

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: May 1, 2007

Decision: MTHO #322

Taxpayer: *Taxpayer*

Tax Collector: Town of Cave Creek

Hearing Date(s): December 6, 2006 & March 8, 2007

DISCUSSION

Introduction

On August 22, 2006, *LLC* and *Members of the LLC* (“Taxpayer”) filed a protest of a tax assessment made by the Town of Cave Creek (“Town”). After review, the Town concluded on September 7, 2006, that the protest was timely and in the proper form. On September 16, 2006, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response to the protest on or before October 30, 2006. On October 29, 2006, the Town filed a response. On October 30, 2006, Taxpayer filed a submission in support of its protest. On November 3, 2006, the Hearing Officer ordered the Taxpayer to file any reply on or before November 24, 2006. On November 9, 2006, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on December 6, 2006. On November 13, 2006, Taxpayer filed a reply. On November 30, 2006, Taxpayer filed a supplemental reply. Both parties appeared and presented evidence at the December 6, 2006 hearing. On December 7, 2006, the Hearing Officer indicated the Town would review additional documentation provided by Taxpayer and the parties would submit a joint recommendation on or before February 6, 2007. The Town sent a February 6, 2007 email requesting a two week extension to file the joint recommendation. On February 7, 2007, the Hearing Officer granted an extension until February 20, 2007 for the parties to file a joint recommendation. On February 20, 2007, Taxpayer filed a letter indicating the parties were unable to agree on a joint recommendation and that the parties requested the hearing be reconvened. On February 21, 2007, a Notice scheduled the hearing to reconvene on March 8, 2007. Both parties appeared and presented evidence at the March 8, 2007 hearing. On March 9, 2007, the Hearing Officer indicated Taxpayer was to provide additional documentation to the Town by March 21, 2007, the parties would submit a joint stipulation by March 28, 2007 or the Town would provide comments/recommendations on that date, and Taxpayer would file any reply by April 4, 2007. On March 22, 2007, Taxpayer filed a letter complaining of leaks of confidential information. On April 4, 2007, the Town filed proposed adjustments. On April 9, 2007, the Hearing Officer ordered Taxpayer to file any reply by April 17, 2007. On April 17, 2007, Taxpayer filed a reply. On April 19, 2007, the Hearing Officer indicated the record was closed and a written decision would be issued on or before June 4, 2007.

Town Position

The Town performed an audit of Taxpayer for the period January 1, 2001 through June 30, 2006. The Town indicated Taxpayer was a newspaper located within the Town since May 2003. According to the Town, Taxpayer had no subscribers and its revenues were from advertising. The Town asserted Taxpayer was not licensed and not paying tax to the Town. As a result of the audit, the Town assessed Taxpayer for unreported publishing income pursuant to Town Tax Code Section 9-435 (“Section 435”) with taxes due in the amount of \$101,701.62 plus interest up through June 2006 in the amount of \$7,790.98. The Town also assessed penalties for failure to timely pay or timely file totaling \$22,297.66. According to the Town, the assessment was made on the LLC as well as individual members as no records were provided at the time of the audit to show a separation of funds and activities.

In response to Taxpayer’s argument that some of the income should have been allocated to other cities, the Town argued that Section 435(d) would apply as follows:

- (d) “Circulation” for the purpose of measurement of gross income subject to the tax, shall be considered to occur at the place of delivery of the published items to the subscriber or intended However, delivery by the United States mails shall be considered to have occurred at the location of publication.

As a result, the Town argued that all the gross income from newspapers mailed would be taxable by the Town.

In response to Taxpayers argument that the Arizona Department of Revenue (“DOR”) had provided advise that Taxpayers income was exempt pursuant to Arizona Revised Statute Section 42-5065 (“Section 5065”), the Town noted that no written substantiation was provided. Additionally, the Town asserted Section 5065 is state law and not applicable to cities and towns. According to the Town, the Town Business License (“License”) has a line in which a taxpayer voluntarily writes in their transaction privilege tax (“TPT”) license number. The Town indicated the License does not state that a TPT license is not required.

After the December 6, 2006 hearing, the Town agreed to review additional documentation supplied by Taxpayer. As a result of that review, the Town proposed the following adjustments: gross receipts should be reduced by \$215,204.30 to correct for errors and to match actual sales; a deduction should be allowed for non-taxable accounts in the amount of \$129,579.08; a deduction should be allowed for exempt sales in the amount of \$135,348.37; there should be a tax collected factor of \$66,731.42; and, there should be a deduction for out-of-Town hand or rack deliveries in the amount of \$851,948.98. After the March 8, 2007 hearing, the Town agreed to an additional deduction of \$6,647.60 for out-of-Town rack deliveries and a reduced tax collected factor of \$162.14. Based on the post hearing adjustments, the Town’s proposed assessment consisted of taxes due in the amount of \$66,569.29, penalties in the amount of \$16,642.32, and interest up through January 2007 in the amount of \$7,429.82. The Town acknowledged at the March 8, 2007 hearing that the assessment should only be against the LLC and not the individual members. In response to allegations made by Taxpayer, the Town asserted they had not leaked any confidential information.

Taxpayer Position

Taxpayer asserted the gross receipts calculated by the Town was not a statistically valid sample of the gross receipts of Taxpayer pursuant to Town Code Section 9.530(a)(1)(2) ("Section 530(a)"). According to Taxpayer, an allocation of gross receipts to the cities of Phoenix, Scottsdale, and Carefree pursuant to Section 435(e) has not been applied to the gross receipts of Taxpayer. Taxpayer noted that Section 435(e) provides as follows:

- (e) Allocation of taxes between cities and towns. In cases where publication or distribution occurs in more than one city or town, the measurement of gross income subject to tax by the Town shall include:
 - (1) that portion of the gross income from publication which reflects the ratio of circulation in all incorporated cities and towns in this State having substantially similar provisions; plus...

Based on the above, Taxpayer argued the gross receipts from newspapers that were mailed to other cities/towns would not be taxable by the Town.

Taxpayer indicated the DOR informed them they were not subject to the TPT pursuant to Section 5065. Accordingly to Taxpayer, the Town issued business licenses for the years 2004 and 2005 which stated the TPT number was not applicable. As a result, Taxpayer argued no penalties should be imposed.

Taxpayer complained at the March 8, 2007 hearing that the Town was leaking confidential information regarding this matter to one of Taxpayer's competitors. Subsequent to the March 8, 2007 hearing, Taxpayer again complained that confidential information regarding this matter was being leaked by the Town. As a result, Taxpayer requested sanctions against the Town through the denial of any past credit adjustments.

ANALYSIS

There was no dispute that Taxpayer was in the newspaper business in the Town since May 2003. There was no dispute that Taxpayer had unreported publishing income pursuant to Section 435. It was also clear that the Town's original audit contained errors in the amount of income and the amount of deductions. As a result, it was proper for the Town to review additional documentation provided by Taxpayer and recommend a post-hearing revised assessment. Accordingly, we shall approve the Town's revised assessment set forth in their April 4, 2007 letter. We must still decide if any of the Taxpayer's income should be allocated to other cities as argued by Taxpayer. We think not. Section 435(d) provides that delivery by the United States mails shall be considered to have occurred at the location of publication. There was no dispute that the publication occurred in the Town. Section 435(e) provides for an allocation between cities and towns in cases where publication or distribution occurs in more than one city or town. Since publication occurred in the Town, the only issue is whether or not distribution occurred in more than one city or town. There was evidence that some hand deliveries and some

street deliveries occurred in other cities and towns. The Town allocated taxes for those deliveries. The newspapers that were mailed to other cities and towns were distributed in the Town pursuant to Section 435(d). Accordingly, we conclude the Town has properly assessed Taxpayer for taxes on the newspapers mailed. We note that the Town's original assessment improperly assessed the members of the LLC as well as the LLC. The LLC is a "person" pursuant to the Town Code and is the proper taxpayer in this matter.

Since Taxpayer failed to timely file reports or timely pay taxes, the Town was authorized pursuant to the Town Code to assess penalties. However, those penalties may be waived if Taxpayer is able to demonstrate "reasonable cause" for failing to timely file and timely pay. We find Taxpayer's reliance on the DOR and a misunderstanding regarding the License to be "reasonable cause" and as a result we will waive the penalties.

We are unable to conclude the Town was releasing confidential information regarding this matter. Even if there were any such unauthorized leaks, we are certain there was no affect on the conclusions and findings reached in this Decision. As a result, we must deny Taxpayer's request for any sanctions.

FINDINGS OF FACT

1. On August 22, 2006, Taxpayer filed a protest of a tax assessment made by the Town.
2. After review, the Town concluded on September 7, 2006, that the protest was timely and in the proper form.
3. On September 16, 2006, the Hearing Officer ordered the City to file any response on or before October 30, 2006.
4. On October 29, 2006, the Town filed a response to the protest.
5. On October 30, 2006, Taxpayer filed a submission in support of its protest.
6. On November 3, 2006, the Hearing Officer ordered Taxpayer to file any reply on or before November 24, 2006.
7. On November 9, 2006, a Notice scheduled the matter for hearing commencing on December 6, 2006.
8. On November 13, 2006, Taxpayer filed a reply.
9. On November 30, 2006, Taxpayer filed a supplemental reply.
10. Both parties appeared and presented evidence at the December 6, 2006 hearing.

11. On December 7, 2006, the Hearing Officer indicated the Town would review additional documentation provided by Taxpayer and the parties would submit a joint recommendation on or before February 6, 2007.
12. The Town sent a February 6, 2007 email requesting a two week extension to file the joint recommendation.
13. On February 7, 2007, the Hearing Officer granted an extension until February 20, 2007 for the parties to file a joint recommendation.
14. On February 20, 2007, Taxpayer filed a letter indicating the parties were unable to agree on a joint recommendation and that the parties requested the hearing to be reconvened.
15. On February 21, 2007, a Notice scheduled the hearing to reconvene on March 8, 2007.
16. Both parties appeared and presented evidence at the March 8, 2007 hearing.
17. On March 9, 2007, the Hearing Officer indicated Taxpayer was to provide additional documentation to the Town by March 21, 2007, the parties would file a joint stipulation by March 28, 2007 or the Town would provide comments/recommendations on that date, and Taxpayer would file any reply by April 4, 2007.
18. On March 22, 2007, Taxpayer filed a letter complaining of leaks of confidential information.
19. On April 4, 2007, the Town filed proposed adjustments.
20. On April 9, 2007, the Hearing Officer ordered Taxpayer to file any reply by April 17, 2007.
21. On April 17, 2007, Taxpayer filed a reply.
22. On April 19, 2007, the Hearing Officer indicated the record was closed and a written decision would be issued on or before June 4, 2007.
23. The Town audited Taxpayer for the period January 1, 2001 through June 30, 2006.
24. Taxpayer was a newspaper located within the Town since May 2003.
25. Taxpayer had no subscribers and its revenues were from advertising.
26. Taxpayer was not licensed and not paying tax to the Town.

27. The Town assessed Taxpayer for unreported publishing income pursuant to Section 435 with taxes due of \$101,701.62 plus interest up through June 2006 in amount of \$7,790.98.
28. The Town assessed penalties for failure to timely pay or timely file totaling \$22,297.66.
29. The assessment was made on the LLC as well as individual members as no records were provided at the time of the audit to show a separation of funds and activities.
30. Taxpayer received no written guidance from the DOR.
31. The Town License has a line in which a taxpayer voluntarily writes in their TPT license number.
32. After review of additional information provided by Taxpayer, the Town proposed the following adjustments: gross receipts should be reduced by \$215,204.30 to correct for errors and to reflect actual sales; a deduction should be allowed for non-collectible accounts in the amount of \$129,579.08; a deduction should be allowed for exempt sales in the amount of \$135,348.37; there should be a tax collected factor of \$66,731.42; and, there should be a deduction for out-of-Town hand or rack deliveries in the amount of \$851,948.98.
33. After the March 8, 2007 hearing, the Town agreed to an additional deduction of \$6,647.60 for out-of-Town rack deliveries and a reduced tax collected factor of \$162.14.
34. The Town's revised assessment after the proposed adjustments consisted of taxes due in the amount of \$66,569.28, penalties in the amount of \$16,642.32, and interest up through January 2007 in the amount of \$7,429.82.
35. Taxpayer complained that confidential information regarding this matter was being leaked to outside sources by the Town.

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 LLC was a "person" pursuant to the Town Code.
3. The LLC was the only taxpayer in this matter.

4. During the audit period, Taxpayer had unreported publishing income pursuant to Section 435.
5. The Town's original audit had errors in the amount of income and the amount of deductions.
6. It was proper for the Town to amend the assessment after review of additional documentation provided by Taxpayer.
7. The Town properly included gross income from newspapers mailed to other cities in the Town's assessment pursuant to Section 435(d).
8. Since Taxpayer failed to timely file reports or timely pay taxes, the Town was authorized to assess penalties.
9. Taxpayer demonstrated "reasonable cause" to have the penalties waived.
10. The assessment was not affected by any possible leaks of confidential information
11. 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 August 22, 2006, protest of *LLC* and *Members of the LLC* of a tax assessment made by the Town of Cave Creek is hereby partly denied and partly granted, consistent with the Discussion, Findings, and Conclusions, herein

It is further ordered that the Town of Cave Creek shall revise the assessment by removing *Members of the LLC* individually from the assessment.

It is further ordered that the Town of Cave Creek shall revise its assessment to reflect the adjustments set forth in the Town's April 4, 2007 letter.

It is further ordered that the Town of Cave Creek shall revise its assessment by waiving all penalties.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer