

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: April 30, 2009

Decision: MTHO # 471

Taxpayer: *Taxpayer*

Tax Collector: City of Phoenix

Hearing Date: None

DISCUSSION

Introduction

On October 27, 2008, *Taxpayer* filed a protest of a denial of a refund request by the City of Phoenix (“City”). After review, the City concluded on December 15, 2008 that the protest was timely and in the proper form. On December 18, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) classified this matter as a hearing and ordered the City to file any response on or before February 2, 2009. On January 12, 2009, Taxpayer requested this matter be reclassified as a redetermination. On January 20, 2009, the Hearing Officer reclassified this matter as a redetermination. On February 12, 2009, the Hearing Officer extended the City’s deadline until February 26, 2009. On February 12, 2009, the City filed a response to the protest. On February 18, 2009, the Hearing Officer granted Taxpayer until March 11, 2009 to file a reply. On February 20, 2009, the Hearing Officer extended the deadline for Taxpayer’s reply until March 27, 2009. On March 24, 2009, Taxpayer filed a reply. On March 25, 2009, the Hearing Officer indicated that the record was closed and that a written decision would be issued on or before May 11, 2009.

City Position

The City indicated that on November 28, 2007, Taxpayer had requested a tax refund of \$79,999.30 in connection with the filing of amended returns for the period of July 2003 through December 2006. On September 15, 2008, the City denied the refund request.

The City asserted that City Code Section 445(b) (“Section 445(b)”) governs the issue in this case. Section 445(b) provides that “If individual utility meters have been installed for each tenant and the lessor separately charges each single tenant for the exact billing from the utility company, such charges are exempt.” These charges are exempt from the rental tax assessed in Section 445(a).

According to the City, Taxpayer is a property manager for two locations in the City: The City noted that one location consisted of a large complex by the airport which composed of the *Tenant One* buildings at *Phoenix One Location*. The City indicated there were

several other tenants other than the *Tenant One* at the *Phoenix One Property* but there was only one meter for the building.

The City asserted the invoices to the Taxpayer's tenants had one line item called "operating expenses" that included the utility charges, other charges, and the management fee. According to the City, a management fee was added to the total bill including the utility charge to the tenant. As a result, the City concluded there was no direct pass through of the utility charge to the tenant as required by Section 445(b).

Taxpayer Position

Taxpayer filed a request for a refund of \$79,999.30 for its sales tax returns for the period July 2003 through December 2006. Taxpayer argued that sales tax had been paid twice to the City: (1) Taxpayer had paid the sales tax on the utility invoice to the utility company and the utility company remitted the sales tax to the City; and, (2) Taxpayer had paid the sales tax to the City. Taxpayer asserted there are several buildings at the *Phoenix One Property*. According to Taxpayer each building has an electric meter. Taxpayer acknowledged that one of the buildings ("*Phoenix Two Location*") had more than one tenant but only a single electric meter. As a result, Taxpayer withdrew its refund claim for the *Phoenix Two Location* building. Taxpayer noted the remaining buildings are all single tenant buildings with an electric meter on each building. Taxpayer indicated they estimated the amount of electricity that will be consumed by the tenant and bill the same amount on a monthly basis for eleven months. Taxpayer performs an annual "true-up" to adjust to the exact amount of the billings. Taxpayer also acknowledged that it charged a management fee which is compensation to the owner for indirect, non-building specific costs. Taxpayer asserted the management fee was for services performed in connection with the tenancy and not for the provision of electricity.

Taxpayer argued that Section 445(b) does not specify how the exact amount should be billed. According to Taxpayer, the exact amount of electricity charge is passed through by means of the monthly estimates and the annual true-up. Taxpayer asserted to is unreasonable to expect a landlord who typically bills rent on a calendar monthly basis to provide on that bill the exact amount of the electric charge when the cycle for electric meter readings is different from the calendar month. Taxpayer indicated that the existence of a management services fee which is calculated against the gross receipts of the lessor does not in any way constitute a charge for the provision of electricity. Based on the above, Taxpayer requested the determination of the City regarding the taxability of the charge for electricity be redetermined.

ANALYSIS

The single issue in this matter whether or not the utility charges assessed by Taxpayer of its tenants falls within the provisions of Section 445(b). Based on the evidence presented, all of Taxpayer's buildings at the *Phoenix One Property*, with the exception of the *Phoenix Two Location* building, are single tenant buildings with an electric meter. As a

result, Taxpayer meets the first requirement of Section 445(b). The primary issue then becomes whether or not Taxpayer's billing method meets the requirement of the lessor separately charging each single tenant for the exact billing from the utility company. After careful review, we conclude that Taxpayer's billing method does not meet the requirement of the lessor separately charging for the exact billing from the utility company. While we can accept Taxpayer's estimation and true-up billing method, we cannot accept the added management fee on top of the utility bill. As a result of the added management fee, Taxpayer's tenants are paying for the billing from the utility company plus an added fee. We must conclude that Taxpayer does not charge the tenant for the exact billing from the utility company but instead charges for the utility bill plus a fee. Accordingly, Taxpayer does not meet the requirements of Section 445(b). Based on all of the above, Taxpayer's protest should be denied.

FINDINGS OF FACT

1. On October 27, 2008, Taxpayer filed a protest of a tax refund denial made by the City.
2. After review, the City concluded on December 15, 2008 that the protest was timely and in the proper form.
3. On December 18, 2008, the Hearing Officer classified this matter as a hearing and ordered the City to file any response on or before February 2, 2009.
4. On January 12, 2009, Taxpayer requested this matter be reclassified as a redetermination.
5. On January 20, 2009, the Hearing Officer reclassified this matter as a redetermination.
6. On February 12, 2009, the Hearing Officer extended the City's deadline until February 26, 2009.
7. On February 12, 2009, the City filed a response to the protest.
8. On February 18, 2009, the Hearing Officer granted Taxpayer until March 11, 2009 to file a reply.
9. On February 20, 2009, the Hearing Officer extended Taxpayer's deadline until March 27, 2009.
10. On March 24, 2009, Taxpayer filed a reply.
11. On March 25, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before May 11, 2009.

12. On November 28, 2007, Taxpayer filed a request for a tax refund in the amount of \$79,999.30 in connection with the filing of amended returns for the period July 2003 through December 2006.
13. On September 15, 2008, the City denied Taxpayer's refund request.
14. Taxpayer has a large complex by the airport which composed of the *Tenant One* buildings at the *Phoenix One Property*.
15. There is only one meter per building at the *Phoenix One Property*.
16. The invoices to Taxpayer's tenants had a line item entitled "operating expenses" which included the utility charges, other charges, and a management fee.
17. The *Phoenix Two Location* building had more than one tenant but only a single electric meter.
18. Taxpayer's remaining buildings at the *Phoenix One Property* are all single tenant buildings each with an electric meter.
19. Taxpayer charged tenants a management fee which was compensation to the owner for indirect, non-building specific costs.
20. Taxpayer bills rent on a calendar monthly basis.
21. The electric meter readings are on a different cycle than the calendar monthly basis.
22. Taxpayer estimated the amount of electricity that would be consumed by the tenant and bill the same amount on a monthly basis for eleven months.
23. Taxpayer preformed an annual "true-up" to adjust to the exact amount adjust to the exact amount of the electric billings.
24. Taxpayer adds a management fee onto the costs from the utility company which is charged to Taxpayer's tenants.

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. Taxpayer is in the business of renting real property pursuant to Section 445.

3. With the exception of the *Phoenix Two Location* building, Taxpayer's buildings at the *Phoenix One Property* were single tenant buildings each with an electric meter.
4. Taxpayer assessed a management fee on the charges from the utility company and collected the utility charge plus the management fee from Taxpayer's tenants.
5. Taxpayer does not charge its tenants the exact billing from the utility company and does not meet the requirements set forth in Section 445(b).
6. Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the October 27, 2008 protest by *Taxpayer* of a denial of a tax refund by the City of Phoenix is hereby denied.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer