DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: May 29, 2015
Decision: MTHO # 856
Taxpayer:
Tax Collector: City of Tucson
Hearing Date: None

DISCUSSION

Introduction

On October 16, 2014, ***Taxpayer*** filed a letter of protest for a tax assessment made by the City of Tucson ("City"). At the request of Taxpayer, this matter was classified as a redetermination. After submission of all documentation, the Hearing Officer closed the record. On May 13, 2015, the Hearing Officer indicated a written decision would be issued to the parties on or before June 29, 2015.

DECISION

On November 20, 2014, the City issued a tax assessment to Taxpayer for taxes in the amount of $17,555.83, interest up through June 2014 in the amount of $1,040.42, and penalties of $3,511.18. Subsequently, the City waived the penalties. The audit period was from June 2010 through May 2014. The tax assessment was issued pursuant to City Code Section 19-445 ("Section 445"). Section 445 provides for a tax on the gross income from the business activity of engaging or continuing in the business of leasing, or renting real property located within the City for a consideration, or the licensing for use of real property to the final licensee located within the City for a consideration. City Code Section 19-100 ("Section 100") defines "licensing for use" as follows: "Licensing for use means any agreement between the user ("licensee") and the owner or the owner's agent ("licensor") for the use of the licensor's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement".

In this case, Taxpayer provided space for equipment from ***R & C*** for which it received commissions from ***R & C***. The City taxed those commissions pursuant to Section 445. The City asserted that any customer service activity provided by Taxpayer is minimal.

The ***RB*** accepts only credit card payments and are fully self-help. The ***CS*** machines provide a service for a fee. The payments constitute a payment for the use of the space.

Taxpayer protested the entire assessment. According to Taxpayer, it has engaged in a mutual business operation with ***R & C***. During the audit period, Taxpayer entered into agreements with ***R & C*** whereby ***R & C*** located their equipment in Taxpayer's stores for which Taxpayer received a commission for the use of its facilities. According to Taxpayer, they were engaged in a joint venture whereby Taxpayer agreed to market and provide movie rental and currency exchange. Taxpayer was required to provide electricity to power the equipment, maintain the appearance of the equipment, and to work with ***R & C*** on the equipment location. Taxpayer employees provided assistance on how to use the machines. According to Taxpayer, its role goes well beyond supplying the negligible amount of floor space required to place the equipment.

Taxpayer also argued that the payments made by ***R & C*** demonstrate that they are paying for more than the negligible space used by the respective machines. Taxpayer asserted that published commercial lease rates in the City range from approximately $4.00 to $25.00 per square foot per year. Since the ***R & C*** machines use less than 25 square feet of space, Taxpayer argued that ***R & C*** would each pay no more than $625.00 per location per year. In this case, Taxpayer received an average of $16,880.60 per location per year.

Taxpayer argued that this matter was previously addressed by the Hearing Officer in MTHO #141 in which the taxpayer allowed vending machines to be placed at taxpayer's business location. The Hearing Officer concluded the taxpayer's income from the vending machines was not taxable under City Code Section 445.

Taxpayer argued that the City cannot retroactively apply City Code Section 445 to Taxpayer's mutual business operations with ***R & C***. According to Taxpayer, City Code Section 542(b) ("Section 542") prohibits the City from assessing any tax, penalty or interest retroactively based on a change in interpretation or application. The City responded that Section 445 has contained language on licensing for use since April 1987.

We conclude that the agreements between Taxpayer and ***R & C*** for the placement of equipment in Taxpayer's stores are not a sale or a lease agreement. Based on the definition set forth in Section 100, the agreements between Taxpayer and ***CS*** would be a "licensing for use" as Taxpayer received consideration for the use of its property by ***R & C.*** This is a separate transaction than the rental agreement between Taxpayer and its lessor. Accordingly, it would not result in any double taxation.

As to the commercial lease rates, this is not a lease or rental agreement. Taxpayer received commissions based on "licensing for use" of its property. If the ***R & C*** machines were not used, Taxpayer would have received no commissions.

While the City may not have previously assessed Taxpayer for taxes on the ***R & C*** commissions, there was no evidence to demonstrate that the City had concluded such income was not taxable pursuant to Section 445. At best, the City simply did not consider

the taxability of such income. As a result, we are unable to conclude that the City had adopted a new interpretation of the taxability of the ***R & C*** commissions.

Based on all the above, we conclude that Taxpayer's protest should be denied consistent with the Discussion, Findings, and Conclusions, herein.

FINDINGS OF FACT

1. On October 16, 2014, the City issued a tax assessment to Taxpayer for additional taxes in the amount of $17,555.83, interest up through June 2014 in the amount of $1,040.42, and penalties in the amount of $3,511.18.

2. Subsequently, the City waived the penalties.

3. The audit period was from June 2010 through May 2014.

4. During the audit period, Taxpayer entered into agreements with ***R & C*** whereby ***R & C*** would pay Taxpayer a commission for allowing ***R & C*** to place their equipment in Taxpayer's stores.

5. The agreements Taxpayer had with ***R & C*** did not constitute a sale or rental agreement.

6. Taxpayer's customers could utilize the ***CS*** equipment to exchange cash for a voucher.

7. Taxpayer's customers could utilize the ***RB*** equipment to rent movies.

8. Taxes were paid on the gross income from the rental payments made by Taxpayer to its lessor.

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 445 imposes a tax on the gross income from the business activity of engaging or continuing in the business of leasing, or renting real property located within the City for a consideration, or the licensing for use of real property to the final licensee located within the City for a consideration.

3. Taxpayer's agreements with ***R & C*** did not constitute sale or rental agreements.

4. Section 100 defines "licensing for use" as an agreement between the user ("licensee") and the owner or the owner's agent ("licensor") for the use of the licensor's property whereby the licensor receives consideration, where such agreement does not qualify as a "sale" or "lease" or "rental" agreement.

5. Based on the definition set forth in Section 100, the agreements between Taxpayer and ***R & C*** would be a "licensing for use" as Taxpayer received consideration for the use of its real property by ***R & C.***

6. The rental payments paid by Taxpayer to its lessor are based on a separate taxable transaction than the commissions paid to Taxpayer for the licensing for use of its real property.

7. The taxation of the commissions for the licensing for use does not result in any double taxation.

8. There was insufficient evidence to demonstrate that the City had changed its interpretation of Section 445 on the taxability of the ***R & C*** commissions.

9. The commercial lease rates were not relevant as Taxpayer received commissions based on the "licensing for use" of its real property.

10. Taxpayers protest should be 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 October 16, 2014 protest by ***Taxpayer*** of a tax assessment made by the City of Tucson is hereby denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer