DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: July 22, 2005
Decision: MTHO #207
Tax Collector: City of Phoenix
Hearing Date: None

DISCUSSION

Introduction

On September 24, 2004, ***Taxpayer*** LLC ("Taxpayer") filed a protest of an assessment made by the City of Phoenix ("City"). After review, the City concluded on September 14, 2004 that the protest was timely and in the proper form. On September 18, 2004, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to provide a response to the protest on or before November 2, 2004. The City filed a September 27, 2004, letter indicating the Taxpayer had requested the matter be stayed pending a decision on the Taxpayer's appeal to the Arizona Department of Revenue ("DOR"). On October 4, 2004, the Hearing Officer stayed this matter and ordered the Taxpayer to provide an updated status on or before January 4, 2005. On January 18, 2005, the Hearing Officer extended the Taxpayer's deadline to provide an updated status until February 1, 2005. On January 20, 2005, the Taxpayer provided a copy of the DOR decision. On February 7, 2005, the Hearing Officer ordered the Taxpayer to provide clarification of its protest on or before February 21, 2005. On February 18, 2005, the Taxpayer requested this matter be set for hearing. On February 24, 2005, the Hearing Officer ordered the City to file a response to the protest on or before April 11, 2005. On March 8, 2005, the City filed a response to the protest. On March 14, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before April 4, 2005. On May 18, 2005, a Notice of Tax Hearing ("Notice") scheduled this matter for hearing commencing on June 23, 2005. On June 10, 2005, the Taxpayer requested this matter be reclassified as a redetermination. On June 20, 2005, the Hearing Officer reclassified this matter as a redetermination and indicated the record was now closed with a written decision to be issued on or before August 4, 2005.

City Position

During the audit period, the Taxpayer was engaged in the business of amusements where customers pay to use go-karts on a track at the Taxpayer's facility. The Taxpayer also had retail sale revenues for sales of t-shirts, souvenirs, food and beverages. According to the City, the DOR performed a multijurisdictional audit for the State and the City on the Taxpayer. For the audit period of March 2002 through July 2003, the Taxpayer was assessed taxes in the amount of $5,562.69 for unreported use taxable purchases. In addition, the Taxpayer was assessed interest up through July 2004 of $1,170.50 and a penalty of $556.29 for failure to pay tax when due.

The City asserted that the Taxpayer's business of charging customers to use go-karts on the Taxpayer's track is taxable as amusement revenues rather than the rental of tangible personal property as argued by the Taxpayer. Amusement revenues are defined pursuant to City Code Section 14-410 ("Section 410") as:

> "businesses operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiards or pool parlors, bowling alleys, skating rinks, tennis courts, golf courses, video games, pinball machines, public dances, dancehalls, sports events, jukeboxes, batting and driving ranges, animal rides, or any other business charging admission for exhibition, amusement, or entertainment."

The City acknowledged that the Taxpayer did not charge an admission fee to simply enter their business. However, the City indicated that the definition of amusements includes bowling alleys, pool parlors and skating rinks. According to the City these businesses do not charge an admission to simply enter their business. The City asserted that the Taxpayer's go-kart usage is similar to bowling alleys, pool parlors and skating rinks which are defined as amusements in Section 410. The City argued that the Taxpayer's customers do not "rent" the go-kart or the track. Unlike a lawn mower rental where the customer could use it how, when and where they wanted, the Taxpayer's customers must use the go-kart on the track provided by the Taxpayer and only during the hours they are open for business. The City also noted that the Taxpayer has consistently reported their revenues for go-kart usage to the City as amusement revenues. Based on the above, the City argued the Taxpayer was clearly engaged in the business of amusements and not the rental of tangible personal property.

According to the City, City Code Section 14-540 (a) ("Section 540 (a)") provides that any taxpayer who fails to pay the tax due before the delinquencies date will pay interest. Further, Section 540 (a) provides that interest may not be waived by the City nor abated by the hearing Officer except as it relates to tax abated. The City asserted that since the tax assessment was proper that the interest may not be abated.

While the Taxpayer has requested the penalty for failure to timely pay be waived, the City argued the Taxpayer failed to provide a reason to waive the penalty. As a result, the City asserted the penalty should be approved. The City also noted that the assessment by the DOR was upheld in its entirety. The City indicated that the City and State have essentially identical Tax Code language concerning the category of amusement revenues.

Taxpayer Position

The Taxpayer argued that the revenues derived from customers operating go-karts should be classified as rental of tangible personal property rather than amusements. According to the Taxpayer, they do not charge a fee to enter their facility, but only charge a fee to go-kart drivers. According to the Taxpayer, the rental fee generally applies to a certain number of laps around the track. The Taxpayer indicated that between one and thirteen

patrons may operate go-karts on the track at any given time. The Taxpayer asserted that the customer has possession or control of the go-kart which makes the revenues taxable as rental of tangible personal property. The Taxpayer noted that go-kart usage is not defined in the amusements classification. The Taxpayer argued that any ambiguity about the business activity must be resolved in favor of the Taxpayer. The Taxpayer asserted that the use tax does not apply to go-kart purchases because when the go-karts are purchased they are treated as a sale for lease. According to the Taxpayer, when the go-karts are transferred to the customers for a consideration, a sale or rental has occurred. Based on the above, the Taxpayer argued that the use tax does not apply to the purchase of go-karts. With regard to the above issues, the Taxpayer also protested the penalty and interest that were included on the tax assessment.

ANALYSIS

The primary issue to be resolved is whether or not the Taxpayer's business is taxable under the amusement classification or the rental of personal property. If it is determined to be the business of rental of personal property, than the use tax assessment was improper. If the business was properly taxed under the amusement classification, the use tax assessment was proper. First, we must agree with the City that Section 410 enumerates a variety of businesses that do not charge an entrance fee but are taxed under the amusements classification. Consequently, we don't find the non-entrance fee argument to be persuasive. While the customers use of the go-karts has some attributes similar to the rental of personal property, we find the limitations placed on the use does not provide the customers with enough control of the go-karts to be considered as rental. We agree with the Taxpayer that use of go-karts is not one of the businesses actually enumerated in Section 410, however, we find the language of "charging admission for …amusement" to be broad enough to include charging for use of go-karts. Based on all the above, we find the Taxpayer's business classification to be amusements pursuant to Section 410. As a result, the Taxpayer has not met their burden of proof of demonstrating the purchase of the go-karts was exempt from use tax pursuant to City Code Section 14-610 ("Section 610").

Since the underlying tax has been upheld, the interest can not be waived pursuant to Section 540 (a). The City was authorized pursuant to Section 540 (b) (2) to assess a late payment penalty. The penalty may be waived if the Taxpayer demonstrates the failure to timely pay was due to reasonable cause. We have some concerns that the Taxpayer was reporting the revenues for go-kart usage as amusement revenues while arguing that the use tax does not apply to the go-kart purchases because they should be classified as rental of tangible personal property. In spite of that inconsistency, we do not find the Taxpayer's arguments rental of tangible personal property to be unreasonable. Accordingly, we conclude that the Taxpayer has demonstrated reasonable cause to have the penalties waived.

FINDINGS OF FACT

1. On September 2, 2004, Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on September 14, 2004 that the protest was timely and in the proper form.

3. On September 18, 2004, the Hearing Officer ordered the City to provide a response to the protest on or before November 2, 2004.

4. The City filed a September 27, 2004 letter indicating the Taxpayer had requested the matter be stayed pending a decision on the Taxpayer's appeal t o the DOR.

5. On October 5 2004, the Hearing Officer stayed this matter and ordered the Taxpayer to provide an updated status on or before January 4, 2005.

6. On January 18, 2005, the Hearing Officer extended the Taxpayer's deadline to provide an updated status until February 1, 2005.

7. On January 20, 2005, the Taxpayer provided a copy of the DOR decision.

8. On February 7, 2005, the Hearing Officer ordered the Taxpayer to provide clarification of its protest on or before February 21, 2005.

9. On February 18, 2005, the Taxpayer requested this matter be set for hearing.

10. On February 24, 2005, the Hearing Officer ordered the City to file a response to the protest on or before April 11, 2005.

11. On March 8, 2005, the City filed a response to the protest.

12. On March 14, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before April 4, 2005.

13. On May 18, 2005, a Notice scheduled this matter for hearing commencing on June 23, 2005.

14. On June 10, 2005, the Taxpayer requested this matter be reclassified as a redetermination.

15. On June 20, 2005, the Hearing Officer reclassified this matter as a redetermination and indicated the record was now closed with a written decision to be issued on or before August 4, 2005.

16. During the audit period, the Taxpayer would charge customers a fee for the use of go-karts on the Taxpayer's facility.

17. The Taxpayer purchased the go-karts without paying use tax by claiming the go-karts were used in the business of rental of tangible personal property.

18. For the audit period of March 2002 through July 2003, the DOR performed a multijurisdictional audit for the State and City on the Taxpayer.

19. The Taxpayer was assessed City taxes in the amount of $5,562.69 for unreported use taxable purchases.

20. The Taxpayer was assessed interest up through July 2004 of $1,170.50 and a penalty of $556.29 for failure to pay tax when due.

21. The Taxpayer did not charge an admission fee to simply enter the business.

22. The definition of amusements includes bowling alleys, pool parlors and skating rinks, none of which charge an admission to simply enter their business.

23. The Taxpayer's customers must use the go-kart on the track provided by the Taxpayer during the hours the Taxpayer is open for business.

24. The rental fee charged customers generally applies to a certain number of laps around the track.

25. Between one and thirteen patrons may operate go-karts on the track at any given time.

26. The assessment by the DOR was upheld in its entirety.

27. The City and State have essentially identical Tax Code language concerning the category of amusement revenues.

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 language in Section 410 of "charging admission for … amusement" includes charging for use of go-karts.

3. The Taxpayer's revenues from customers for the use of go-karts on the Taxpayer's track during normal business hours were properly taxed under the business classification of amusements pursuant to Section 410.

4. The Taxpayer's go-karts were not utilized in the business of renting of tangible personal property.

5. The Taxpayer has not met their burden of proof of demonstrating the purchase of the go-karts was exempt from use tax pursuant to Section 610.

6. Since the underlying tax was upheld, the interest can not be waived pursuant to Section 540 (a).

7. The City was authorized pursuant to Section 540 (b) (2) to assess a late payment penalty.

8. The Taxpayer has demonstrated reasonable cause for failing to timely pay use tax on the go-kart purchases.

9. The penalty for failure to pay tax when due should be waived.

10. With the exception of the penalty, the Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the September 2, 2004 protest of ***Taxpayer*** LLC of a tax assessment made by the City of Phoenix should be denied, with the exception of the penalty for failure to timely pay the use tax.

It is further ordered that the City of Phoenix shall revise its assessment by removing the penalty for failure to timely pay the use tax.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer