DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: January 23, 2013
Decision: MTHO #742
Taxpayer:
Tax Collector: Town of Fountain Hills
Hearing Date: November 26, 2012

DISCUSSION

Introduction

On May 15, 2012, ***Taxpayer*** filed a letter of protest for a tax assessment made by the Town of Fountain Hills ("Town"). A hearing was commenced before the Municipal Tax Hearing Officer ("Hearing Officer") on November 26, 2012. Appearing for the Town was the ***Auditor***. Appearing for Taxpayer was the ***manager*** of the business. At the conclusion of the hearing, Taxpayer was granted additional time to file a response to case submitted by the Town at the hearing. On December 14, 2012, the Hearing Officer closed the record and indicated a written decision would be issued to the parties on or before January 28, 2013.

DECISION

On February 20, 2012, the Town issued an assessment to Taxpayer for additional taxes in the amount of $20,649.01, interest up through January 2012 in the amount of $3,945.77, and penalties in the amount of $5,026.95. The audit period was from May 2005 through December 2011. The assessment was based on unreported income from operating a self-serve car wash in the Town. Coin operated self-car washes operate by allowing the customer to use the facilities and the equipment necessary to wash a car. According to the Town, the customer pays for the equipment to work, uses the equipment in any manner needed, has control over the equipment, and occupies a space that is reserved for the wash. Taxpayer also had one automatic bay car wash in which the customer has little, if any control. The Town made the assessment pursuant to Town Code Section 8A-450 ("Section 450"). The Town had relied upon State Tax Commission of Arizona v. Peck, 106 Ariz. 394 (1970) to support the Town's position. The Court in Peck had concluded that car-washing machines were taxable under Arizona Department of Revenue law as the rental or leasing of tangible personal property. The Court concluded the customers had exclusive control over all manual operations to run the machines.

Taxpayer argued that the car washes did not involve any leasing, licensing, or renting of

tangible personal property as required by Section 450. Taxpayer asserted that all of its facilities and equipment utilized in the car wash business are attached or affixed to the land. As a result, none of the equipment is tangible personal property as required by Section 450. Taxpayer argued that Peck has been distinguished by Energy Squared Inc. v. Arizona Department of Revenue, 56 P .3d 686 (2002). In Energy Squared the Court held that the State of Arizona's transaction privilege tax did not apply to the proceeds of a tanning salon because the salon's "customers do not 'themselves exclusively control all manual operations necessary to run' the tanning beds or booths in question." Taxpayer asserted the same lack of control factors exist with respect to Taxpayer's automatic car wash bay. At a minimum, Taxpayer argued the tax assessment must be reduced to account for the elimination of the automatic car wash bay proceeds. In addition, Taxpayer noted that Peck was distinguishable from this case since Section 450 contains language "that which is semi-permanent or permanently installed." Taxpayer argued that because all of its facilities and equipment utilized in providing self-service car washes are attached or affixed to the land, they do not constitute tangible personal property.

Taxpayer protested the Town's assessment of penalties for failure to file and failure to pay taxes pursuant to Town Code Section 8A-540 ("Section 540") and ARS Section 42-1125 ("Section 1125"). Taxpayer noted that Section 1125 permits the penalties to be waived if the failure is due to reasonable cause. Section 1125 defines reasonable cause to mean a reasonable basis for the taxpayer to believe that the tax did not apply to the business activity. Taxpayer argued that its interpretation of Section 450 is reasonable and as a result the penalties should be eliminated.

Section 450 imposes a tax on the gross income from the business activity of engaging in the business of leasing, licensing for use, or renting of tangible personal property for a consideration, including that which is semi-permanently or permanently installed within the Town as provided by Regulation. There is a provision c(8) that provides an exemption for coin-operated car washing establishments. Provision c(8) was never adopted by the Town. Town Code Section 8A-100 ("Section 100") provides a definition of "licensing for use" to mean any agreement between the user and the owner for the use of the owner's property whereby the owner receives consideration, where such agreement does not qualify as a "sale', "lease" or "rental" agreement. We conclude that customers of the non-automatic car wash bays were renting the use of tangible personal property pursuant to section 450 and the Peck case. While the statute in the Peck case did not include the language of "semi-permanent or permanently installed", we are convinced that language provides additional support for the Town's position. We conclude that car wash equipment is covered by the definition contained in Town Regulation 8A-450.4 ("Regulation 450.4"). Regulation 450.4 defines "semi-permanent or permanently installed" to mean "that the item of tangible personal property has and is expected to have at the time of installation a permanent location at the site installed,…". The term does not include mobile tangible personal property designed for regular use at different locations. We conclude that the tangible personal property utilized in Taxpayer's car wash establishment is not mobile in nature and is semi-permanent or permanently installed at the car wash location pursuant to Section 450 and Regulation 450.4. We note that Taxpayer has argued that because the equipment is attached or affixed to the land, it is no

longer tangible personal property. Taxpayer has failed to provide any support that the definition of "semi-permanent or permanently installed" contained in Regulation 450.4 is improper. We concur with Taxpayer's argument that the equipment contained in the automatic car wash bay is not rental pursuant to Energy Squared due to lack of customer control over the equipment. However, the equipment contained in the automatic car wash bay would fall under the business of "licensing for use" pursuant to Sections 100 and 450. Based on all the above, we conclude the Town's tax assessment was proper.

The Town assessed Taxpayer for penalties for failure to timely file or timely pay taxes pursuant to Town Code Section 540 ("Section 540"). Those penalties can be waived for reasonable cause. While we disagreed with Taxpayer on the tax assessment, we do conclude that Taxpayer demonstrated reasonable cause to have all penalties waived. Taxpayers protest should be partly denied and partly granted, consistent with the Discussion, Findings, and Conclusions, herein.

FINDINGS OF FACT

1. On May 15, 2012, Taxpayer filed a letter of protest for a tax assessment made by the Town.

2. On February 20 2012, the City issued an assessment to Taxpayer for additional taxes in the amount of $20,649.01, interest up through January 2012 in the amount of $3,945.77, and penalties in the amount of $5,026.95.

3. The audit period was from May 2005 through December 2011.

4. The assessment was based on unreported income from operating a self-serve car wash in the Town.

5. The customer would pay for the use of Taxpayer's facilities and the car wash equipment to work, use the equipment in any manner needed, have control over the equipment, and occupy a space reserved for the car wash.

6. Taxpayer also had one automatic car wash bay in which the customer would remain in the car.

7. Taxpayer believed the tax did not apply to its business.

8. Customers for Taxpayer's automatic car wash bay did not have control over the equipment.

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. Section 450 imposes a tax on the business activity of engaging in the business of leasing, licensing for use, or renting of tangible personal property within the Town.

3. Section 100 provides a definition of "licensing for use" to mean any agreement between the user and the owner for the use of the owner's property whereby the owner receives consideration, where such agreement does not qualify as a "sale", "lease" or "rental" agreement.

4. The customers of the non-automatic car wash bays were renting the use of tangible personal property pursuant to Section 450, Regulation 450.4, and the Peck case.

5. The tangible personal property utilized in Taxpayer's car wash establishment is not mobile in nature and is semi-permanent or permanently installed at the car wash pursuant to Section 450 and Regulation 450.4.

6. The equipment contained in the automatic car wash bay is not rental pursuant to Energy Squared due to lack of customer control over the equipment.

7. The equipment in the automatic car wash bay would fall under the business of "licensing for use" pursuant to Sections 100 and 450.

8. Because no tax forms were files or taxes paid, the Town was authorized pursuant to Section 540 to assess penalties.

9. Taxpayer has demonstrated reasonable cause to have all penalties waived in this matter.

10. Taxpayers protest should be partly granted and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.

11. The parties have timely appeal rights pursuant to Model City Tax Code Section 575.

ORDER

It is therefore ordered that the May, 2012 protest by ***Taxpayer*** of a tax assessment made by the Town of Fountain Hills is hereby partly granted and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the Town of Fountain Hills shall remove all penalties assessed in this matter.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer