCC) § 19-465(15) for sales to customers that the City was able to verify had a City privilege tax license under the restaurant classification. The assessment taxed income from sales made to customers that had not provided Taxpayer an exemption certificate and the City was unable to verify that the customer had a privilege tax license.

Because the City allowed Taxpayer a resale exclusion for some of the transactions, we do not address under what circumstances a caterer may be entitled to a resale exclusion or whether Taxpayer here was engaged in two lines of business. The only question addressed here is whether Taxpayer adequately substantiated its entitlement to a resale exclusion with respect to sales made to customers that had not provided Taxpayer an exemption certificate and the City was not able to verify that the customer had a privilege tax license.

Taxpayer argued that TCC § 19-460(a) imposes the City privilege tax on the business activity of selling tangible personal property at retail. Therefore sales for resale are not subject to the privilege tax. However, TCC § 19-460(a) is not the only code provision relating to resale sales.

The City code provides that 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). Though TCC § 19-460(a) taxes sales at retail, 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. TCC § 19-460(b). Regulation 350.1(4)a further provides that for transactions claimed to be exempt as sales for resale, a taxpayer is required to maintain the City Privilege License number and State Transaction Privilege Tax License number of the customer, the name, business address, and business activity of the customer, and evidence sufficient to persuade a reasonably prudent businessman that the transaction is believed to be in good faith a purchase for resale in the ordinary and regular course of the purchaser's business activity.

While TCC § 19-465(1) exempts sales of tangible personal property to a person regularly engaged in the business of selling such property from the tax on retail sales, TCC § 19-465(15) specifically addresses sales to restaurants and similar establishments. Subsection (15) conditions entitlement to the exemption to sales to establishments that are "... properly licensed and paying a tax under Section 19-455 or the equivalent excise tax upon such income."

Statutes relating to the same or similar subject (statutes *in pari materia*) must be read together and all parts of the law on the same subject must be given effect, if possible. *Hibbs ex rel. Arizona Dept. of Revenue v. Chandler Ginning Co.*, 164 Ariz. 11, 790 P.2d 297 (App. 1990). Giving effect to TCC §§ 19-460(b), 19-465(1), 19-465(15) and Regulation 350.1(4)a, Taxpayer did not present sufficient evidence to substantiate its entitlement to a resale exclusion for sales made to customers that had not provided Taxpayer an exemption certificate and the City was not able to verify that the customer had a privilege tax license. The City's privilege tax assessment was therefore proper.

¹ Taxpayer agreed at the hearing that it was subject to the privilege tax on its catering income from customers who themselves held events to be catered.

Penalties:

The assessment also included failure to file and failure to pay penalties. The Tax Collector is authorized to assess penalties pursuant to STC § 540. Taxpayer argued that it relied on its accountant for not filing returns and paying tax. The tax collector is required to waive or adjust the late filing and late pay penalties if the taxpayer establishes through competent evidence that it contacted a tax advisor who is competent on the specific tax matter and, after furnishing necessary and relevant information, the taxpayer was incorrectly advised that no tax was owed and/or the filing of a return was not required.

Taxpayer testified that its accountant told Taxpayer it did not need to file or pay tax on its transactions with customers that arranged events for others. Taxpayer however did not establish that its accountant was competent regarding the City's privilege tax on catering activities or that Taxpayer furnished necessary and relevant information to its accountant. Taxpayer did not demonstrate reasonable cause for its failure to timely file its privilege tax returns and to pay the tax that was assessed. The penalties included in the assessment are therefore upheld.

Findings of Fact

1. Taxpayer operates a catering business.
2. Taxpayer's customers include those who themselves hold events and those that arranged events for others, such as weddings, at the customer's location.
3. The Tax Collector conducted an audit assessment of Taxpayer for the periods September through November 2003, May through October 2004 and December 2004 through March 2011 and issued an assessment.
4. The assessment included in Taxpayer's gross income from its catering business both receipts from customers that arranged events for others that did not provide an exemption certificate acceptable to the City and receipts from customers who held events themselves.
5. The City allowed Taxpayer a resale exclusion under TCC § 19-465(15) for sales to customers that arranged events for others and that the City was able to verify had a City privilege tax license under the restaurant classification.
6. The assessment included interest and combined penalties for failure to timely file and failure to timely pay the tax.
7. Taxpayer did not file returns or report its gross receipts to the City for most of the audit periods.
8. Taxpayer timely protested the assessment stating that transactions with customers that arrange events for others were sales for resale not subject to the City's privilege tax.
9. Taxpayer requested that the penalties be abated because when Taxpayer started the business, his accountant told Taxpayer that it did not need to charge or pay sales tax on sales to customers that were arranging events for others.

Conclusions of Law

1. TCC § 19-455(a) imposes the City privilege tax on the business activity of preparing or serving food or beverage in a bar, cocktail lounge, restaurant, or similar establishment where articles of food or drink are prepared or served for consumption on or off the premises, including also the activity of catering.
2. TCC § 19-100 defines restaurants as including all caterers.
3. TCC § 19-460(a) imposes the City privilege tax on the business activity of selling tangible personal property at retail.
4. The privilege tax is measured by a Taxpayer's gross income from its business activity. TCC §§ 19-455(a) and 19-460(a).
5. 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).
6. TCC § 19-465(1) exempts from the tax imposed by TCC § 19-460 sales of tangible personal property to a person regularly engaged in the business of selling such property.
7. 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. TCC § 19-460(b).
8. The City Regulation § 350.1(4)a further provide that for transactions claimed to be exempt as sales for resale, a taxpayer is required to maintain:
 - (i) the City Privilege License number and State Transaction Privilege Tax License number of the customer (or the equivalent city, if applicable, and state tax numbers of the city and state where the customer resides), and
 - (ii) the name, business address, and business activity of the customer, and
 - (iii) evidence sufficient to persuade a reasonably prudent businessman that the transaction is believed to be in good faith a purchase for resale, or a purchase, rental, lease, or license for use of rental equipment, by the vendee in the ordinary and regular course of his business activity, as provided by Regulation.
9. TCC § 19-465(15) exempts from the tax imposed by TCC § 19-460 sales to hotels, bars, restaurants, dining cars, lunchrooms, boarding houses, or similar establishments of articles consumed as food, drink, or condiment, whether simple, mixed, or compounded, where such articles are customarily prepared or served to patrons for consumption on or off the premises, where the purchaser is properly licensed and paying a tax under Section 19-455 or the equivalent excise tax upon such income.
10. A taxpayers 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 he is liable. TCC § 19-350(a).
11. All deductions, exclusions, exemptions, and credits provided in this Chapter are conditional upon adequate proof and documentation of such as may be required either by the Code or Regulation. TCC § 19-360(a).
12. Statutes relating to the same or similar subject (statutes *in pari materia*) must be read together and all parts of the law on the same subject must be given effect, if possible. *Hibbs ex rel. Arizona Dept. of Revenue v. Chandler Ginning Co.*, 164 Ariz. 11, 790 P.2d 297 (App. 1990).

13. The tax collector is required to waive or adjust the late filing and late pay penalties if the taxpayer establishes through competent evidence that the taxpayer contacted a tax advisor who is competent on the specific tax matter and, after furnishing necessary and relevant information, the taxpayer was incorrectly advised that no tax was owed and/or the filing of a return was not required. TCC § 19-540(f)(3)h.
14. Taxpayer did not establish that its accountant was competent regarding the City's privilege tax on catering activities or that Taxpayer furnished necessary and relevant information to its accountant.
15. Taxpayer did not demonstrate reasonable cause for its failure to timely file its privilege tax returns and to pay the tax that was assessed.
16. 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 periods September through November 2003, May through October 2004 and December 2004 through March 2011 is denied.

The Tax Collector's Notice of Assessment to Taxpayer for the periods September through November 2003, May through October 2004 and December 2004 through March 2011 is upheld.

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

Sincerely,

Hearing Officer

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c: ***Tax Audit Administrator***
Municipal Tax Hearing Office