

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: March 30, 2009
Decision: MTHO #465
Taxpayer: *Taxpayer*
Tax Collector: City of Tempe
Hearing Date: February 18, 2009

DISCUSSION

Introduction

On November 3, 2008, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Tempe (“City”). After review, the City concluded on November 14, 2008 that the protest was timely and in the proper form. On November 19, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response to the protest on or before January 5, 2009. On December 18, 2008, the City filed a response to the protest. On December 26, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before January 16, 2009. On January 16, 2009, Taxpayer filed a reply. On January 16, 2009, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on February 18, 2009. Both parties appeared and presented evidence at the February 18, 2009. On February 19, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before April 6, 2009.

City Position

The City indicated an assessment was issued for Taxpayer on October 31, 2007 for the period of October 2003 through September 2007. According to the City, Taxpayer protested that assessment and the Hearing Officer issued Decision MTHO #404 on August 11, 2008. Taxpayer subsequently filed an appeal of Decision MTHO #404. On September 18, 2008, the City issued an estimated assessment against Taxpayer covering the period from October 2007 through June 2008. The City assessed Taxpayer for additional taxes in the amount of \$20,862.36, and interest up through October 2008 in the amount of \$830.51. At the hearing, the City revised the assessment based on additional tax credits for taxes paid to the City by subcontractors of Taxpayer. The revised assessment was for additional taxes in the amount of \$15,175.52 and interest up through February 2009 in the amount of \$856.22. The City argued that the significant matters in dispute were considered by the Hearing Officer in MTHO #404. According to the City, Taxpayer had appealed Decision #404 and the City opined that this estimated assessment will also likely be appealed. As a result, the City requested this matter be consolidated with Decision #404. (We note that both the City and Taxpayer requested the record for Decision #404 be incorporated into this record.)

In response to Taxpayer's protest, the City did update the tax credits for taxes paid to the City by Trade Contractors for the *Project* ("Project"). The City indicated that the checks issued by *Processor* in this matter were joint checks that had to be signed by Taxpayer before a Trade Contractor could cash the check.

Taxpayer Position

Taxpayer indicated it served as a construction manager at the Project in the City and received a flat fee for services in the amount of \$781,000.00. Taxpayer asserted it administered contracts in excess of \$24,000,000.00 on the Project. According to Taxpayer, it merely served as a conduit for the majority of the money, which flowed from *Processor*, the owner of the Project, to the Trade Contractors who performed the actual construction. Taxpayer protested the City's initial assessment, dated October 31, 2007, and filed a protest. A hearing was held and the Hearing Officer issued Decision MTHO #404, dated August 11, 2008. Subsequently, Taxpayer filed an appeal of the Hearing Officer's Decision #404.

Taxpayer is now appealing the City's September 18, 2008 assessment for the remainder of the Project. Taxpayer argued there were several basic and fundamental differences between this audit and the previous audit. According to Taxpayer, in the previous audit, *Processor* paid checks to Taxpayer and Taxpayer served as a conduit for the funds from the developer to the Trade Contractors. Taxpayer indicated all funds were deposited into Taxpayer's account. In this case, Taxpayer opined it never received the funds that were paid by *Processor*. According to Taxpayer, *Processor's* checks were deposited directly into the accounts of the Trade Contractors. Taxpayer argued that the City never even attempted to prove that Taxpayer received any of the funds upon which it is being taxed. Taxpayer asserted that at least three of the checks did not even clear *Processor's* bank.

Taxpayer argued that the City miscalculated the tax payments that Trade Contractors have made to the City. Based on the above, Taxpayer requested this assessment be redetermined and that Taxpayer be awarded its attorney fees.

ANALYSIS

As agreed to be the parties, the record from MTHO #404 was incorporated into this record. After review of this matter, we do not find any significant difference in this case from the record in MTHO #404. We do not find the payments from *Processor* in this case to be significantly different than in MTHO #404. In MTHO #404, *Processor* paid Taxpayer and the monies went into Taxpayer's bank account and Taxpayer then paid the monies to the Trade Contractors. In this case, *Processor* issued joint checks to the Trade Contractors and Taxpayer. Although the monies didn't go into Taxpayer's bank account, Taxpayer still had control over when the Trade Contractors were paid. The Trade Contractors were not able to cash the checks until they were signed by Taxpayer. We do not find the difference significant enough to change our conclusion from MTHO #404

whereby we concluded the amount of Taxpayer's gross income for the Project included the amounts paid to the Trade Contractors.

Based on the record, we are satisfied the City has granted Taxpayer credit for all taxes that can be verified were paid by Trade Contractors to the City for the Project for the updated audit period. We shall require the City to provide any additional tax credits for payments made since the hearing by Trade Contractors to the City for the Project for the updated audit period.

Taxpayer also raised the issue that three checks (numbers 3114, 3262, and 3264) have never cleared *Processor's* bank as of October 1, 2008. As a result, Taxpayer argued it could not have received the income from these three checks. We note the City didn't file any response to this issue. In order to include these payments as part of the assessment, we shall require the City verify these checks or replacement checks have cleared *Processor's* bank.

Taxpayer has requested reimbursement of fees and costs related to this matter. We note that City Code Section 578 ("Section 578") provides that such a request should be presented to the City's Taxpayer Resolution Officer. We also note that Section 578 provides the fees and costs may be reimbursed if the taxpayer is the prevailing party. For a taxpayer to be considered as the prevailing party there must be a finding that the City's position was not substantially justified and the taxpayer must prevail on the most significant issue or set of issues. As a Presiding Officer, we conclude the most significant issue(s) was whether or not Taxpayer was a contractor and what the amount of Taxpayer's gross income was. Taxpayer did not prevail on those issues. We also are unable to conclude that the City's position was not substantially justified.

FINDINGS OF FACT

1. On November 3, 2008, Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on November 14, 2008 that the protest was timely and in the proper form.
3. On November 19, 2008, the Hearing Officer ordered the City to file any response to the protest on or before December 11, 2008.
4. On December 18, 2008, the City filed a response to the protest.
5. On December 26, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before January 16, 2009.
6. On January 16, 2009, Taxpayer filed a reply.

7. On January 16, 2009, a Notice scheduled the matter for hearing commencing on February 18, 2009.
8. Both parties appeared and presented evidence at the February 18, 2009 hearing.
9. On February 19, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before April 6, 2009.
10. The City issued an assessment for Taxpayer on October 31, 2007 for the period October 2003 through September 2007.
11. The City had assessed portions of the Project which Taxpayer protested in MTHO #404.
12. A Decision was issued on MTHO #404 on August 11, 2008.
13. Taxpayer filed an appeal of the Decision in MTHO #404.
14. On September 18, 2008, the City issued an estimated assessment against Taxpayer covering the period from October 2007 through June 2008.
15. The City assessed Taxpayer for additional taxes in the amount of \$20,862.36, and interest up through October 2008 in the amount of \$830.51.
16. At the hearing, the City revised the assessment based on additional tax credits for taxes paid to the City by Trade Contractors on the Project.
17. The revised assessment was for additional taxes in the amount of \$15,175.52 and interest up through February 2009 in the amount of \$856.22.
18. The checks issued by *Processor* in this matter were joint checks that had to be signed by Taxpayer before any Trade Contractor could cash the check.
19. The parties stipulated that the record from MTHO #404 should be incorporated into this record.
20. The City's assessment includes income from check numbers 3114, 3262, and 3264 which as of October 1, 2008 had not cleared *Processor's* bank account.

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 record from MTHO #404 is incorporated into this record.
3. Taxpayer had control over when the Trade Contractors were paid as the checks from *Processor* could not be cashed by the Trade Contractors until signed by Taxpayer.
4. We do not find any significant difference in this case as to the payments to the Trade Contractors than in MTHO #404.
5. The Conclusions and Analysis in the Decision for MTHO #404 apply in this case.
6. Check numbers 3114, 3262, and 3264 should not be included in Taxpayer's gross income if they never clear *Processor*'s bank.
7. Taxpayer should receive tax credits for all taxes paid to the City by Trade Contractors for the Project during the assessment period.
8. 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 November 3, 2008 protest by *Taxpayer* of a tax assessment made by the City of Tempe is hereby partly granted and partly denied consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Tempe shall verify if Check Numbers 3314, 3262, and 3264 or replacement checks have cleared *Processor*'s bank in order to include them in the gross income of Infrastructure, Dynamics Inc.

It is further ordered that the City of Tempe shall provide any additional tax credits for payments made by Trade Contractors to the City for the Project since the hearing on this matter.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer