

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: May 28, 2005

Decision: MTHO #169

Tax Collector: City of Scottsdale

Hearing Date: November 30, 2005

DISCUSSION

Introduction

On December 15, 2003, *Taxpayer*, Inc. (“Taxpayer”) filed a protest of a denial of a refund claim made with the City of Scottsdale (“City”). After review, the City concluded on December 30, 2003 that the protest was timely and in the proper form. On January 7, 2004, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response to the protest on or before February 23, 2004. On February 18, 2004, the City filed a response. On March 8, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before March 29, 2004. On April 15, 2004, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on June 7, 2004. On May 24, 2004, the Taxpayer requested the hearing be continued. On May 27, 2004 the Hearing Officer granted the continuance. On June 16, 2004, a Notice was issued rescheduling the hearing until August 19, 2004. On August 18, 2004, the parties requested a continuance while they discussed settlement. On August 18, 2004, the Hearing Officer granted the continuance. On October 18, 2004, a Notice rescheduled the hearing until November 30, 2004. Both parties appeared and presented evidence at the November 30, 2004 hearing. On November 30, 2004, the Hearing Officer ordered the Taxpayer to provide additional documentation to the City and for the parties to agree on dates for the documentation and initiate a conference call on December 22, 2004. A conference call was held on December 22, 2004 at which time the City indicated they needed more time to review the Taxpayer’s documentation. On December 24, 2004, the Hearing Officer ordered another conference call to be held on January 20, 2005. A conference call was held on January 20, 2005 at which time the City indicated it would be issuing a revised assessment. On January 21, 2005, the Hearing Officer ordered another conference call to be held on February 10, 2005. A conference call was held on February 10, 2005 at which time the parties indicated a settlement had been reached. On February 11, 2005, the Hearing Officer ordered the Taxpayer to file a withdrawal of its protest by March 11, 2005. On March 11, 2005, the Taxpayer requested an extension. On March 12, 2005, the Hearing Officer granted an extension until March 18, 2005. The Taxpayer filed a March 17, 2005 letter indicating the settlement had failed. On March 21, 2005, the Hearing Officer indicated the record was being closed and a written decision would be issued on or before May 23, 2005. On March 28, 2005, the City filed a response. On March 28, 2005, the Hearing Officer ordered the Taxpayer to file any reply by April 4, 2005. On April 18, 2005, the Hearing Officer indicated no reply had been filed and the record was now closed and a written decision would be issued on or before June 2, 2005.

Taxpayer Position

According to the Taxpayer, they overpaid taxes to the City for the period March 1999 through February 2003 in the amount of \$146,141. The Taxpayer indicated they negotiate with a hotel to rent rooms at a discount. The Taxpayer then re-rents the rooms to its customers based on cost plus a mark-up. During the period in dispute, the Taxpayer paid the City taxes on the amounts it collected from customers. When the customer of the Taxpayer arrives at a hotel, the customer signs in as a guest while the Taxpayer is responsible for paying the hotel for the room.

The Taxpayer asserts it neither owns nor operates hotels. The Taxpayer argued that the tax in question is for the business activity of operating a hotel business. The Taxpayer argued that the law provides that tax statutes are interpreted strictly against the tax collectors and any ambiguities are resolved in favor of the Taxpayer. Although the Taxpayer may rent hotel rooms to transients, the Taxpayer argued it is not subject to the City tax because the City Code applies to businesses that operate hotels. The Taxpayer had previously received a September 12, 2002 Private Taxpayer Ruling (“Ruling”) from the Arizona Department of Revenue (“DOR”) concluding the Taxpayer was not subject to State of Arizona (“State”) transaction privilege tax on the gross receipts from the business. The Taxpayer had also requested a Ruling from the City on the tax issue on October 8, 2002. The City issued a Ruling on November 20, 2002 concluding the Taxpayer was liable for City tax on its gross receipts.

City Position

The City asserted that the Taxpayer enters into agreements with hotels to obtain hotel rooms at a discount and then rents the rooms to its customers at a higher price. The City indicated that hotel is defined in city Code Section 100 (“Section 100”) as follows:

“Hotel” means **any public or private hotel**, inn, hostelry, tourist home, house, motel, rooming house, **apartment house**, trailer, **or other lodging place** within the City offering lodging, wherein the owner thereof, for compensation, furnishes lodging to any transient, except foster homes, rest homes, sheltered care homes, nursing homes, or primary health care facilities.

While the Taxpayer did not own the hotels, the City argued that the Taxpayer acted as a broker as defined in Section 100:

“Broker” means any person engaged or continuing in the business who acts for another for a consideration in the conduct of a business activity taxable under this Chapter, and who receives for his principal all or part of the gross income from the taxable activity.

As a result, the City argued the Taxpayer was subject to tax on the gross income from the business of charging for lodging and/or lodging space pursuant to City Code Section 444 (“Section 444”). In the case where the real property is not a hotel, the City argued the Taxpayer is a “licensor” acting on behalf of the real property owner and such activity is considered “Licensing (for use)” is defined in Section 100:

“Licensing (for Use)” means any agreement between the user (“licensee”) and the owner or the owner’s agent (“licensor”) for the use of the licensor’s property whereby the licensor receives consideration, where such agreement does not qualify as a “sale” or “lease” or “rental” agreement.

The City asserted the gross income of a licensor is taxable pursuant to City Code Section 445 (“Section 445”).

While the Taxpayer argued it did not separately state a municipal tax on its invoices, the City concluded based on the City’s examination of rental agreements that the Taxpayer did separately itemize and collect City tax. The City asserted that if any refund were to be allowed the Taxpayer would need to remit such taxes to those customers from whom the taxes were collected.

Subsequent to the hearing, the City reviewed additional documentation provided by the Taxpayer to determine whether the hotels which the Taxpayer had agreements with had paid taxes to the City on revenues received from the Taxpayer. As a result of that review, the City concluded that some hotels did pay taxes to the City in the amount of \$23,737.82 for their transactions with the Taxpayer.

ANALYSIS

It is clear from the evidence that the Taxpayer did not operate a hotel. As a result, the primary issue is whether the Taxpayer was acting as a broker for the hotels making the gross income of the Taxpayer taxable pursuant to Sections 100, 444 and 445. We conclude that the Taxpayer was acting as a broker for the hotels. In addition to the actions of the Taxpayers, we find language in the agreements between the Taxpayer and hotels supports a broker relationship. The following was extracted from the agreement between the *Hotel* and the Taxpayer: “Please advise your rates accordingly, and thank you in advance for any special marketing that you may do on our behalf.” Next, we must decide whether the taxable amount is the amount received by the Taxpayer from its customers or the amount paid by the Taxpayer to the hotels. In reviewing the rental agreements between the Taxpayer and its customers, the customer only receives a dollar amount for room rental plus taxes. There is no breakdown indicating an amount for room rental plus an amount for a service charge for the Taxpayer. The Taxpayer remits the agreed upon amount to the hotels and keeps the mark-up as a commissioned fee for its services. City Regulation 100.1 (a) (“Regulation 100.1 (a)”) provides that no deduction shall be allowed for any commissions or fees retained by a broker. As a result, we conclude that the total amount received by the Taxpayer is taxable gross income. Lastly, the City Regulation 100.1 (d) provides that liability of a broker is relieved of the responsibility to pay taxes when the taxes were paid by the principal. In this case, the Taxpayer has provided documentation demonstrating the hotels had paid taxes in the amount of \$23,737.82. As a result, those amounts should be refunded to the Taxpayer.

FINDINGS OF FACT

1. On December 15, 2003, the Taxpayer filed a protest of a denial of a refund claim made with the City.
2. After review, the City concluded on December 30, 2003 that the protest was timely and in proper form.
3. On January 7, 2004, the Hearing Officer ordered the City to file a response to the protest on or before February 23, 2004.
4. On February 18, 2004, the City filed a response.
5. On March 8, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before March 29, 2004.
6. On April 15, 2004, a Notice scheduled the matter for hearing commencing on June 7, 2004.
7. On May 24, 2004, the Taxpayer requested the hearing be continued.
8. On May 27, 2004, the Hearing Officer granted the continuance.
9. On June 16, 2004, a Notice was issued rescheduling the hearing until August 19, 2004.
10. On August 18, 2004, the parties requested a continuance while they discussed settlement.
11. On August 18, 2004, the Hearing Officer granted the continuance.
12. On October 18, 2004, a Notice rescheduled the hearing until November 30, 2004.
13. Both parties appeared and presented evidence at the November 30, 2004 hearing.
14. On November 30, 2004, the Hearing Officer ordered the Taxpayer to provide additional documentation to the City and for the parties to agree on dates for the documentation and initiate a conference call on December 22, 2004.
15. A conference call was held on December 22, 2004 at which time the City indicated they needed additional time to review the documentation of the Taxpayer.
16. On December 24, 2004, the Hearing Officer ordered another conference call to be held on January 20, 2005.
17. A conference call was held on January 20, 2005 at which time the City indicated it would be issuing a revised assessment.

18. On January 21, 2005, the Hearing Officer ordered another conference call to be held on February 10, 2005.
19. A conference call was held on February 10, 2005 at which time the parties indicated a settlement had been reached.
20. On February 11, 2005, the Hearing Officer ordered the Taxpayer to file a withdrawal of its protest by March 11, 2005.
21. On March 11, 2005, the Taxpayer requested an extension.
22. On March 12, 2005, the Hearing Officer granted an extension until March 18, 2005.
23. The Taxpayer filed a March 17, 2005 letter indicating the settlement had failed.
24. On March 21, 2005, the Hearing Officer indicated the record was being closed and a written decision would be issued on or before May 23, 2005.
25. On March 28, 2005, the City filed a response.
26. On March 28, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before April 4, 2005.
27. On April 18, 2005, the Hearing Officer indicated no reply had been filed and the record was closed and a written decision would be issued on or before June 2, 2005.
28. During the refund period, the Taxpayer negotiated with hotels to rent rooms at a discount.
29. The Taxpayer would re-rent the rooms based on cost plus a mark-up.
30. During the refund period, the Taxpayer paid the City taxes on the amounts it collected from its customers.
31. When the customer arrived at the hotel, the customer would sign in as a guest and the Taxpayer would be responsible for paying the hotel for the room.
32. The Taxpayer had received a September 12, 2002 Ruling from the DOR concluding the Taxpayer was not subject to State transaction privilege tax on the gross receipts from the business.
33. The Taxpayer had received a November 20, 2002 Ruling from the City concluding the Taxpayer was liable for City tax on its gross receipts.
34. The Taxpayer separately itemized and collected City taxes from its customers.
35. Some of the hotels that rented rooms to the Taxpayer remitted taxes to the City in the amount of \$23,737.82 for their transactions with the Taxpayer.

36. The following was extracted from the agreements between the *Hotel* and the Taxpayer: “Please advise your rates accordingly, and thank you in advance for any special marketing that you may do on our behalf.”
37. The rental agreements between the Taxpayer and its customers contained no breakdown indicating an amount for room rental plus an amount for a service charge for the 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. The Taxpayer did not operate hotels during the refund.
3. The Taxpayer acted as a broker for hotels during the refund period pursuant to Section 100.
4. The Taxpayer’s gross income for the refund period was taxable pursuant to Sections 100, 444 and 445.
5. During the refund period, the Taxpayer would remit the agreed upon amount to the hotels and keep the mark-up as a commission/fee for its services.
6. Regulation 100.1 (a) provides that no deduction shall be allowed for any commissions or fees retained by a broker.
7. Regulation 100.1 (d) provides that a liability of a broker is relieved of the responsibility to pay taxes when the taxes were paid by the principal.
8. The Taxpayer provided documentation to demonstrate that the hotels had paid \$23,737.82 to the City for transactions with the Taxpayer during the refund period.
9. The Taxpayer’s protest should be granted to the extent of a refund in the amount of \$23,737.82.

ORDER

It is therefore ordered that the December 15, 2003 protest of *Taxpayer*, Inc. is granted in part and denied in part consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Scottsdale shall refund taxes in the amount of \$23,737.82 plus applicable interest to *Taxpayer*, Inc. for the period March 1999 through February 2003.

It is further ordered that this Decision is effective immediately.