DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: November 2, 2004
Decision: MTHO #186
Tax Collector: City of Scottsdale
Hearing Date: September 28, 2004

DISCUSSION

Introduction

On March 31, 2004, ***Taxpayer***, Inc. ("Taxpayer") filed a protest of a tax assessment made by the City of Scottsdale ("City"). After review, the City concluded on April 15, 2004, that the protest was timely and in the proper form. On April 20, 2004, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before June 4, 2004. On June 2, 2004, the City filed a response to the protest. On June 4, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before June 25, 2004. On June 16, 2004, a Notice of Tax Hearing ("Notice") was issued setting the matter for hearing commencing on July 22, 2004. On June 23, 2004, the Taxpayer filed a reply. On July 9, 2004, a Notice was issued rescheduling the hearing commencing on August 9, 2004. On July 27, 2004, the Taxpayer requested the hearing be continued. On July 30, 2004, the Hearing Officer granted the requested continuance. On August 11, 2004, a Notice was issued rescheduling the hearing commencing on September 28, 2004. On August 13, 2004, the City issued a revised assessment. On September 9, 2004, the Taxpayer indicated they had no objection to the City removing the restaurant/catering issue from the assessment. Both parties appeared and presented evidence at the September 28, 2004 hearing. On September 29, 2004, the Hearing Officer indicated the record was closed and a written decision would be issued on or before November 12, 2004.

City Position

1. AVGAS

The City argued that the Taxpayer sold aviation fuel, commonly known as AVGas, for us in piston-powered aircrafts. The City asserted that City Code Section 460 (a) ("Section 460 (a)") authorized a tax on the gross income from the business activity of selling tangible personal property at retail. According to the City, the Taxpayer clearly received gross income from the retail sale of aviation fuel. The City indicated that City Code Section 465 (j) ("Section 465 (j)") does exempt

> "sales of **motor vehicle fuel** and use fuel which are subject to tax imposed under the provisions of Article I or II, Chapter 16, Title 28, Arizona Revised Statutes; or sales of use fuel to a holder of a valid single trip use fuel tax permit issued under A.R.S. Section 28-5739, or sales of natural gas or liquefied petroleum gas used to propel a motor vehicle." (emphasis added)

A.R.S. Section 28-5601(19) defines motor vehicles as:

> ". . . a self-propelled vehicle required to be licensed or subject to licensing for operation on a highway."

A.R.S. Section 28-101(13) defines motor vehicle fuel as:

> "all products that are commonly or commercially known or sold as gasoline, including casinghead gasoline, natural gasoline, and all flammable liquids, and that are composed of a mixture of selected hydrocarbons expressly manufactured and blended for the purpose of effectively and efficiently operating internal combustion engines. **Motor vehicle fuel does not include** inflammable liquids that are specifically manufactured for racing motor vehicles and that are distributed for and used by racing motor vehicles at a racetrack, use fuel as defined in Section 28-5601, **aviation fuel,** fuel for jet or turbine powered aircraft or the mixture created at the interface of two different substances being transported through a pipeline, commonly known as transmix."

The City argued that the Taxpayer is not selling motor vehicle fuel, but is selling aviation fuel as defined by A.R.S. Section 28-101(5) as following:

> "all flammable liquids composed of a mixture of selected hydrocarbons expressly manufactured and blended for the purpose of effectively and efficiently operating an internal combustion engine for use in an aircraft but does not include fuel for jet or turbine powered aircraft."

Based on the above, the City argued the sale of aviation fuel by the Taxpayer is subject to privilege tax under the retail classification of the City Code.

2. ***ABC*** Commissions

According to the City, the Taxpayer receives monthly gross income in the form of commissions from ***ABC*** Corporation ("***ABC***") for a right to use the Taxpayer's property. The City asserted that City Code Section 445 (a) ("Section 445 (a)") states the following:

> "The tax rate shall be at an amount equal to one and four tenths percent (1.4%) of the gross income from the business activity upon every person engaging or continuing in the business of …licensing for use of real property to the final licensee located within the City for a consideration…"

Further licensing for use is defined in City Code Section 100 ("Section 100") as follows:

> "…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."

The City argued that the Taxpayer received commissions from ***ABC*** for the license to sue the Taxpayer's facilities. As a result, the Taxpayer was assessed a tax on the gross income received for providing a license for use of real property pursuant to Section 445 (a). The City asserted this was different than the tax on ***ABC*** for the business activity for the rental of tangible personal property pursuant to City Code Section 450 ("Section 450").

Taxpayer Position

1. AVGas

The Taxpayer argued that the City had a long-standing policy of not taxing AVGas and is attempting to change that policy in this case without giving fair notice to the Taxpayer. The Taxpayer asserted that the June 2003 Retail Sales brochure ("Brochure") that the City provided to the public indicated that "gasoline sales" are not taxable. The Taxpayer also argued that former City Code Section 6-215 ("Section 215") provided that certain sales of "gasoline", including "gasoline" sold for aircraft were not taxable. The Taxpayer indicated that the City failed to specifically carve out gasoline sold to piston-powered aircraft from its exemption under Section 465(j). The Taxpayer asserted that a reasonable interpretation of Section 465(j) is that the City has imposed a tax only on retailers of fuel for jet aircraft and for turban powered aircraft. The Taxpayer argued that if the City had intended to tax sales of AVGas used in piston-powered aircraft, the City should have spoken more clearly. The Taxpayer asserted that tax statutes are strictly construed against taxing authorities.

2. ***ABC*** Commissions

According to the Taxpayer, ***ABC*** does not have an "exclusive right" to any "specific area" within the Taxpayer's facility. The Taxpayer asserted that for privilege tax purposes, ***ABC*** is not a tenant but is a mere licensee. The Taxpayer indicated that in exchange for a license, ***ABC*** pays the Taxpayer a commission on the automobiles rented by ***ABC***. The Taxpayer argued that the City had already collected a privilege tax on all of the commissions paid by ***ABC*** to the Taxpayer. The Taxpayer asserted that the City's position would result in the City imposing two privilege taxes on the same transactions. The Taxpayer argued this would result in transactions being double taxed by the City.

ANALYSIS

1. AVGas

We find the Taxpayer's sale of the AVGas would be the business activity of engaging in the business of selling tangible personal property at retail. Section 465(j) does provide for exemption of "sales of motor vehicle fuel and use fuel which are subject to tax imposed under the provisions of Article I or II, Chapter 16, Title 28, Arizona Revised Statutes …" We concur with the City that Section 101(31) specifies that motor vehicle fuel does not include aviation fuel. Accordingly, we must conclude that the sale of the AVGas does not fall within the exemption set forth in Section 465(j). We also would find no evidence to support the Taxpayer's allegation that the City has changed its position on the taxability of gas. A careful reading of old Section 215 leads us to conclude that AVGas was also taxable under Section 215. While the Taxpayer argued that they had detrimentally relied on some of the City brochures and statutes, we could find no evidence of any such reliance. In fact, the Taxpayer made a determination that the AVGas was exempt from State taxation and simply concluded that it was also exempt from City tax without checking with the City or the City statutes/regulations. Accordingly, we must deny the Taxpayer's protest of the City's assessment on the sale of AVGas.

2. ***ABC***

The commissions paid to the Taxpayer by ***ABC*** were taxable as income from the activity of licensing for use pursuant to Section 445(a). Based on the evidence presented, ***ABC*** may also charge City tax on the same income, which is included in the itemized customer bill within a category entitled "City Fee". ***ABC*** collects City rental tax on that income. Anytime the same monies are taxed by the same entity twice, we are concerned with possible double taxation. The Taxpayer made it clear that there was no agency relationship with ***ABC***. It is also clear that a ***ABC*** customer never sees a charge for the Taxpayer but simply a charge entitled "City Fee". If this were truly a case of "double taxation", we would expect to see the Taxpayer commission itemized to the ***ABC*** customer and a Section 445(a) City tax charged on that itemized commission. That does not occur in this case. We conclude that ***ABC*** has included the Taxpayer commission as part of its rental price to the ***ABC*** customer and then charged a City rental tax. That is a separate and distinct tax from the City tax on the licensing for use income of the Taxpayer. As a result, there was no double taxation and the Taxpayer protest of this item should be denied.

3. Catering/Restaurant

The City assessed the Taxpayer for additional taxes in the amount of $15,425.52 for restaurant/catering income pursuant City code Section 455 ("Section 455"). Subsequently, on August 13, 2004, the City revised its assessment and removed the tax assessment on the restaurant/catering income. Accordingly, the Taxpayer's protest of the tax assessment on the restaurant/catering income is granted.

FINDINGS OF FACT

1. On March 31, 2004, the Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on April 15, 2004, that the protest was timely and in proper form.

3. On April 20, 2004, the Hearing Officer ordered the City to file a response on or before June 4, 2004.

4. On June 2, 2004, the City filed a response to the protest.

5. On June 4, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before June 25, 2004.

6. On June 16, 2004, a Notice was issued setting the matter for hearing commencing on July 22, 2004.

7. On July 23, 2004, the Taxpayer filed a reply.

8. On July 9, 2004, a Notice was issued rescheduling the hearing commencing on August 9, 2004.

9. On July 27, 2004, the Taxpayer requested the hearing be continued.

10. On July 30, 2004, the Hearing Officer granted the requested continuance.

11. On August 11, 2004, a Notice was issued rescheduling the hearing commencing on September 28, 2004.

12. On August 13, 2004, the City issued a revised assessment.

13. On September 9, 2004, the Taxpayer indicated they had no objection to the City removing the restaurant/catering issue from the assessment.

14. Both parties appeared and presented evidence at the September 28, 2004 hearing.

15. On September 29, 2004, the Hearing Officer indicated the record was closed and a written decision would be issued on or before November 12, 2004.

16. On March 5, 2004, the City issued an audit assessment against the Taxpayer for the period October 1999 through March 2003.

17. The City assessed the Taxpayer for taxes due in the amount of $97,039.33 plus interest.

18. On August 13, 2004 the City revised its assessment for taxes due in the amount of $82,681.77 plus interest.

19. During the audit period, the Taxpayer sold AVGas, for use in piston-powered aircraft, at retail.

20. During the audit period, the Taxpayer received monthly gross income in the form of commissions from ***ABC*** for a right to use the Taxpayer's property.

21. The Brochure that the City provided to the public indicated that "gasoline sales" are not taxable.

22. During the audit period, ***ABC*** included the Taxpayer's commissions in a category of costs entitled "City Fee" charged to the ***ABC*** rental customers.

23. There was no agency relationship between the Taxpayer and ***ABC***.

24. The Taxpayer did not rely on any City brochures and/or City statutes regarding the taxability of the sale of AVGas at retail.

25. The Taxpayer made a determination that the AVGas sales were exempt from City tax based on the sales being exempt from State taxes.

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. The Taxpayer's sale of AVGas was the business activity of engaging in the business of selling tangible personal property at retail pursuant to Section 460(a).

3. Section 465(j) does not exempt the Taxpayer's sale of AVGas from the Section 460(a) tax.

4. AVGas is not motor vehicle fuel as defined in ARS Section 28-101(5).

5. AVGas is aviation fuel as defined in ARS Section 28-101(5).

6. The Taxpayer's gross income from commissions from ***ABC*** was taxable pursuant to Section 445(a).

7. The Taxpayer did not have an agency relationship with ***ABC***.

8. The City tax on the Taxpayer for licensing for use income from ***ABC*** is a separate and distinct tax from the City tax on rental income of ***ABC***.

9. The parties were in agreement that the City's assessment for restaurant/catering income pursuant to Section 455 was erroneous.

10. The City's assessment as revised in the City's August 13, 2004 letter should be approved.

11. The Taxpayer's protest should be denied with the exception of the protest of the restaurant/catering assessment.

ORDER

It is therefore ordered that the March 31, 2004 protest of ***Taxpayer***, Inc. of a tax assessment made by the City of Scottsdale is hereby denied with the exception of the City's removal of the tax assessment on the restaurant/catering income.

It is further ordered that the City of Scottsdale shall revise its assessment consistent with the August 13, 2004 revision filed by the City.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer