DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: December 12, 2009
Decision: MTHO # 481
Taxpayer: ***Taxpayer***
Tax Collectors: Cities of Peoria & Phoenix
Hearing Date: May 20, 2009

DISCUSSION

Introduction

On January 5, 2009, a letter of protest was filed by ***Taxpayer*** of a tax assessment made by the Cities of Peoria and Phoenix ("Cities"). A hearing was commenced before the Municipal Tax Hearing Officer ("Hearing Officer") on May 20, 2009. Appearing for Taxpayer was ***Taxpayer Representatives***. Subsequent to the hearing, Taxpayer was represented by ***Taxpayer Representatives 2***. Appearing for the City of Peoria was ***Assistant City Attorney*** and ***Auditor***. Appearing for the City of Phoenix was ***Assistant City Attorney*** and ***Auditor***. At the conclusion of the post-hearing briefing schedule, the Hearing Officer indicated a written decision would be issued on or before December 11, 2009.

DECISION

Taxpayer is a dealer of recreational vehicles with dealerships located in both Cities. Taxpayer sells various types of recreational vehicles, including motor homes, travel trailers, and fifth-wheels. The Cities completed an audit of Taxpayer for the period July 2004 through December 2007. As a result, the City of Phoenix assessed Taxpayer for additional taxes in the amount of $36,840.36 and interest up through September 2008 in the amount of $4,508.35. The City of Peoria assessed Taxpayer for additional taxes in the amount of $71,909.18 and interest up through September 2008 in the amount of $13,869.35.

In its opening brief, Taxpayer requested the following documents to be admitted into evidence: Exhibit A—Arizona Forms 5000 relating to Montana LLCs; Exhibit B—Arizona Forms 5010 relating to sales to Montana LLCs; Exhibit C—Arizona Department of Transportation Affidavits for Arizona Non-Resident Permit relating to sales to Montana LLCs; Organization Documents for Montana LLCs; Exhibit E—Montana Secretary of State letters verifying LLCs existence; Exhibit F—Audit Assessment for ***RV Dealer*** relating to the period of July 1997 through January 2000 (Collectively referred to as "Exhibits"). Taxpayer argued that pursuant to Model City Tax Code Section 570(b) ("Section 570") the "petition may be amended at any time prior to the time the taxpayer

rests his case at the hearing or such time as the Hearing Officer allows for submitting of amendments in cases of redetermination without hearing." Taxpayer opined that since the Hearing Officer allowed the parties to supplement the arguments at hearing by submitting post-hearing memoranda, Taxpayer had not yet rested its case and could still admit documents into evidence. In response, the Cities asserted Section 570 refers to amendments to the original petition. The Cities opined this was not an amendment to the petition but was a request to submit additional evidence that could have been submitted at the hearing. According to the Cities, the hearing was not continued but was concluded on May 20, 2009. As a result, the Cities argued Taxpayer's request should be denied.

After review of Section 570, we must agree with the Cities that Taxpayer's reference is to amendments to the original petition. We also conclude that the hearing was concluded on May 20, 2009. The record was left open for the sole purpose of submitting closing arguments in which to discuss the evidence presented at the hearing and to make the proper legal arguments. The purpose of closing the evidentiary portion of the hearing is to insure that new evidence will not be introduced for which there is no opportunity to be heard or cross examined on. Even the portion that Taxpayer references for amendment to petitions provides "the Hearing Officer shall require a reasonable period of time for the Tax Collector to review and respond to the petition and to any written amendments." Based on the above, we conclude that Taxpayer's exhibits do not have to be admitted. In spite of that, we are going to admit the late filed exhibits for what value they may have into evidence. After review of the exhibits, we conclude these would have been documents that would have been reviewed by the auditors as part of the audit process. As a result, there should be no surprises to the Cities and we find the Cities were able to adequately respond to them in their briefs.

The primary issue in this matter is whether or not "fifth wheels" are "motor vehicles" and as such are exempt pursuant to the City of Peoria Code Section 12-465(l) and City of Phoenix Code Section 14-465(l) (Collectively referred to as "Section 465(l)"). Section 465(l) provides that "sales of motor vehicles to nonresidents of this State for use outside this State if the vendor ships or delivers the motor vehicle to a destination outside this State." are exempt retail sales. There was no dispute that the "fifth wheels" are not independently motor-driven. The fifth wheel vehicle is dependent upon a hook-up with a motor-driven vehicle such as a truck to be driven on the road. There was also no dispute that the fifth-wheel is a vehicle that contains living quarters and may have a motor for items such as an air conditioner. Taxpayer argued that neither the City Codes nor Title 42 of the Arizona Revised Statutes ("ARS") define the term "motor vehicle". Taxpayer asserted that we must look at the common and approved use of the term "motor vehicle". Taxpayer argued that "fifth wheels" are licensed and registered with the Arizona Department of Transportation ("DOT"), Motor Vehicle Division ("MVD"). Taxpayer also argued that a "fifth wheel" is always coupled with a tractor forming a tractor-trailer that has a motor that makes it go down the road. The Cities argued the fifth wheel has no motor and as a result it does not qualify as a motor vehicle.

It is clear that Section 465(l) provides an exemption for certain sales of motor vehicles. Model City Tax Code Section 360 ("Section 360") provides that all exemptions in the

Code are conditional upon adequate proof and documentation being provided by a taxpayer who claims an exemption. As a result, the burden is on Taxpayer to demonstrate a sale of a fifth wheel is a sale of a motor vehicle. We conclude that the term "motor vehicle" means exactly what it says, which is a vehicle with a motor that will provide power to go down the road. Taxpayer acknowledged the fifth wheel did not have a motor to power its way down the road. Taxpayer argued that by coupling the fifth wheel with a tractor, it would form a tractor-trailer which would have a motor to go down the road. Unfortunately for Taxpayer, Section 465(l) doesn't refer to a vehicle that is coupled with another vehicle with a motor that makes it go down the road. We must conclude that Taxpayer has failed to meet its burden of proof and documentation of demonstrating it is entitled for an exemption for the fifth wheels.

The City of Peoria conducted a previous audit of Taxpayer for the period July 1997 through January 2000. There was no mention in the previous audit assessment of any claimed exemptions for the sale of fifth wheels being denied. As a result, Taxpayer argued that the Cities were estopped from disallowing the claimed exemptions for sales of fifth wheels. Taxpayer relied on Valencia Energy Co. v. Arizona Department of Revenue, 191 Arizona 565, 959 P.2d 1256(1998). The four elements of equitable estoppel as set forth in Valencia are as follows: The party to be estopped commits acts inconsistent with a position it later adopts; Reliance by the other party; and Injury to the latter resulting from the former's repudiation of its prior conduct; and, applying estoppel against the taxing authority would neither unduly damage the public interest nor substantially and adversely affect the exercise of governmental powers. Taxpayer also relied on Luther Constr. Co., Inc. v. Ariz. Dep't of Revenue, 205 Ariz. 602, 605-7, 74 P.3d 276, 279-81 (Ariz. Ct. App. 2003). According to Taxpayer, the Court of Appeals held that a taxing authority's position on audit is an official affirmative conduct on which taxpayers may rely for purposes of establishing the elements of estoppel. Taxpayer argued that the change of position by the Cities resulted in a detriment to Taxpayer because it is now subject to an assessment on the sale of fifth wheels without having a chance to recoup the tax from its customers. Taxpayer noted that Model City Tax Code Section 542(b) ("Section 542") provides that if the Tax Collector adopts a new interpretation or application of any provision in the Chapter, the change applies only prospectively unless it is favorable to the taxpayer. Taxpayer argued that the Cities were improperly interpreting or applying a tax law retroactively.

The Cities argued that the Hearing Officer does not have the ability to assert estoppel against the Cities. The Cities cited Model City Tax Code Section 570 ("Section 570") as limiting the Hearing Officer's jurisdiction to apply equitable principles such as estoppel. The Cities opined that even if the Hearing Officer could apply estoppel, the elements of the test are not met. The Cities argued that the test set forth in Valencia requires affirmative acts inconsistent with the position later relied on. The Cities asserted that there was no such affirmative act taken during the 2001 audit. At worst, the Cities argued Taxpayer failed to follow the law regarding fifth wheels in a 2001 audit and the auditor missed it. The Cities argued that this was a far cry from Luther. According to the Cities, in Luther there was affirmative action shown where several letters were sent to the taxpayer specifically addressing the exact taxing provision at question in the taxpayer's

favor.

After review of Section 570, we can not find any language to limit the Hearing Officer's jurisdiction to apply equitable principles such as estoppel. The primary issue on the estoppel argument is whether or not either City engaged in affirmative conduct with a position it later adopted adverse to the Taxpayer. Clearly the City of Phoenix did not engage in any such affirmative conduct since they did not participate in the previous audit. In our review of the materials provided for the City of Peoria's 2001 audit of Taxpayer, we can find no reference to fifth wheels. As a result, we cannot conclude if the auditor either reviewed or was aware of any fifth wheel sales. Accordingly, we cannot conclude the City of Peoria had engaged in any affirmative conduct with fifth wheel sales that would be inconsistent with their position in this case. Based on all the above, we do not find that Taxpayer has met all four prongs of the Valencia test in order to apply estoppel.

Similar to the estoppel argument, Taxpayer argued that the Cities were precluded from retroactively taxing the sales of fifth wheels pursuant to Model City Tax Code Section 542 ("Section 542"). Section 542 provides that when "the Tax Collector adopts a new interpretation or application of any provision of this Chapter", the change could only be applied prospectively. We agree with Taxpayer that Section 542 precludes the Cities from retroactively applying a tax when the Cities adopt a new interpretation or application of any provision of the Chapter. We simply are not convinced there has been a new interpretation or application. We have not been provided any written document that would demonstrate the Cities previously had reviewed sales of fifth wheels and concluded those sales were exempt motor vehicle sales.

Next, we have the issue of whether or not sales made to Montana LLCs formed for Arizona residents were exempt. Section 465(l) provides that retail sales of motor vehicles to non-residents of this State for use outside this State if the vendor ships or delivers the motor vehicle to a destination outside this State is exempt from the tax imposed in Section 460. In this case, the Cities disallowed exemptions taken by Taxpayer for sales of motor vehicles to Montana LLCs. Taxpayer argued it has met the requirements of Section 465(l) and the exemptions should be allowed. Taxpayer provided evidence that for the sales in question there were LLCs that were organized under the laws of Montana. Further, Taxpayer provided evidence the vehicles were delivered outside the State. While the LLCs were organized under Montana law, most of the deliveries were to Blythe, California. Taxpayer also provided as part of their post-hearing exhibits, copies of Arizona Form 5000's ("Form 5000") and Arizona Form 5010's ("Form 5010") whereby a member of a Montana LLC would certify the vehicle was being purchased by a non-resident of the State for use out-of-the-State. As a result, Taxpayer argued it met the requirements set forth in Section 465(l) for a valid exemption.

The Cities on the other hand, argued the Montana LLCs were a sham that was established for the sole purpose of avoiding paying sales taxes to the Cities on the sales of vehicles. The Cities asserted that every interpretation is strictly construed against exemption from taxation ordinances. The Cities argued Taxpayer failed to meet its burden of proof and

the claimed exemptions should be denied.

There is no dispute that Taxpayer is entitled to an exemption for certain sales that meets the elements set forth in Section 465(l). We note that Model City Tax Code Section 360 ("Section 360") makes it clear that the burden of proof on claimed exemptions is on Taxpayer. Additionally Model City Tax Code Section 220 ("Section 220") requires the Tax Collector(s) to disregard any transaction which has been undertaken in an artificial manner in order to evade taxes. Based on our previous determination on fifth wheels, any of those sales are already disallowed as they would not meet the requirement of being a motor vehicle. After reviewing the record, we conclude the following: the Montana LLCs were legal entities formed in the state of Montana; for most of the Montana LLCs, the members were Arizona residents; the Montana LLCs were formed for the sole purpose of evading sales taxes on the purchase of a vehicle; all of the vehicles in question were delivered out-of-State with most being delivered to ***Hobson Way Property*** in Blythe, California; there was no evidence of any purpose for the Montana LLCs other than to avoid paying sales taxes on the purchase of a vehicle; there was no evidence of any contact by the LLC members to the state of Montana other than the formation of the LLC; Taxpayer provided copies of Form 5000's and Form 5010's whereby the members of the LLCs certified the purchases were exempt and certified they were not a resident of the State and were purchasing the vehicle for use outside the State; the City determined through the audit process that many of the members of the LLCs had State addresses, State checking accounts, purchased State service contracts, and purchased State insurance policies.

At first blush, it would appear that Taxpayer has met the requirements of Section 465(l): the LLCs were non-residents; the vehicles were delivered out-of-State; and, members of the LLCs have certified the vehicles would be utilized out-of-State. Is that enough for Taxpayer to satisfy its burden of proof? We think not. Section 220 requires the Cities to disregard any transaction which has been undertaken in an artificial manner in order to evade taxes. It is absolutely clear from the record that the sole purpose of the LLCs was to evade taxes. At a minimum, that should have alerted Taxpayer to do more than a cursory look at the transaction. We find the record demonstrates that Taxpayer understood it needed to do more. For example, Taxpayer provided an internal out-of-State delivery checklist for the vehicle sold to ***Sale 1*** that indicates Taxpayer checked for the following: out-of-State driver's license; out-of-State insurance; out-of-State credit application; out-of-State credit report; Form 5000; out-of-State delivery document; out-of-State payment; 30 day temp permit; and out-of-State park receipt. Based on that information, it is clear that the ***Sale 1*** would have been exempt if it was a sale of a motor vehicle. Unfortunately for Taxpayer, the ***Sale 1*** was a sale of a fifth wheel and would not qualify as a motor vehicle sale. Similarly, Taxpayer provided sufficient information on the vehicle sale to ***Sale 2*** to provide for an exemption if it was a sale of a motor vehicle. However, it also was a sale of a fifth wheel and would not qualify as a motor vehicle sale. Taxpayer noted the audit work papers of the Cities listed non-State driver's licenses for sales to: ***Sale 3***; ***Sale 4***; ***Sale 5***; ***Sale 6;*** and ***Sale 7***. We find the additional information on the out-of-State driver's licenses in conjunction with the Form 5000 and 5010's to be sufficient for a reasonably prudent business person acting in good faith to conclude these

were sales to out-of-State residents for out-of-State use. We note our conclusion may well have been different if there was evidence the purchaser obtained a new out-of-State drivers license coinciding with the time of the vehicle purchase. The ***Sale 5***, ***Sale 6***, and ***Sale 7*** were all sales of fifth wheels and would not qualify as an exempt motor vehicle sale. We conclude that the ***Sale 3*** and ***Sale 4*** were exempt sales of motor homes. We do not find Taxpayer has met its burden of proof of demonstrating any other sales were exempt. We conclude a reasonability prudent business person acting in good faith would not have relied solely on the Form 5000's and 5010's when the only connection to Montana was the formation of the LLCs for tax avoidance purposes.

As we previously noted, the LLCs were formed for the sole purpose to evade taxes. That should have alerted Taxpayer to do more than a cursory look. Even though Taxpayer's customers signed the Form 5000's and 5010's certifying under penalties of perjury, we conclude when there is a Montana LLC formed for the sole purpose of evading taxes and the delivery is to out-of-State other than Montana, Taxpayer must be able to have additional documentation to show the transaction was not undertaken in an artificial manner in order to evade taxes. As we previously noted, we would accept almost any non-State connection such as an out-of-State driver's license to demonstrate the transaction was not undertaken in an artificial manner to solely evade taxes. We have not seen such documentation for any of the remainder of Taxpayer's protest of disallowed exempt sales and we must conclude Taxpayer has failed to meet its burden of proof consistent with Sections 220 and 360.

The last issue involves several sales which Taxpayer alleged were improperly disallowed sales for resale. Taxpayer asserted that it sold a few vehicles to other dealers, including ***RV Dealer 2***, ***RV Dealer 3***, and ***RV Dealer 4***. We can find no reference to the Resale Sales until Taxpayer's reply brief. As a result, we must deny Taxpayer's request for exemptions for the Resale Sales since the Cities have had no opportunity to be heard on this matter. Based on all the above, Taxpayer's protest should be partly granted and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.

FINDINGS OF FACT

1. On January 5, 2009, Taxpayer filed a protest of a tax assessment made by the City.

2. The Cities completed an audit of Taxpayer for the period of July 2004 through December 2007.

3. The City of Phoenix assessed Taxpayer for additional taxes in the amount of $36,840.36, and interest up through September 2008 in the amount of $4,508.35.

4. The City of Peoria assessed Taxpayer for additional taxes of $71,909.18 and interest

up through September 2008 in the amount of $13,869.35.

5. Taxpayer is a dealer of recreational vehicles with dealerships located in both Cities.

6. Taxpayer sells various types of recreational vehicles, including motor homes, travel trailers, and fifth wheels.

7. The fifth wheels are not independently motor-driven.

8. The fifth wheels are a vehicle that contains living quarters and may have a motor for such items as an air conditioner.

9. The fifth wheel is dependent on a hook-up with a motor-driven vehicle such as a truck to be driven down the road.

10. The fifth wheels are licensed and registered with MVD.

11. The City of Peoria conducted a previous audit of Taxpayer for the period July 1997 through January 2000.

12. There has been no written document to demonstrate the Cities had previously reviewed sales of fifth wheels and concluded those sales were exempt motor vehicle sales.

13. For the sales in question, there were LLCs that were organized under Montana law.

14. For the sales in question, the vehicles were delivered out-of-State.

15. While the LLCs were organized under Montana law, most of the deliveries of the vehicles were to Blythe, California.

16. Most of the members of the LLCs were residents of the State.

17. Members of the Montana LLCs certified on Forms 5000 and 5010 that the vehicles were being purchased by non-residents of the State and were going to be used outside of the State.

18. There was no evidence of any purpose for the LLCs other than to avoid paying sales taxes on the purchase of a vehicle.

19. There was no evidence of any contact by the LLC members to the State of Montana other than the formation of the LLC.

20. Many of the members of the LLCs had State addresses, State checking accounts, purchased State service contracts, and purchased State insurance policies.

21. Taxpayer provided an internal out-of-State delivery checklist for the ***Sale 1*** that indicated Taxpayer checked for the following: out-of-State driver's license; out-of-State insurance; out-of-State credit application; out-of-State credit report; Form 5000; out-of-State delivery document; out-of-State payment; 30 day temp permit; and, out-of-State park receipt.

22. The ***Sale 1*** did not qualify as exempt because it was a sale of a fifth wheel.

23. The ***Sale 2*** did not qualify as an exempt sale as it was a sale of a fifth wheel.

24. In addition to the Form 5000 and Form 5010's, Taxpayer provided evidence of out-of-State driver's licenses for the ***Sale 3***, ***Sale 4***; ***Sale 5***; ***Sale 6***, and ***Sale 7***.

25. The ***Sale 3*** and ***Sale 4*** were sales of motor homes.

26. The ***Sale 5***, ***Sale 6***, and ***Sale 7*** were sales of fifth wheels.

27. There was no mention of the ***RV Dealer 4*** until Taxpayer's reply brief.

28. The auditors for the Cities would have reviewed Taxpayer's late filed Exhibits as part of the audit process.

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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's late-filed Exhibits are admitted for what value they may have.

3. Section 465(l) provides that "sales of motor vehicles to nonresidents of this State for use outside this State if the vendor ships of delivers the motor vehicle to a destination outside this State ." are exempt sales.

4. Section 360 provides that all exemptions are conditional upon adequate proof and documentation being provided by a taxpayer who claimed an exemption.

5. Taxpayer has failed to meet its burden of proving fifth wheels are motor vehicles as set forth in Section 465(l).

6. Section 570 does not preclude the Hearing Officer of applying equitable

principles such as estoppel.

7. We cannot conclude the Cities have engaged in any affirmative conduct with regard to the sale of fifth wheels that would be inconsistent with their position in this matter.

8. We conclude that Taxpayer has not met all the prongs of the Valencia test in order to apply estoppel.

9. We find that there is not sufficient evidence to conclude the Cities have adopted a new interpretation or application of any provision of the Code.

10. Section 465(l) provides that retail sales of motor vehicles to non-residents of this State for use outside this State if the vendor ships or delivers the motor vehicle to a destination outside this State is exempt from the tax imposed in Section 460.

11. Section 360 places the burden of proof on all claimed exemptions on Taxpayer.

12. Section 220 requires the Cities to disregard any transaction which has been undertaken in an artificial manner in order to evade taxes.

13. The sole purpose of forming the LLCs was to avoid taxes.

14. The ***Sale 1*** and the ***Sale 2*** were sales of fifth wheels and would not qualify for an exemption pursuant to Section 465(l).

15. The ***Sale 5***, ***Sale 6***, and ***Sale 7*** were sales of fifth wheels and would not qualify for an exemption pursuant to Section 465(l).

16. Taxpayer has met its burden of proof that the ***Sale 3*** and ***Sale 4*** were exempt sales of motor vehicles pursuant to Section 465(l).

17. The remainder of Taxpayer's protest of disallowed exempt sales is denied as Taxpayer failed to meet its burden of proof pursuant to Sections 220 and 360.

18. Taxpayer's request for exemptions for the ***RV Dealer 4*** is denied as the Cities had no opportunity to be heard on the request.

19. 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 5, 2009 protest by ***Taxpayer***. of tax assessments made by the Cities of Peoria and Phoenix is hereby partly denied and partly granted, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the Cities shall include the ***Sale 3*** and ***Sale 4*** as exempt sales.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer