

DECISION OF MUNICIPAL TAX HEARING OFFICER

January 3, 2011

Taxpayer's Representative
Representative's Address

Taxpayer
MTHO #594

Dear Taxpayer's Representative:

We have reviewed the evidence and arguments presented by *Taxpayer* and the City of Peoria (Tax Collector or City) at the hearing on November 17, 2010. The review period covered was May 1, 2006 through February 28, 2010. Taxpayer's protest, Tax Collector's response and our findings and ruling follow.

Taxpayer's Protest

Taxpayer was assessed City of Peoria privilege tax under the retail classification for Taxpayer's sale of food for home consumption (food) at retail. Taxpayer was not aware that the City of Peoria taxed the sale of food. Taxpayer had previously operated a convenience store in the City of Phoenix, which did not tax the sale of food. The State of Arizona does not tax the sale of food. When Taxpayer began its business in Peoria, the City did not give a brochure or otherwise inform Taxpayer that the City taxed the sale of food for home consumption. Taxpayer did not collect the tax from its customers during the audit period. Taxpayer should only be liable for tax from the time it was informed by the City that tax should be collected on the sale of food for home consumption. In addition, the assessment was not timely.

Tax Collector's Response

Taxpayer operates a convenience store that sells tangible personal property at retail. Taxpayer incorrectly exempted sales of food for home consumption from its reported gross income. Food for home consumption is not exempt under the Peoria City Code. It is Taxpayer's responsibility to know the law. Taxpayer did not ask for advice from the City regarding how to correctly report privilege tax to the City. The tax is imposed on the business, not on the customers. It is not relevant that Taxpayer did not pass the tax on to its customers. The assessment was timely issued within the statute of limitations.

Discussion

Taxpayer operates a convenience store. The Tax Collector conducted an audit assessment of Taxpayer for the period May 1, 2006 through February 28, 2010 and issued an assessment under the retail classification for Taxpayer's sale of food for home consumption that Taxpayer had exempted.

Taxpayer timely protested the assessment raising the following issues:

- Taxpayer was not aware that the sale of food for home consumption was taxable;

- Taxpayer did not collect the tax from its customers; and
- The assessment was untimely.

It is not disputed that the Peoria City Code (PCC) § 12-460 imposes a privilege tax on persons engaging in the business of selling tangible personal property at retail. Exemptions from the tax are provided by PCC § 12-465. PCC § 12-465(q) only exempts the sale of food purchased with food stamps.¹ The City does not exempt the sale of food for home consumption.

Taxpayer testified at the hearing that he was not aware that the City taxed the sale of food for home consumption. When Taxpayer applied for a privilege tax license, the City did not give Taxpayer any brochure or other information on how a convenience store should properly report its privilege tax. Taxpayer had previously operated a store in Phoenix, which at that time did not tax the sale of food. Phoenix had provided Taxpayer with information on how to report its tax. Taxpayer contends it should only have to pay tax after the City informed Taxpayer that the sale of food for home consumption was taxable.

Every person is presumed to know the law and its requirements, and a mistake as to such requirements is no excuse for failure to meet them. *Newman v. Fidelity Savings and Loan Association*, 14 Ariz. 354, 128 P. 53 (1912). No authority has been cited, and we have found none, that would allow an assessment to be vacated because the taxpayer was not aware it was subject to tax. It is Taxpayer's responsibility to be familiar with the code of the jurisdiction where it will be operating. Taxpayer did not look at the city code and did not ask the city for help. The fact that Taxpayer did not receive instruction from the City regarding the reporting of the tax does not invalidate the assessment.

Taxpayer argued that it did not pass the tax onto its customers. The City privilege tax is assessed against the business for the privilege of engaging in business in the City. The tax is not assessed against the customer. A taxpayer business may, but is not required to, pass the cost of the tax onto its customers. The taxpayer business is liable for the tax whether or not the cost of the tax was collected from the customer.

Taxpayer also argued that the assessment was untimely. Each month is a separate tax period. The earliest month in the audit period was May 2006. The return for May 2006 was required to be filed by the last business day of June 2006, which was June 30, 2006. The assessment was issued June 25, 2010. Therefore the assessment for the entire audit period was timely.

Finally, Taxpayer stated that he does not have the ability to pay the assessment. The purpose of the protest and hearing process is to determine whether the assessment was valid under the City Code. Taxpayer's ability or inability to pay the assessment does not bear on the validity of the assessment and is not a question that may be considered by the Hearing Office.

Findings of Fact

1. Taxpayer operates a convenience store within the City.
2. Taxpayer sells food for home consumption and non-food items at the store.
3. The Tax Collector conducted an audit assessment of Taxpayer for the period May 1, 2006 through February 28, 2010 and issued an assessment for additional city privilege tax of \$8,400.14, penalties of \$840.03 and interest through June 2010 of \$1,195.22.

¹ Taxpayer was allowed an exemption for food stamp purchases and sales of lottery tickets.

4. During the audit period Taxpayer did not separately charge its customers for or pay the City privilege tax on its sale of food for home consumption.
5. Taxpayer provided all requested records during the audit process.
6. Taxpayer paid privilege tax on its sale of non-food items.
7. The assessment included as taxable Taxpayer's sales of food for home consumption.
8. Taxpayer timely protested the assessment contending:
 - a. Taxpayer was unaware that the sale of food for home consumption was subject to the privilege tax;
 - b. Taxpayer did not collect the privilege tax on the sale of food for home consumption from its customers, and
 - c. The assessment was untimely.
9. The audit assessment was dated June 25, 2010.
10. Prior to the audit the City did not contact Taxpayer to inform Taxpayer that the sale of food for home consumption was taxable.
11. Taxpayer did not look at the City Tax Code or inquire at the City regarding the taxability of the sale of food for home consumption.
12. The City did not provide any erroneous information to Taxpayer.
13. Taxpayer stated at the hearing that it did not have the ability to pay the assessment.
14. The Tax Collector agreed at the hearing to abate the penalties that were imposed in the assessment.

Conclusions of Law

1. The City imposes a privilege tax on the activity of selling tangible personal property at retail. PCC § 12-460.
2. The City Code only exempts the sale of food purchased with food stamps. PCC § 12-465(q).
3. The City Code does not exempt the sale of food for home consumption from the City privilege tax. PCC § 12-465(q).
4. Taxpayer's sale of food for home consumption was not exempt from the City privilege tax.
5. The Tax Collector may issue an assessment at any time within four years after the date on which the return is required to be filed, or within four years after the date on which the return is filed, whichever period expires later. PCC § 12-550(a)(1).
6. Taxpayer's privilege tax return for May 2006, the first month in the audit period, was required to be filed on or before June 30, 2006. PCC § 12-530(c).
7. The Tax Collector issued the assessment within four years after Taxpayer's return for May 2006 was required to be filed and was therefore timely.

8. The City privilege tax is a tax on the person engaging in business and not a tax on the customer. *Arizona Department of Revenue v. Action Marine, Inc.* 218 Ariz. 141, 181 P.3d 188 (2008).
9. A business may, but is not required to, pass the cost of the tax onto its customers.
10. A taxpayer is liable for the tax whether or not the taxpayer passes the cost of the tax onto its customers. *Arizona Department of Revenue v. Action Marine, Inc., supra.*
11. Taxpayer is liable for the City privilege tax on its sale of food for home consumption even though Taxpayer did not pass the cost of the tax onto its customers.
12. Taxpayers are presumed to know the law and its requirements, and a mistake as to such requirements is no excuse for failure to meet them. *Newman v. Fidelity Savings and Loan Association*, 14 Ariz. 354, 128 P. 53 (1912).
13. Under the administrative review process a taxpayer may contest the applicability or amount of the tax imposed on him. PCC § 12-570(b)(1).
14. Taxpayer's inability to pay the assessment is not relevant regarding the validity of the assessment.
15. The City's assessment of privilege tax and interest against Taxpayer was proper.
16. The Tax Collector shall abate the penalties that were assessed.

Ruling

Taxpayer's protest of an assessment of privilege tax and interest made by the City of Peoria for the period May 1, 2006 through February 28, 2010 is denied.

The Tax Collector's Notice of Assessment to Taxpayer for the period May 1, 2006 through February 28, 2010 is upheld except that the Tax Collector shall remove the penalties from the assessment.

The parties have timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section -575.

Sincerely,

Hearing Officer

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c: **Revenue Manager**
Municipal Tax Hearing Office