

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: January 21, 2009

Decision: MTHO # 428

Taxpayer:

Tax Collector: Town of Buckeye

Hearing Date: August 20, 2008

DISCUSSION

Introduction

On January 30, 2008, ***Taxpayer*** filed a protest of a tax assessment made by the Town of Buckeye (“Town”). After review, the Town concluded on February 13, 2008, that the protest was timely and in the proper form. On April 7, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the Town to file a response to the protest on or before May 21, 2008. On May 23, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before June 13, 2008. Taxpayer filed a reply on June 11, 2008. On June 13, 2008, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on August 20, 2008. Both parties appeared and presented evidence of the August 20, 2008 hearing. At that time, both parties agreed to the following schedule: Taxpayer would provide information/documents to the Town regarding taxes paid to the Town by trade contractors for two projects at issue on or before September 29, 2008; the Town would provide comments/recommendations on or before October 29, 2008; and, Taxpayer would file a reply on or before November 12, 2008. On September 29, 2008, Taxpayer sent an email requesting an extension to provide information/documents. On September 30, 2008, the Hearing Officer granted Taxpayer an extension until October 8, 2008; the Town an extension until November 10, 2008; and Taxpayer an extension for a reply until November 24, 2008. On October 8, 2008, Taxpayer provided information/documents. On November 14, 2008, the Hearing Officer granted the Town an extension for a response until November 28, 2008, and Taxpayer an extension for a reply until December 12, 2008. On November 24, 2008, the Town filed comments/recommendations. On December 9, 2008, Taxpayer filed a reply. On December 11, 2008, the Hearing Officer indicated the record was closed and a written decision would be issued on or before January 26, 2009.

Town Position

The Town conducted an audit of Taxpayer for the period June 2006 through October 2007. As a result of that audit, Taxpayer was assessed for additional taxes in the amount of \$292,569.84, penalties pursuant to Town Code Section 18-540 (“Section 540”) totaling

\$72,357.84, and interest up through December 2007 in the amount of \$14,808.98. According to the Town, in June 2008, Taxpayer entered into an agreement (“**Sunny Day Agreement**”) with **Sunny Towne Center, L.L.C.** (“**Sunny Owner**”) for the construction of infrastructure improvements for a shopping center known as **Sunny Towne Center** (“**Sunny Project**”). The Town indicated Taxpayer entered into another agreement in December 2006 (“**Happy Agreement**”) for the construction of infrastructure improvements for a shopping center known as **Happy Marketplace** (“**Happy Project**”).

As part of the audit process, the Town concluded that the **Sunny and Happy Projects** were Taxpayer’s only significant activities in the Town during the audit period. As a result, the Town indicated the scope of the audit focused on the revenues from the **Sunny and Happy Projects**. The Town disputed Taxpayer’s argument that it was a consultant rather than a contractor on the two projects. The Town asserted that the Arizona Court of Appeals (“Court”) addressed the taxation of a “construction manager” in Arizona Department of Revenue v. Ormond Builders, Inc., 216 Ariz. 379, 166 P.3d 934 (Div. 1, 2007). According to the Town, the Court in Ormond addressed four discreet issues: (1) whether the taxpayer’s activities performed pursuant to the agreements met the definition of a “prime contractor” under ARS Section 42-5072; (2) whether the income received by the taxpayer constituted revenue from prime contracting; (3) whether the taxpayer’s activities performed pursuant to the agreements met the definition of a “construction contractor” under the Model City Tax Code Section 100; and, (4) whether the income received by the taxpayer constituted revenue from construction contracting.

The Town assessed Taxpayer as a construction contractor on the **Sunny & Happy Projects** and as a result all of its receipts from those projects were included in the taxable gross receipts. The Town indicated Town Code Section 18-100 (“Section 100”) defines construction contracting as follows:

“Construction contracting means a person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or through others, construct, alter, repair, add to subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation, or other structure, project, development, or improvement to real property, or to do any part thereof. “Construction contractor” includes subcontractors, specialty contractors, prime contractors, and any person receiving consideration for the general supervision and/or coordination of such a construction project except for remediation contracting. This definition shall govern without regard to whether or not the construction contractor is acting in fulfillment of a contract.”

In response to Taxpayer, the Town argued that Ormond supports the Town’s conclusion that Taxpayer was a contractor on the **Happy and Sunny projects**. The Town asserted that the contracts between Taxpayer and the **Sunny and Happy Owners** require Taxpayer to perform the same duties that the Court cited in the Ormond case in concluding that Ormond was a contractor. The Town noted that in the Ormond case, the Court relied on the fact that Ormond was not a party or a signatory to any of the contracts and that the trade contractors could look only to the owners, if they were not paid. As a result, the

Court concluded that Ormond was merely a conduit for payments from the owner to the subcontractors and those payments were not includable in gross income. The Town asserted that unlike Ormond, Taxpayer's contract with *Sunny and Happy* clearly indicates Taxpayer is responsible for completion of the project. The Town noted that all of the contracts with trade contractors are only between Taxpayer and the trade contractors. The Town argued that in the event of non-payment, the trade contractors can look only to Taxpayer and not to *Sunny and Happy*. Accordingly, the Town concluded all of the payments received by Taxpayer pursuant to the contracts with *Sunny and Happy* are included in Taxpayer's gross income.

The Town disputed Taxpayer's argument that payments to trade contractors should be excluded because each trade contractor completed an Arizona Form 5005 ("Form 5005") indicating responsibility for payment of privilege tax. The Town noted that Form 5005 indicates "the purpose of this form is to provide a subcontractor with the validation required for tax exemption of a particular project, for a period of time, or until revoked." The Town asserted Taxpayer was the general contractor and payments flowed from the Taxpayer to the subcontractors. The Town opined the Form 5005's were meaningless since there were no payments flowing from the subcontractors to Taxpayer on which an exemption could be claimed. The Town argued that Taxpayer could not relieve itself of its obligation under the law by a contractual agreement with its subcontractors.

The Town disputed Taxpayer's claim that the Town was well aware all the trade contractors had paid sales taxes on the contracts. According to the Town, all of the trade contractors have not paid transaction privilege taxes on their contracts. Since some of the trade contractors have paid transaction privilege taxes on the projects, the Town indicated a willingness to accept properly completed assignments and waivers from subcontractors pursuant to Town Code Section 18-565 ("Section 565"). In response to Taxpayer, the Town indicated they were not attempting to collect double taxes. The Town asserted that very few of the trade contractors involved in the two projects have paid taxes to the Town. The Town indicated a willingness to accept properly completed assignments and waivers from trade contractors pursuant to Section 565. According to the Town, they have not received any such assignments and waivers from any of the trade contractors for the two projects.

The Town disputed Taxpayer's claim that it was entitled to a tax credit pursuant to Town Code Section 18-417(3)(A) ("Section 417") for taxes paid to another jurisdiction. The Town asserted Section 417 applies to owner-builders and Taxpayer was not an owner builder since, it had no ownership in the *Sunny or Happy Projects*.

The Town disputed Taxpayer's claim for a deduction for professional services. According to the Town, Town Code Section 18-415 ("Section 415") imposes a tax on the gross income from the business activity of construction contracting within the Town. The Town asserted that Section 415 provides no exemption or deduction for professional services to a contractor.

In response to Taxpayer's post-hearing arguments and documents, the Town asserted

Taxpayer had improperly raised a new issue regarding use of improper tax rates. According to the Town, the failure to raise the issue at the administrative hearing results in that issue being waived (See Neal v. City of Kingman, 169 Ariz. 133, 136, 817 P.2d 937, 940 (1991)). The Town argued that even if it was proper to raise the issue, Taxpayer was wrong in concluding the proper tax rate was three percent. The Town indicated Town Regulation 18-415.3(A) (“Regulation 415”) provides the following: “Gross income from a contract executed prior to the enactment date shall not be subject to the tax rate change, provided the contract contains no provision that entitles the construction contractor to recover the amount of tax.” According to the Town, the **Sunny Day Agreement** is a “cost-plus” agreement that sets forth the contractor’s costs to be reimbursed by the owner. Numbered among those costs are: “Sales, use or similar taxes imposed by a government authority that are related to the Work and for which the Contractor is liable.” The Town argued that since Taxpayer is to be reimbursed for taxes paid by Taxpayer, Taxpayer is subject to the increased three percent rate pursuant to Regulation 415.

After review of Taxpayer’s post-hearing documentation, the Town concluded Taxpayer was entitled to a credit of \$92,777.41 for taxes paid by the trade contractors. The Town concluded that much of the substantiation that was provided pertains to taxes paid outside the relevant audit period. In addition, the Town noted that in at least one case the information provided by the trade contractor was inaccurate. While Taxpayer claimed **Trade Contractor #1 and Trade Contractor #2** have paid taxes to the Town in the respective amounts of \$615.79 and \$53,480.95, the Town is unable to substantiate the amount of taxes paid. The Town indicated they tried on numerous occasions to contact these trade contractors but the calls have gone unanswered. As a result, the Town is unable to verify these taxes were attributable to either the **Sunny or Happy Projects**. Accordingly, the Town disagreed with granting a tax credit for these two trade contractors. While **Trade Contractor #3** may have informed Taxpayer that it intends to amend tax returns and pay the Town taxes in the amount of \$10,518.77, the Town concluded a tax credit should not be given to Taxpayer. According to the Town, Taxpayer is the contractor liable for the taxes and the Town was not willing to grant a tax credit that **Trade Contractor #3** might pay at some future undetermined date. The Town indicated that one other trade contractor remitted its Town privilege taxes to the State of Arizona (“State”) under the wrong business class. According to the Town, the trade contractor paid the proper tax to the State but the State did not credit the Town with the full amount because Taxpayer had reported under the wrong business class.

The Town noted that there is no statutory provision which allows interest to be abated by the Town. The Town indicated that ARS Section 42-1123 (B) (“Section 1123”) provides the interest added to the principal is there after considered a part of the principal amount of tax. The Town opined that the imposition of penalties was appropriate pursuant to Section 540(f) as Taxpayer failed to report any income related to the **Happy or Sunny Projects**. The Town indicated that Taxpayer appeared to be arguing that it had been advised by a competent tax practitioner that no taxes were owed. The Town argued that ARS Section 42-1125 (“Section 1125”) permits waivers of penalties for reliance on tax practitioners that occur prior to the delinquency date of the return. In this case, the Town

asserted the advice came after the audit was conducted. In response to Taxpayer's post hearing arguments, the Town indicated they had calculated taxes, interest, and penalties based upon information available to the Town at the time of the audit. The Town agreed to recalculate the taxes, interest, and penalties based upon the month of receipt by Taxpayer of the checks.

The Town recommended Taxpayer's request for attorney fees be denied. The Town noted that Town Code Section 18-578 ("Section 578") provides a taxpayer is entitled to attorney fees only if both of the following are present: (1) the Town's position was not substantially justified; and, (2) the taxpayer ultimately prevails as to the most significant issue or set of issues. The Town argued that in light of the recent decision in Ormond, the Town's position was substantially justified. As a result, the Town asserted that even if Taxpayer was to ultimately prevail on any significant, the request for attorney fees should be denied.

Taxpayer Position

Taxpayer argued that it served as a construction consultant on the *Sunny and Happy Projects*. Taxpayer asserted that since it was a consultant rather than a contractor it should not be taxed on the amount that briefly passed through its bank accounts on the *Sunny and Happy Projects*, a total of \$16,234,282.13. According to Taxpayer, the only amount, if any, that it should be taxed on would be the amount of \$565,000.00 it earned on the Sundance and Festival Projects. Taxpayer noted that Town Code Section 18-200 ("Section 200") provides that gross income includes the value accruing from the providing of the services or in this case the \$565,000.00 amount.

Taxpayer argued that even if it was deemed to be a contractor, the trade contractors who worked on the Sundance and Festival Projects were construction contractors who were responsible for taxes on the amounts paid to them. Taxpayer indicated that Section 415(b)(1) provides that gross income derived from acting as a "subcontractor" is exempt from tax. Subcontractor is defined in Section 415 as a construction contractor who is performing work for a construction contractor who has provided the subcontractor with a written declaration it is liable for the tax for the project. It is also a requirement that the contractor must be provided with the general contractor's privilege license number in order to be considered as a subcontractor. Taxpayer asserted the exact opposite occurred in this case as each trade contractor specifically acknowledged that it was a prime contractor that was responsible for taxes. Each trade contractor signed a Prime Contractor's Certificate ("Certificate") with the Arizona Department of Revenue ("DOR"). As a result, Taxpayer argued each of the trade contractors were not subcontractors but rather prime contractors.

Taxpayer asserted that its contracts with *Sunny and Happy* differed substantially from a general contractor agreement. Taxpayer opined that a general contractor charges a set fee for a project and then negotiates with subcontractors and pays them. Taxpayer indicated

its contracts with *Sunny and Happy* provide that Taxpayer would receive a set fee for its services. According to Taxpayer it was to collect the amounts owing from *Sunny and Happy* for the trade contractors and pass those exact amounts on to the trade contractors. Taxpayer expressed a belief that the Town was well aware all of the trade contractors paid the Town sales taxes on their contracts. Taxpayer argued that the Town is now demanding to be paid for the taxes a second time.

In response to the Town, Taxpayer asserted it was not responsible for the actual performance of the construction contract by the trade contractors. According to Taxpayer, its Scope of Work during the construction phase of the contract was as follows:

“Preparation of trade contractors approved for use by the Owner; preliminary lien information, review and correction; preparation, review, and processing of applications for payment; change order preparation, processing, and contract modification; construction costs updates (line item), and budget comparison; revise and refine project construction budgets and monetary draw schedule on a monthly basis incorporating approved changes, and identify variances between actual and budgeted costs; lien waiver processing and filing; provide project update summary reports and field logs on a monthly basis; assess progress of the project, delays (if any) and the percentages of completion of trade contractors’ work”.

Based on the above, Taxpayer argued there was no requirement for it to perform or supervise any of the actual construction. Taxpayer indicated it was only required to administer the trade contracts. Taxpayer noted that each of the contracts with the trade contractors reflected that *Sunny and Happy projects* had the financial responsibility and funds available to fully fund and complete their respective agreements. As a result, Taxpayer asserted the trade contractors had acknowledged that the ultimate legal responsibility for paying them was with *Sunny and Happy owners*.

According to Taxpayer, each of the trade contractors signed a Form 5005 indicating that it would be liable for the taxes. Taxpayer asserted that a subcontractor signing a Form 5005 assumes the prime contracting transaction privilege tax liability. Taxpayer noted that ARS Section 42-5075(E) (“Section 5075”) provides as follows:

“if the person who provides the certificate is not liable for tax as a prime contractor, that person is nevertheless deemed to be the prime contractor in lieu of the contractor and is subject to the tax under this section under the gross receipts or gross proceeds received by the contractor.”

Since the trade contractors were personally responsible for the taxes on the *Sunny and Happy projects*, Taxpayer argued that would dispose of the City’s request that the trade contractors submit an Assignment and Waiver form (“Assignment”) pursuant to Section 565 in order to credit Taxpayer for tax payments made by the trade contractors. Taxpayer asserted that Section 565 simply does not apply because it is only applicable when it determined that the taxes have been reported and paid to the Town by the wrong taxpayer. In this case, Taxpayer asserts that the wrong taxpayer has not paid the taxes on the *Sunny and Happy projects*.

Taxpayer indicated that the terms of the *Sunny and Happy contracts* provided that Taxpayer would administer contracts with trade contractors, not perform them. Taxpayer argued that it did not assume the duties of a general contractor responsible for construction of the *Sunny and Happy Projects*. As discussed in *Ormond*, since Taxpayer did not have the responsibility to complete the trade contractors' work, Taxpayer could not be considered a contractor for that work. Taxpayer noted that Section 100 defines a "construction contractor" as a person who undertakes the construction, alternation, repair and/or improve a building, structure or project. Taxpayer argued that each of the trade contractors fits the definition of construction contractor.

Taxpayer requested all interest and penalties be waived. Taxpayer indicated that since the Town has received all tax payments to which the Town was entitled, Taxpayer opined it was unjust for the Town to claim interest. According to Taxpayer, it has consistently filed and paid Town taxes in a timely manner. Additionally, Taxpayer asserted that a tax advisor has advised Taxpayer that the taxes demanded by the Town were not proper. Accordingly, Taxpayer requested the penalties be waived.

Subsequent to the hearing, Taxpayer argued that the Town had utilized the wrong tax rate in determining the correct amount of taxes to be assessed. According to Taxpayer, the *Sunny* contract was entered into in June 2006. Taxpayer asserted that any contract entered into prior to August 2006 should have been calculated at two percent. Taxpayer argued the Town had erroneously assessed Taxpayer at a three percent rate. For that reason, Taxpayer indicated assessment amounts should be adjusted to reflect the proper tax rate.

In response to the Town, Taxpayer argued that the Town is required pursuant to Town Tax Code 18-555(d) ("Section 555") to determine the "correct tax liability of the taxpayer." As a result, Taxpayer asserted the Town has an affirmative legal duty to assess the proper tax rate. Taxpayer argued that the *Neal* case did not apply in this case. According to Taxpayer this tribunal has been given an opportunity to rule on this issue. Taxpayer also noted that if judicial review is necessary, Taxpayer would be entitled to a trial *de novo* where Taxpayer could raise the issues. In reply to the Town, Taxpayer argued that Town Ordinance No. 41-06, dated May 16, 2006, specifically states that "the additional tax imposed pursuant to this ordinance shall not apply to contracts entered into prior to the effective date of this ordinance." Taxpayer asserted that to the extent there appears to be a conflict between the Ordinance and the Regulation, the more specific ordinance prevails over the more general regulation. Taxpayer also argued that Town had read portions of all the contracts signed by Taxpayer with trade contractors provides that the trade contractors assumes all liability to privilege taxes. As a result, Taxpayer opined the contracts exclude any reimbursement to the Taxpayer for the taxes assessed.

Taxpayer provided sworn statements by the Trade contractors on the *Sunny and Happy projects* setting forth in detail the tax amounts paid by the trade contractors during the audit period was \$131,811.98. In reply to the Town, Taxpayer indicated any dispute between the State and the Town should be resolved between the State and the Town. Taxpayer asserted it should receive full credit for the amount of taxes paid by the trade

contractor.

According to Taxpayer, *Trade Contractor #2 and Trade Contractor #1* have both indicated they have paid transaction privilege taxes to the Town in the amounts of \$53,480.95 and \$615.79 respectively. Taxpayer indicated that neither of these companies has provided requested substantiation information. In reply to the Town, Taxpayer asserted the Town did not dispute taxes were paid but would not allow a tax credit to Taxpayer because the Town was unable to substantiate the amount of taxes paid. According to the Taxpayer, the Town's tax records should show how much was received in tax payments from these two companies.

According to Taxpayer, the trade contractor *Trade Contractor #3* has informed Taxpayer that it would amend its returns and pay the Town taxes in the amount of \$10,518.77. In reply to the Town, Taxpayer opined that it believes these taxes have now been paid and Taxpayer should receive a tax credit in the amount of \$10,518.77.

Taxpayer argued the Town has improperly computed interest and penalty charges. According to Taxpayer the Town has calculated the dates of receipt of funds to Taxpayer based upon the dates on checks. Taxpayer asserted it was the owner's normal procedure on the *Sunny Project* to hold on to the checks and deliver them to Taxpayer at a later date. Taxpayer argued that if it is determined any taxes are owed; the penalties and interest should be calculated using the dates Taxpayer actually received the funds.

ANALYSIS

The first issue to be resolved is whether or not Taxpayer was a construction contractor. As noted by the parties, Section 100 provides a broad definition for a construction contractor. It is defined as a person that undertakes or offers to undertake to or does himself or through others construct, alter, etc. a building or structure or project, etc. We conclude based on testimony and review of the contracts between the *Sunny and Happy Owners* and Taxpayer that Taxpayer was clearly a construction contractor pursuant to Section 100. The contract refers to Taxpayer as a contractor; Taxpayer was required to fully execute and perform the entirety of the scope of the work set forth in the contract; Taxpayer was to be solely responsible for the methods and means of accomplishing the work; Taxpayer was to be paid for the actual cost of the work plus a contractor's fee; and Taxpayer had full responsibility for performance of the work and direction of the work force. Consistent with the definition set forth in Section 100 and the Ormond case, we conclude Taxpayer was a construction contractor.

As noted by Taxpayer, the Court in Ormond did not include the amounts in gross income that Ormond received to pay other contractors on behalf of the project owners. We find the facts are sufficiently different from Ormond to lead us to a different conclusion. In this case, Taxpayer contracted directly with each of the trade contractors. Taxpayer had

the authority to order changes at any time to the work; Taxpayer was obligated to pay the trade contractors for the contract amount of their work; and, before final payment was made to the trade contractors, Taxpayer had to accept the work of the trade contractors. Based on all the above, we conclude that the amount of Taxpayer's gross income for the *Sunny and Happy Projects* included the amounts paid to the trade contractors. As a result, we uphold the Town's determination of gross income pursuant to Section 415.

As part of its post-hearing brief, Taxpayer raised the issue of the Town using an improper tax rate. That was the first time that issue was raised by Taxpayer. While we understand Taxpayer may raise this issue on a subsequent appeal, we do not find we have jurisdiction to decide this issue. Town Code Section 18-570 ("Section 570") makes it clear that a protest "petition may be amended at any time prior to the time taxpayer rests his case at the hearing". Since that issue was not raised prior to the conclusion of the hearing, this tribunal does not have jurisdiction pursuant to Section 570 to consider that issue.

As part of the process, the Town was able to ascertain that the trade contractors have paid \$92,777.41 in Town taxes on the *Sunny and Happy Projects* during the audit period. Clearly, Taxpayer should be given a tax credit for that amount. While Taxpayer claimed *Trade Contractor #1 and Trade Contractor #2* have paid taxes to the Town in the respective amounts of \$615.79 and \$53,480.95, the Town did not allow a credit as they were unable to substantiate the amount of taxes paid. Based on the Town's response, we conclude they agree these two trade contractors have paid taxes but are unable to ascertain the amount. We do not understand why the Town can't tell from their records the amount of taxes paid by these two companies. As a result, we conclude *Trade Contractor #1 and Trade Contractor #2 Companies* have paid taxes on work done during the audit period on the *Sunny and Happy Projects* and the best evidence available is that the amounts paid were \$615.79 and \$53,480.95. Accordingly, we shall order the Town to grant Taxpayer a tax credit for these amounts. We reach a different result for *Trade Contractor #3*. The only evidence presented was that *Trade Contractor #3* will be paying \$10,518.77 of taxes to the Town sometime in the future. We conclude there is not sufficient evidence to demonstrate when or if the taxes will be paid by *Trade Contractor #3*, as a result, no tax credit should be granted Taxpayer. We will note that if *Trade Contractor #3* does pay the taxes to the Town prior to this decision being issued, Taxpayer should be granted a tax credit. The next issue is the trade contractor that paid the proper amount of taxes to the State but the State has yet to credit the Town for the full amount of taxes paid. We concur with Taxpayer that this is an issue that should be resolved between the Town and State. Taxpayer should be granted a tax credit for the full amount paid to the State.

Since Taxpayer failed to timely pay taxes or timely file tax reports, the Town was authorized pursuant to Section 540 to assess interest and penalties. Section 540 does not permit any waiver of interest unless the underlying taxes are also abated. As a result, no interest can be waived on the remaining taxes that are owed. The penalties shall be waived if there is a demonstration by the taxpayer of reasonable cause for failing to timely file and failing to timely pay taxes. With the exception of the fee amounts of \$565,000.00 fee collected by Taxpayer, we do find Taxpayer has presented reasonable

cause for failing to timely pay taxes on the remaining taxable income. While we did not agree with Taxpayer's arguments on non-inclusion of the monies paid to the trade contractors, we find the Taxpayer's arguments could be made by a reasonable businessperson. Accordingly, we conclude all penalties should be waived with the exception of those penalties assessed on the \$565,000.00.

Taxpayer has requested reimbursement of fees and costs related to this matter. We note that Town Code Section 578 ("Section 578") provides that such a request should be presented to the Town's Taxpayer Resolution Officer. We also note Section 578 provides the fees and costs may be reimbursed if the taxpayer is the prevailing party. For a taxpayer to be considered as the prevailing party there must be finding that the Town's position was not substantially justified and the taxpayer must prevail on the most significant issue or set of issues. As the Presiding Officer, we conclude the most significant issue(s) was whether or not Taxpayer was a contractor and what the amount of Taxpayer's gross income was. Taxpayer did not prevail on those issues. While the tax credit was a significant dollar amount, we do not conclude it was the most significant issue.

FINDINGS OF FACT

1. On January 30, 2008, Taxpayer filed a protest of a tax assessment made by the Town.
2. After review, the Town concluded on February 13, 2008, that the protest was timely and in the proper form.
3. On April 7, 2008, the Hearing Officer ordered the Town to file a response to the protest on or before May 22, 2008.
4. On May 21, 2008, the Town filed a response to the protest.
5. On May 23, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before June 13, 2008.
6. On June 11, 2008, Taxpayer filed a reply.
7. On June 13, 2008, a Notice scheduled this matter for hearing commencing on August 20, 2008.
8. Both parties appeared and presented evidence at the August 20, 2008 hearing.
9. Both parties agreed to the following post hearing schedule: Taxpayer would provide information/documents to the Town regarding taxes paid to the Town by trade contractors for two projects at issue on or before September 29, 2008; the Town would provide comments/recommendations on or before October 29, 2008; and

Taxpayer would file a reply on or before November 12, 2008.

10. On September 29, 2008, Taxpayer sent an email requesting an extension to provide information/documents.
11. On September 30, 2008, the Hearing Officer granted Taxpayer an extension until October 8, 2008; the Town an extension until November 10, 2008; and Taxpayer an extension for a reply until November 24, 2008.
12. On October 8, 2008, Taxpayer provided information/documents.
13. On November 14, 2008, the Hearing Officer granted the Town an extension for a response until November 28, 2008, and Taxpayer an extension for a reply until December 12, 2008.
14. On November 24, 2008, the Town filed comments/recommendations.
15. On December 9, 2008, Taxpayer filed a reply.
16. On December 11, 2008, the Hearing Officer indicated the record was closed and a written decision would be issued on or before January 26, 2009.
17. The Town conducted an audit for the period June 2006 through October 2007.
18. Taxpayer was assessed for additional taxes in the amount of \$292,569.84, penalties totaling \$72,357.84, and interest up through December 2007 in the amount of \$14,808.98.
19. In June 2008, Taxpayer entered into the ***Sunny Day Agreement*** with the ***Sunny Owner*** for the construction of infrastructure improvements for a shopping center known as the ***Sunny Project***.
20. In December 2006, Taxpayer entered into the ***Happy Market Agreement*** for the construction of infrastructure improvements for a shopping center known as the ***Happy Project***.
21. The ***Sunny and Happy Projects*** were Taxpayer's only significant activities during the audit period.
22. Taxpayer entered into agreements with the owners of the ***Sunny and Happy Projects*** to act as a contractor.
23. Pursuant to the agreements, Taxpayer was to receive payment for the total costs of the ***Sunny and Happy Projects*** plus a contractor's fee.
24. Pursuant to the agreements, Taxpayer had the responsibility for performance of the

work and direction of the work force.

25. Pursuant to the agreements, Taxpayer was solely responsible for the methods and means of accomplishing the work.
26. Each trade contractor completed a Form 5000 indicating responsibility for payment of privilege taxes.
27. Taxpayer received a fee of \$565,000.00 for the *Sunny and Happy Projects*.
28. Taxpayer did not provide any of the trade contractors with a written declaration that Taxpayer would be responsible for the tax for the *Sunny and Happy Projects*.
29. Taxpayer entered into contracts directly with the trade contractors.
30. The work of the trade contractors had to be acceptable to Taxpayer.

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. Pursuant to Section 100 and the Ormond case, Taxpayer was a construction contractor.
3. Taxpayer was obligated to pay the trade contractors pursuant to the contracts between Taxpayer and each trade contractor.
4. The amount s Taxpayer contracted to pay the trade contractors was properly included in Taxpayer's gross income by the Town.
5. Failure to provide Taxpayer with tax credits of \$92,777.41, \$53,480.95, and \$615.79 for Town taxes paid by the trade contractors for work on the *Sunny and Happy Projects* will result in the Town collecting that amount of taxes twice for the same work.
6. Since Taxpayer failed to timely pay taxes, the Town was authorized to assess penalties for late payment.
7. Section 540 does not permit waiver of interest unless the underlying taxes are

abated.

8. With the exception of the \$565,000.00 fee collected by Taxpayer, we conclude Taxpayer has presented reasonable cause to have the penalties for late payment waived.
9. Taxpayer did not prevail on the most significant issue in this matter.
10. Taxpayer failed to raise the issue of the Town utilizing an improper tax rate in a timely matter pursuant to Section 570.
11. Taxpayer's protest should be partly granted and partly denied consistent with the Discussion, Findings, and Conclusions, herein.

ORDER

It is therefore ordered that the January 30, 2008 protest by *Taxpayer* of a tax assessment made by the Town of Buckeye is hereby partially granted and partially denied, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the Town of Buckeye shall credit *Taxpayer* for taxes paid by the trade contractors in the amounts of \$92, 777.41, \$53, 480.95, and \$615.77

It is further ordered that the Town of Buckeye shall credit *Taxpayer* for the full amount of taxes paid by the unnamed trade contractor to the State of Arizona.

It is further ordered that the Town of Buckeye shall recalculate the taxes, interest and penalties based upon the month of receipt by *Taxpayer* of the checks.

It is further ordered that the Town of Buckeye shall waive all late payment penalties except for those assessed on the fee amount of \$565,000.00.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer