

DECISION OF MUNICIPAL TAX HEARING OFFICER

April 23, 2012

Taxpayer #2

Taxpayer

Taxpayer #2's Address

Taxpayer's Restaurant

MTHO #670

Dear *Taxpayer #2*:

We have reviewed the arguments presented by *Taxpayer's Restaurant* in its protest and by the City of Tucson (Tax Collector or City) in its Response to the Protest and at the hearing held on January 6, 2012. Taxpayer did not appear at the hearing and the hearing was held in Taxpayer's absence. Taxpayer's explanation for its absence at the hearing established good cause. Therefore the additional evidence submitted by Taxpayer and the Tax Collector's response were included as part of the record. The review period covered was September 2006 through June 2011. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer was a corporation that operated a restaurant. Taxpayer's president was out of the country during much of the review period and did not participate in the operation of the restaurant. Taxpayer transferred the operation of the restaurant to another person who formed another corporation. The other person and corporation are liable for the tax, not Taxpayer.

Tax Collector's Response

The City privilege tax license for the business was taken out by *Taxpayer #2* as president of *My Own Company Inc.* The license has not been cancelled. This is the only active City license for the business. While Taxpayer claims that the business was transferred to *Taxpayer #3*, there is no subsequent business license taken out by *Taxpayer #3*. Taxpayer has failed to establish it is not liable for the tax. The City's assessment should be upheld as issued.

Discussion

Taxpayer became licensed with the City in August of 2006 to operate *Taxpayer's Restaurant*. *Taxpayer's Restaurant* was the business name of a restaurant operated by *My Own Company Inc.* The license application was signed by *Taxpayer #2* as president of *My Own Company Inc.* There is no dispute that the restaurant was operated during the review period of September 2006 through June 2011 under that license. However, only three privilege tax returns were filed during the review period.

The Tax Collector conducted an audit of Taxpayer. The auditor tried to contact *Taxpayer #2* at the restaurant location, but was told that the owner/operator of the restaurant was *Taxpayer #3*.

The auditor attempted to schedule numerous appointments with *Taxpayer #3*, but all were cancelled by *Taxpayer #3*. The auditor requested documents from *Taxpayer #3* but none were provided. The Tax Collector therefore issued an estimated assessment to Taxpayer, in care of *Taxpayer #2*, based on one of the tax returns Taxpayer had filed.¹

Taxpayer timely protested the assessment contending that its president had been in Iraq during the review period and the restaurant had been transferred to *Taxpayer #3* who was liable for the tax. Taxpayer did not cancel its privilege license or provide copies of any transfer documents substantiating a transfer of the business. Taxpayer did provide a copy of a bank signature card showing *Taxpayer #3* as owner and signer on a bank account. The bank signature card was signed by *Taxpayer #2* as Secretary and listed *My Own Company Inc.* for both the Account Title and the Name of Corporation. This could appear to indicate that *My Own Company Inc.* continued to operate the restaurant.

The Tax Collector was faced with a situation where the licensee contended the business had been transferred, but the license was not cancelled and the person to whom the business was purportedly transferred was unresponsive. Based on the record in this case, the Tax Collector had a reasonable basis to issue the assessment to Taxpayer in care of *Taxpayer #2*.² The presumption is that an assessment of additional tax is correct and the burden is on the taxpayer to overcome the presumption. Taxpayer here has not overcome the presumption of correctness. We therefore conclude that Taxpayer's protest should be denied. The City's privilege tax assessment against Taxpayer was proper.

Findings of Fact

1. Taxpayer applied for a City privilege tax license by application dated August 10, 2006.
2. The application was signed by *Taxpayer #2*, listed *Taxpayer #2* as president, stated the nature of the business as "Restaurant", indicated a business start date of August 15, 2006 and listed Taxpayer's business name as "*My Own Company Inc. dba Taxpayer's Restaurant.*"
3. The City issued Taxpayer business license no. *ABCDE*.
4. The license has not been cancelled.
5. Taxpayer did not file City privilege tax returns or pay City privilege taxes since September 2006 with the exception of August 2006, March 2007 and April 2007.
6. The City attempted to audit Taxpayer. When the auditor attempted to contact *Taxpayer #2* at Taxpayer's business location, the auditor was told that *Taxpayer #3* was the owner/operator.

¹ Because of the contention that the business was transferred to and operated by *Taxpayer #3*, the Tax Collector also issued an assessment for the same period to *Taxpayer #3* and *Taxpayer's Restaurant*. That assessment was not protested and is not at issue here. A taxing agency may assert inconsistent positions in tax collection proceedings and assess deficiencies against more than one person for the same liability in order to protect the public fisc and to prevent the "whipsaw" effect of a decision in favor of one of the parties. *See, Kean v. Commissioner of Internal Revenue*, 407 F.3d 186, 189 (2005).

² The City has not asserted personal liability for the tax against *Taxpayer #2*.

7. The auditor attempted to contact **Taxpayer #3** but **Taxpayer #3** cancelled four appointments and did not return any of four telephone messages left by the auditor.
8. The Tax Collector issued an assessment letter dated August 10, 2011 to **Taxpayer #2** for license no. **ABCDE** for the period September 2006 through June 2011 for privilege taxes in the amount of \$41,832.00, interest through July 31, 2011 in the amount of \$4,560.78 and combined penalties in the amount of \$10,458.00.
9. The Business Privilege Tax Audit Report attached to the letter listed the taxpayer as **Taxpayer's Restaurant**.
10. The assessment was estimated based on the March 2007 privilege tax return that had been filed by Taxpayer.
11. **My Own Company Inc.**, through **Taxpayer #2**, timely protested the assessment stating that during the questioned period **Taxpayer #2** was in Iraq and out of the country since 2006 and he needed to contact **Taxpayer #3** to see what was happening.
12. **My Own Company Inc.** was dissolved by the Arizona Corporation Commission pursuant to A.R.S. § 10-1421 effective December 30, 2008.
13. No evidence was provided that **Taxpayer #2** received any distribution of assets or that **Taxpayer #2** operated **Taxpayer's Restaurant** during any period after the revocation of the corporate charter for **My Own Company Inc.**
14. **My Own Company Inc.** submitted a subsequent letter stating that the president of **My Own Company Inc.** was in Iraq from December 2006 until November 2008 without control of **Taxpayer's Restaurant**. Taxpayer contended that **Taxpayer #3** and **Taxpayer's Restaurant, Inc.** were liable for the privilege taxes assessed.
15. **My Own Company Inc.** submitted a copy of a bank signature card showing **Taxpayer #3** as owner and signer on the account.
16. The bank signature card was signed by **Taxpayer #2** as Secretary and listed both the Account Title and Name of Corporation as **My Own Company Inc.**

Conclusions of Law

1. The City privilege tax is imposed on the business activity upon every person engaging or continuing in the business of preparing or serving food or beverage in a restaurant. 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. It is the taxpayer's responsibility to cause his return and payment to be timely received by the Tax Collector. TCC § 19-530(c).
4. The presumption is that an assessment of additional tax is correct. *See, Arizona State Tax Commission v. Kieckhefer*, 67 Ariz. 102, 191 P.2d 729 (1948).
5. A claim against a dissolved corporation, including a contingent claim or a claim based on an event occurring after the effective date of dissolution, may be enforced under against the dissolved corporation to the extent of its undistributed assets. A.R.S. § 10-1407.D.1.
6. Taxpayer was liable for the payment of privilege taxes to the City for periods **Taxpayer's Restaurant** was in operation.

7. TCC § 19-540(b) imposes penalties for failure to timely file and to pay tax.
8. The penalties may be waived if the taxpayer demonstrates reasonable cause for its failure to file a return or pay the tax. TCC § 19-540.
9. Taxpayer has not demonstrated reasonable cause for its failure to timely file a return and to timely pay tax.
10. The Tax Collector's assessment to Taxpayer was proper.

Ruling

Taxpayer's protest of an assessment made by the City of Tucson for the period September 2006 through June 2011 is denied.

The Tax Collector's Notice of Assessment to Taxpayer for the period September 2006 through June 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