DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: March 31, 2008
Decision: MTHO #403
Taxpayer: ***123 Catering***
Tax Collector: City of Tempe
Hearing Date: None

DISCUSSION

Introduction

On December 14, 2007, ***123 Catering*** ("Taxpayer") filed a protest of a tax assessment by the City of Tempe ("City"). After review, the City concluded on December 18, 2007 that the protest was timely and in the proper form. On December 31, 2007, the Municipal Tax Hearing Officer ("Hearing Officer") classified the matter as a hearing and ordered the City to file any response to the protest on or before February 14, 2008. On January 16, 2008, Taxpayer requested the matter be classified as a redetermination. On January 19, 2008, the Hearing Officer reclassified the matter as a redetermination. On February 14, 2008, the City filed a response to the protest. On February 21, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before March 24, 2008. On March 25, 2008, the Hearing Officer indicated no reply had been received. As a result the Hearing Officer closed the record and indicated a written decision would be issued on or before May 9, 2008.

City Position

The City indicated Taxpayer is a closely held corporation engaged in the business of full time catering. The City noted that ***Owner*** was Taxpayer's President and primary shareholder. The City conducted an audit of Taxpayer for the period August 2003 through July 2007. As a result, the City assessed Taxpayer for additional taxes in the amount of $35,589.45 plus interest up through November 2007 in the amount of $6,247.60.

The City disputed Taxpayer's claim that the catering revenues from the ***Indian Reservation*** were not taxable by the City. According to the City, Taxpayer delivered and served prepared food at the ***Indian Reservation*** location. The City noted that City Code Section 455 ("Section 455") imposes a tax on the activity of catering. Section 455 provides that "When a taxpayer delivers food and/or serves such food off premises, his regular business location shall be deemed the location of the transaction for the purposes of the tax imposed by this Section." City Code Regulation 100.4 ("Regulation 100.4") indicates sales to Native Americans shall be deemed sales within the City unless all of the

following elements exist: solicitation and placement of the order occurs on the reservation; and, delivery is made to the reservation; and, payment originates from the reservation. According to the City, Regulation 100.4 is a clarification of the definitions of Out-of City and Out-of State sales. The City asserted that since Section 455 does not contain an exemption for Out-of-City or Out-of State sales, then Regulation 100.4 does not apply.

In response to cases cited by Taxpayer, the City argued that federal law does not pre-empt local taxation of transactions with Native American entities. According to the City, the cases cited by Taxpayer involved situations where the activity being taxed was conducted entirely on an Indian Reservation. In this case, the City noted there was substantial assembly and/or preparation of the food at Taxpayer's premises in the City prior to delivery and serving at the customer's premises.

The City indicated Taxpayer routinely rents tangible personal property used in its catering business and claims a rent for re-rent exemption from its third party vendors. According to the City, the tangible personal property consisted primarily of dinnerware, glassware, silverware, linens, tables and chairs. The City argued that City Code Section 450 ("Section 450") provides no exemption for tangible personal property used in a restaurant or catering business. The City noted that City Code Section 360(b) ("Section 360(b)") provides that any person who claims an exemption to which they are not entitled is liable for the tax on that transaction as if the vendor had passed the burden of tax on to the person claiming the exemption. As a result, the City assessed Taxpayer the tax that would have been due on rental transactions with third party vendors located in the City. The City indicated that Section 455 defines the activity of catering substantially the same as Arizona Revised Statute 42-5074.A ("Section 5074"). The City further noted that City Code Section 500(e)(2) ("Section 500(e)(2)") provides that: "pursuant to ARS Section 42-6005(D), when the state statute and the model city tax code are the same and where the Arizona Department of Revenue has issued written guidance, the department's interpretation is binding on cities and towns." The City asserted that the Arizona Department of Revenue ("DOR") issued the following guidance in Arizona Transaction Privilege Tax Ruling TPR 93-30 ("TPR-30"): "Gross income consists of all charges a caterer makes for serving meals, food, and drinks on the customer's premises including charges for food and use of dishes, silverware, glasses, chairs, tables, and other property used bt the caterer in connection with serving meals." As a result, the City argued the charges by Taxpayer for the tangible personal property used in the catering business is income from the business of catering and nor a separate line of business. The City asserted the DOR interpretation is consistent with the standards established in State Tax Commission v. Holmes & Narver, Inc. The City argued the silverware, dishes, tables, chairs, and linens are inseparable from and an integral part of the business of serving food. Accordingly, Taxpayer is not entitled to claim a rent for re-rent exemption when renting this property from third party vendors.

The City indicated Taxpayer purchased a small amount of tangible personal property used in its catering business from Out-of-State vendors on which no privilege taxes were paid. The City assessed taxes on the purchases which consisted primarily of table linens,

dishes, and coffee urns.

Taxpayer Position

Taxpayer protested the City's assessment of taxes on the catering revenues from ***Indian Reservation***. Taxpayer asserted it originated the services for catering on the reservation. Taxpayer also indicated it accepted Arizona Form 5000 ("Form 500") from ***Indian Reservation*** in good faith. Taxpayer argued that Section 455 deeming Taxpayer's regular business location as the location of the catering activity is preempted by federal law (See White Mountain Apache Tribe v. Brucker, 448 U.S. 136,151 (1980). In White Mountain, the U.S. Supreme Court held that Arizona's motor carrier license tax and use fuel tax on a non-Indian enterprise cutting timber on a reservation and delivering it to a sawmill owned by a tribal enterprise was preempted by federal law. Based on the above, Taxpayer argued the City cannot tax the catering activities on ***Indian Reservation***.

Taxpayer disputed the City's disallowed exemption claimed on rental property used in catering. Taxpayer asserted that unlike restaurants which serve meals on premises, Taxpayer prepares and serves meals off premises. Taxpayer indicated that if the client doesn't have sufficient tables and chairs for their event, the caterer will rent the tables and chairs to its clients. Taxpayer argued that while a restaurant must have tables and chairs, tables and chairs are not a necessary and integral part of the caterer's catering business.

Taxpayer also disputed the City's use tax assessment on the purchase of silverware, dishes, tables, chairs, and linens. Taxpayer asserted these items were purchased for its inventory of rentals and re-sold to customers. Taxpayer indicated sales tax was collected and paid when these items were rented to Taxpayer's customers.

ANALYSIS

During the audit period, Taxpayer was in the catering business and thus taxable pursuant to Section 455. Section 455 provides that when a taxpayer delivers food and/or serves such food off premises, the taxpayer's regular business location is deemed to be the location of the transactions. As a result, Taxpayer's delivering of food and/or service of food to ***Indian Reservation*** would be deemed to have a transaction location at Taxpayer's business location in the City. As to Taxpayer's argument that the transactions with ***Indian Reservation*** were pre-empted by federal law, we concur with the City that the cases cited by Taxpayer are distinguishable. As noted by the City, the cases cited by Taxpayer involved situations where the activity being taxed was conducted entirely on an Indian Reservation. In this case, there was substantial activity by Taxpayer in preparing the food at Taxpayer's business location in the City prior to delivery and serving at the customer's premises. As a result, we do not find the City is pre-empted by federal law on taxing the catering revenues from ***Indian Reservation***. We also conclude that Taxpayer has failed to meet its burden of proof pursuant to City Code Section 360 ("Section 360")

of demonstrating the ***Indian Reservation*** catering revenues are exempt from taxation.

Next is the issue of the City's disallowed rental exemption claimed by Taxpayer. We concur with Taxpayer that it can have more than one business activity. However, in this case, we conclude the issue of whether or not the rental of tables and chairs by Taxpayer is a separate business activity is controlled by TPR 93-30. As noted by the City, Section 500 provides that: "pursuant to A.R.S. Section 42-6005(D), when the state statutes and model city tax code are the same and where the Arizona Department of Revenue has issued written guidance, the department's interpretation is binding on cities and towns." State Section 5074 has substantionally the same definition as Section 455. Since the DOR has issued written guidance set forth in TPR 93-30, DOR"s interpretation is binding on the City pursuant to Section 6005(D). TPR-30 makes it clear that charges for the use of dishes, silverware, glasses, chairs, tables, and other property used by the caterer in connection with serving meals is part of the gross income from the caterer business. Accordingly, Taxpayer's claim for a rent for re-rent exemption must be denied.

The last issue is whether or not Taxpayer should have been assessed a use tax on tangible personal property purchased from Out-of-State vendors on which no privilege tax was paid. The property purchased was primarily table linens, dishes, and coffee urns. City Code Section 600 ("Section 600") defines the "use of tangible personal property" to mean consumption of the property except the holding for sale, rental, or lease of such property in the regular course of business. While Taxpayer argued these items were resold, we find that consistent with our decision on the disallowed rental exemptions that these items were not resold but were part of the overall catering business. As a result, we conclude table linens, dishes, and coffee urns were used or consumed in Taxpayer's catering business. The City's use tax assessment is upheld. Based on all the above, Taxpayer's protest should be denied.

FINDINGS OF FACT

1. On December 14, 2007, Taxpayer filed a protest of a tax assessment made by the City.

2. After review, the City concluded on December 18, 2007 that the protest was timely and in the proper form.

3. On December 31, 2007, the Hearing Officer classified this matter as a hearing and ordered the City to file any response to the protest on or before February 14, 2008.

4. On January 16, 2008, Taxpayer requested the matter be reclassified as a redetermination.

5. On January 19, 2008, the Hearing Officer reclassified the matter as a

redetermination.

6. On February 14, 2008, the City filed a response to the protest.

7. On February 21, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before March 24, 2008.

8. On March 25, 2008, the Hearing Officer indicated no reply had been received and as a result the record was closed and a written decision would be issued on or before May 9, 2008.

9. Taxpayer is a closely held corporation engaged in the business of full service catering.

10. ***Owner*** is Taxpayer's President and primary shareholder.

11. The City conducted an audit of Taxpayer for the period August 2003 through July 2007.

12. The City assessed Taxpayer for additional taxes in the amount of $35,589.45, plus interest up through November 2007 in the amount of $6,247.60.

13. Taxpayer delivered and served prepared food at the ***Indian Reservation*** location.

14. There was substantial assembly and/or preparation of the food at Taxpayer's premises in the City prior to delivering and serving at the customer's premises.

15. Taxpayer accepted Form 5000 from ***Indian Reservation***.

16. Taxpayer prepares and serves meals off premises.

17. If a client doesn't have sufficient dinnerware, glassware, silverware, linens, and/or tables and chairs, Taxpayer will rent the tangible personal property to its clients.

18. Taxpayer purchased silverware, dishes, tables, chairs, and linens from Out-of State vendors on which no privilege taxes were paid.

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. During the audit period, Taxpayer was in the catering business and thus taxable pursuant to Section 455.

3. Pursuant to Section 455, Taxpayer's delivery of food and/or service of food to ***Indian Reservation*** would be deemed to have a transaction location at Taxpayer's business location in the City.

4. The taxation of Taxpayer's transactions with ***Indian Reservation*** were not pre-empted by federal law.

5. There was substantial activity by Taxpayer in preparing the food at Taxpayer's business location in the City prior to delivery and serving at ***Indian Reservation***.

6. Taxpayer has failed to meet its burden of proof pursuant to Section 360 of demonstrating the ***Indian Reservation*** catering revenues are exempt from taxation.

7. Taxpayer can have more than one business activity.

8. State Section 5074 has substantially the same definition as Section 455.

9. Since the DOR has issued written guidance set forth in TPR 93-30, DOR"s interpretation is binding on the City pursuant to Section 6005(D).

10. TPR-30 makes it clear that charges for the use of dishes, silverware, glasses, chairs, tables, and other property used by the caterer in connection with serving meals is part of the gross income from the caterer business.

11. Taxpayer's claim for a rent for re-rent exemption must be denied.

12. Section 600 defines the "use of tangible personal property" to mean consumption of the property except the holding for sale, rental, or lease of such property in the regular course of business.

13. Table linens, dishes, and coffee urns were used or consumed in Taxpayer's catering business.

14. Taxpayer's protest should be denied, consistent with the Discussion, Findings, and Conclusions, herein.

ORDER

It is therefore ordered that the December 14, 2007 protest by ***123 Catering*** of a tax assessment made by the City of Tempe is hereby denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer