

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: March 1, 2010
Decision: MTHO # 529
Taxpayer: *Taxpayer*
Tax Collector: City of Mesa
Hearing Date: December 22, 2009

DISCUSSION

Introduction

On May 21, 2009, a letter of protest was filed by *Taxpayer* of a tax assessment made by the City of Mesa (“City”). A hearing was commenced before the Municipal Tax Hearing Officer (“Hearing Officer”) on December 22, 2009. Appearing for the City were Tax Administrator, Tax Audit Supervisor, and Senior Tax Auditor. Appearing for Taxpayer were *Taxpayer Representatives*. At the conclusion of the December 22, 2009 hearing, the record was left open in order to allow Taxpayer time to file additional documentation. On January 29, 2010, the Hearing Officer indicated the record was closed and a written decision would be issued on or before March 15, 2010.

DECISION

On February 9, 2009, the City issued three non audit compliance assessments of Taxpayer. The first assessment was for the location at *University Property*, for the period of August 2005 through September 2005. The first assessment was for additional taxes in the amount of \$194.60, interest up through January 2009 in the amount of \$49.52, penalties in the amount of \$48.66, and a license fee of \$50.00. The second assessment was for the location at *Power Property*, for the period of April 2006 through November 2006. The second assessment was for additional taxes in the amount of \$858.10, interest up through January 2009 in the amount of \$150.42, penalties in the amount of \$214.54, and a license fee of \$50.00. The third assessment was for the location at *Signal Butte Property* for the period of January 2008 through December 2008. The third assessment was for additional taxes in the amount of \$1,017.56, interest up through January 2009 in the amount of \$25.39, and penalties of \$212.40.

Each of Taxpayer’s properties was a nail salon where nail technicians provided manicures and pedicures. The City assessed taxes pursuant to City Code Section 5-10-445 (“Section 445”) on the business activity of licensing for use of real property. The City noted that City Code Section 5-10-100 (“Section 100”) defines “licensing for use” as

an agreement between the user (“licensee”) and the owner (“licensor”) for the use of the licensor’s property whereby the licensor receives consideration. The City concluded that the nail technicians utilized by Taxpayer were independent contractors which created a licensing for use situation. According to the City, the situation was similar to that of commissions retained from vending or ATM machines owned by others and located within the premises of business establishments.

Taxpayer disputed the City’s conclusion that the agreements between Taxpayer and the nail technicians were related to “use of the licensor’s property”. Taxpayer provided evidence that it hires and trains nail technicians to service the clients of the salons. According to Taxpayer, the salons provide all the supplies for the nail technicians including polishes, soap, tools, etc. The nail technicians would use whatever work stations were available at the salons to provide services to Taxpayer’s clients. Taxpayer would collect all monies from the clients and at the end of each week; Taxpayer would pay a commission to the nail technicians for the services performed. Taxpayer indicated it received no monies from the nail technicians and the nail technicians only received commissions for services actually provided. Taxpayer acknowledged there were other salons in which the nail technicians actually paid a monthly rent for a work station and used their own supplies to service the clientele of the nail technicians. Taxpayer asserted it chose not to set up its salons in that manner. Taxpayer argued its situation was not similar to that of commissions being retained from vending or ATM machines.

It is clear from Sections 445 and 100 that in order for there to be a “licensing for use” tax that there must be an agreement whereby the licensee (nail technicians) pays a commission to the licensor (Taxpayer) for the use of Taxpayer’s property. After review of the evidence, we do not find such a situation in this case. The nail technicians are not obligated to pay Taxpayer any consideration. We conclude Taxpayer’s situation is different than a situation in which the nail technicians actually pay a monthly rent for a work station and use their own supplies. The latter situation would result in a taxable activity. Taxpayer’s situation is also different than that of vending or ATM machines in which the owner of those machines pays a commission for the use of space to place their machine. Based on all the above, we conclude the City has failed to meet their burden of proof that the licensing for use tax would apply in this case. The assessments are not upheld and Taxpayer’s protest should be granted. While the parties made arguments regarding the ownership of two of the salons, we do not find it necessary to make a determination on that issue.

FINDINGS OF FACT

1. On May 21, 2009, Taxpayer filed a protest of a tax assessment made by the City.

2. On February 9, 2009, the City issued three non-audit compliance assessments of Taxpayer.
3. The first assessment was for the *University Property* for the period of August 2005 through September 2005.
4. The first assessment was for additional taxes in the amount of \$194.60, interest up through January 2009 in the amount of \$49.52, penalties totaling \$48.66, and a license fee of \$50.00.
5. The second assessment was for the *Power Property* for the period of April 2006 through November 2006.
6. The second assessment was for additional taxes in the amount of \$858.10, interest up through January 2009 in the amount of \$150.42, penalties in the amount of \$214.54, and a license fee of \$50.00.
7. The third assessment was for the *Signal Butte Property* for the period of January 2008 through December 2008.
8. The third assessment was for additional taxes in the amount of \$1,017.56, interest up through January 2009 in the amount of \$25.39, and penalties totaling \$212.40.
9. Each of Taxpayer's properties was a nail salon where nail technicians provided manicures and pedicures.
10. Taxpayer provided evidence that it hires and trains nail technicians to service the clients of the salons.
11. The salons provide all the supplies for the nail technicians, including polishes, soap, tools, etc.
12. The nail technicians use whatever work stations that are available at the salons to provide services to Taxpayer's clients.
13. Taxpayer would collect all monies from the clients and at the end of each week; Taxpayer would pay a commission to the nail technicians for the services performed.
14. Taxpayer received no monies from the nail technicians and the nail technicians only received commissions for services actually provided.

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. Section 445 imposes a tax on the business activity of “licensing for use” of real property.
3. Section 100 defines “licensing for use” as an agreement between the user (“licensee”) and the owner (“licensor”) for the use of the licensor’s property whereby the licensor receives consideration.
4. The nail technicians were not obligated to pay Taxpayer any consideration for the use of Taxpayer’s property.
5. The City failed to meet their burden of proof that Taxpayer was engaged in the business activity of “licensing for use” of real property pursuant to Section 445.
6. Taxpayer’s protest should be granted, consistent with the Discussion, Findings, and Conclusions, herein.

ORDER

It is therefore ordered that the May 21, 2009 protest by *Taxpayer* of a tax assessment made by the City of Mesa is hereby granted, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Mesa shall amend the assessment consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer