

## DECISION OF MUNICIPAL TAX HEARING OFFICER

November 16, 2015

*Taxpayer's Representative*  
*Address of Taxpayer's Representative*

*Taxpayer*  
MTHO # 867

Dear *Taxpayer's Representative*:

We have reviewed the evidence and arguments presented by *Taxpayer* and the City of Phoenix (City or Tax Collector) at the hearing on June 22, 2015 and in post-hearing memoranda. The refund period covered was June 2008 through July 2008 and the assessment period covered was May 2008 through May 2013. Taxpayer's protest, Tax Collector's response and our findings and ruling follow.

### Taxpayer's Protest

Taxpayer is in the business of providing portable toilets to its customers. The City considers Taxpayer's separately stated charges for sanitation service taxable as a part of leasing the portable toilet units. Taxpayer contends it is providing a non-taxable sanitation service where the tangible personal property is an inconsequential element. At the minimum, Taxpayer's separately stated sanitation charges are exempt as maintenance charges.

Taxpayer also provides temporary fencing to customers. The City considered transactions involving fences that were installed in real property and fencing leased for over 180 days taxable by the City. Taxpayer contends that fencing leased for over 180 days is taxable at the location of the fence outside the City and not by the City. Fencing that is installed in real property is properly taxable as contracting at the location of the fence.

### Tax Collector's Response

Taxpayer is in the business of leasing portable toilets. Under the City's regulation, all charges by the lessor to the lessee for repair, maintenance or other service on the property rented is included in gross income. Taxpayer is therefore taxable on the total amount charged for providing the portable toilets.

Taxpayer leases temporary fencing to its customers. Leasing of temporary fencing is taxable under the rental of personal property classification even if the property is permanently or semi-permanently installed. Taxpayer's business office is located in the City. The City thus properly sourced the transactions to the City. Taxpayer did not show that its leases of fencing were for periods of over 180 days.

### Discussion

Taxpayer is engaged in multiple activities, including providing portable toilets and temporary fencing to customers. Taxpayer filed a claim for refund and the City issued a proposed assessment for the respective refund and assessment periods. The primary questions presented are:

- Whether Taxpayer providing portable toilets to customers is subject to the City privilege tax as the rental of tangible personal property?
- If it is subject to tax, may separately stated sanitation charges be excluded?
- Is Taxpayer providing temporary fencing to customers subject to the City privilege tax under the rental of personal property or construction contracting classification.
- Should the transaction be sourced for tax purposes to the City or to the city where the temporary fence was located.

### **The Rental of Portable Toilet Units is Subject to the Privilege Tax.**

Phoenix City Code (PCC) § 14-450 imposes the City privilege tax on every person engaging or continuing in the business of leasing, licensing for use, or renting tangible personal property for a consideration. Rent is defined as the amount paid by a hirer of personal property to the owner for the use thereof. Here, Taxpayer's customers obtain both the use of portable toilet units and the servicing of the units. Taxpayer provides the use of tangible personal property to its customers for a consideration. We hold that is the rental or licensing of tangible personal property under PCC § 14-450.

Taxpayer contends it is in the business of providing sanitation service and the tangible personal property (portable toilet) is an inconsequential element, citing Regulation § 14-460.4. Regulation § 14-460.4 was promulgated under PCC § 14-460(c)(5) that provides an exclusion from the privilege tax on sales of tangible personal property by professional or personal service occupations where such sales are inconsequential elements of the service provided. The question here is whether Taxpayer is subject to tax on rentals under PCC § 14-450 and not whether Taxpayer is subject to tax on retail sales under PCC § 14-460. The exclusion for inconsequential transfers of property under PCC § 14-460 is not applicable to transactions under PCC § 14-450. *See*, PCC § 14-400(d).

### **The Sanitation Fees Are Deductible Maintenance Charges.**

The privilege tax under PCC § 14-450 is measured by Taxpayer's gross income from the business activity. All gross income is presumed to be subject to the tax until the contrary is established by the Taxpayer. PCC § 14-400(c).

PCC § 14-450(c)(6) exempts from the tax separately billed charges for delivery, installation, repair, and/or maintenance as provided by Regulation.<sup>1</sup> Maintenance is generally defined as the act of maintaining; the state of being maintained; the upkeep of property or equipment. The sanitation service provided by Taxpayer is the act of maintaining and upkeeping the portable toilet units. While the City allowed an exemption for separately stated delivery charges, it did not allow an exemption for sanitation service charges because the lessee could not rent a portable toilet unit without the sanitation service. Neither the code nor the regulations provide for such a limitation.

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<sup>1</sup> Neither the Phoenix Code nor the Regulations under PCC § 14-450 define "maintenance".

Therefore, Taxpayer's separately stated charges for sanitation service are exempt from the City's privilege tax. In instances where Taxpayer provides a unit for a flat fee without separately stating service charges, such as for temporary events, the entire charge is subject to the tax with no deductions for any delivery or sanitation expenses included in the fee.

### **The Rental of Fencing by Taxpayer is Subject to the Privilege Tax as Rental.**

PCC § 14-450 imposes the City privilege tax on the business of leasing, licensing for use, or renting tangible personal property, including that which is semi-permanently or permanently installed within the City as provided by Regulation. Semi-permanently or permanently installed includes personal property if the property's installation requires alterations to the premises. Statutes should be interpreted so that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant. Giving meaning to "semi-permanently or permanently installed", Taxpayer's rental of temporary fencing is subject to city privilege tax under the rental classification even if the fencing is attached to posts that are driven into the ground or through concrete.

### **Sourcing of Transactions.**

Lease transactions are generally sourced to the City where taxpayer's business office is based. However, PCC § 14-450(c)(2) excludes from the tax by a city leases of personal property that is semi-permanently or permanently installed within another city or town that levies an equivalent excise tax on the transaction. Leases of semi-permanently or permanently installed property is not taxable in the city where the taxpayer has its business office unless the property is installed in that city or in another city that does not levy an equivalent excise tax.

### **Sourcing of Leases.**

Leases of portable toilets are not for periods of over 180 days and do not require alteration to the premises. Taxpayer's leases of portable toilets are properly sourced to the City.

Taxpayer leases panels that are free standing and are stabilized by sand bags. Taxpayer also leases fences that are attached to posts that are driven into the ground or through concrete. Taxpayer testified under oath that most of the fence lease agreements were for periods over 180 days. Taxpayer also leases panels for special events for periods less than 180 days.

Based on the record in this case, leases of free standing panels for periods 180 days or less and leases of fencing semi-permanently or permanently installed in the City or within a city that does not levy an equivalent excise tax are properly sourced to the City. Leases of panels and fencing for periods over 180 days or that are semi-permanently or permanently installed within another city that levies an equivalent excise tax on the transaction are not sourced to the City and are exempt from the City privilege tax under PCC § 14-450(c)(2).

### **Additional Assessment**

Taxpayer also provides temporary electrical service to contractors. At the time the proposed assessment was issued the parties had agreed on the treatment of charges for temporary electrical service. At the hearing and in its post-hearing response the City asserted it had the right to increase the proposed assessment based on information provided by Taxpayer at the hearing. The

Tax Collector contends Taxpayer made a material misrepresentation of fact or failed to disclose a material fact.

Generally, once the Tax Collector completes an examination and issues a written notice of the determination of a deficiency, the taxpayer's liability for the time period subjected to the examination is fixed and determined, and no additional audit or examination may be conducted by the Tax Collector with respect to such time period. PCC § 14-556(a). However, if a taxpayer failed to disclose material information or made a material misrepresentation of fact during the initial examination, the Tax Collector may increase an assessment (PCC § 14-556(c)(1) and (2)) or issue a new assessment (PCC § 14-556(a)(2)).

While general testimony and arguments were presented, the parties have presented minimal evidence regarding temporary power. While it appears the auditor may have been under a misimpression, the exact basis of the misimpression is not clear. We cannot conclude from the record whether there was a failure to disclose material information or if Taxpayer made a material misrepresentation of fact. In addition, the Tax Collector did not submit evidence regarding any proposed increase in the assessment. Therefore, the treatment of temporary power in the proposed assessment will not be disturbed here. This does not preclude the Tax Collector from issuing another proposed assessment under PCC § 14-556(a)(2) addressing the temporary power issue.

Based on the above, the City shall modify its denial of Taxpayer's claim for refund and the proposed assessment consistent with this decision.

#### Finding of Facts

1. Taxpayer is in the business of providing, for a fee, the use of portable chemical toilets and waste removal services and temporary fencing to customers in Arizona.
2. Taxpayer generally provides portable toilets on a month-to-month basis.
3. Taxpayer services the portable toilets periodically, once, twice or three times per week.
4. Service of the portable toilets includes cleaning, sanitation and waste collection.
5. Taxpayer collects fees consisting of "rental charges" and "service charges" for the containers, plus delivery and pick-up charges. Taxpayer separately charges for the portable toilet, sanitation and delivery of the unit.
6. Taxpayer also provides portable toilets on a short term basis (a day or a few days) for special events.
7. Taxpayer usually does not service the portable toilet during a special event.
8. Taxpayer charges a flat rate for providing portable toilets for special events. There is no separate charge for the portable toilet, delivery, pick-up or service of the toilet.
9. Taxpayer also performs sanitation services for customers who own their own portable toilet units.
10. Taxpayer filed a claim for refund for the refund period contending that it erroneously paid tax on its receipts from providing sanitation services. The City denied Taxpayer's claim for refund.

11. The City issued a proposed assessment contending that Taxpayer's separately stated charge for sanitation is a part of the rental of the portable toilet and is therefore subject to the City privilege tax.
12. The City did allow an exemption for separately stated sanitation charges for portable toilets owned by the customer.
13. Taxpayer also provides temporary fencing and panels for special events and on a long term basis to contractors and other customers.
14. Panels are sections of fence held together with a clamp and stand on the ground. Panels are free standing and are usually secured with sand bags.
15. Temporary fences and gates are attached to poles driven into the ground or through concrete.
16. The City also contends in its proposed assessment that Taxpayer's leases of panels and temporary fences were leases of tangible personal property and should have been sourced to the City even if the leased property was located outside the City.
17. Fences and panels, other than those provided for special events, are provided for periods of over 180 days. Fences and panels provided for special events are provided for periods less than 180 days and are free standing.
18. Taxpayer timely protested the City's denial of its claim for refund and the City's proposed assessment.

#### Conclusions of Law

1. The City privilege tax is imposed on persons engaging in certain business activities. Phoenix City Code, Chapter 14.
2. All gross income is presumed subject to the tax until the contrary is established by the taxpayer. PCC § 14-400(c).
3. Statutes should be interpreted so that no clause, sentence, or word is rendered superfluous, void, contradictory or insignificant. *State v. Superior Court for Maricopa County*, 113 Ariz. 248, 550 P.2d 626 (1976).
4. PCC § 14-450(a) imposes the City privilege tax on every person engaging or continuing in the business of leasing, licensing for use, or renting tangible personal property for a consideration, including that which is semi-permanently or permanently installed within the City as provided by Regulation.
5. Taxpayer is engaged in the business of renting tangible personal property when it rents its portable toilet units and temporary fencing.
6. PCC § 14-460 imposes the City privilege tax on the business activity of selling tangible personal property at retail.
7. PCC § 14-460(a)(5) excludes from the City privilege tax on retail sales sales by professional or personal service occupations where such sales are inconsequential elements of the service provided.

8. PCC § 14-400(d) provides that all exemptions, deductions, and credits set forth in this chapter shall be limited to the specific activity or transaction described and not extended to include any other activity or transaction subject to the tax.
9. The exclusion for inconsequential transfers of tangible personal property under PCC § 14-460 is not applicable to rental transactions under PCC § 14-450.
10. PCC § 14-450(c)(2) provides an exemption for the rental, leasing, or licensing for use of tangible personal property that is semi-permanently or permanently installed within another city or town that levies an equivalent excise tax on the transaction.
11. PCC § 14-450(c)(6) provides an exemption for separately billed charges for delivery, installation, repair, and/or maintenance as provided by Regulation.
12. Under Regulation 14-450.4(a) the term "semi-permanently or permanently installed" means that the item of tangible personal property has and is expected to have at the time of installation a permanent location at the site installed, as under a long term lease agreement.
13. Under Regulation 14-450.4(b) an item of tangible personal property is deemed permanently installed if its installation requires alterations to the premises.
14. Under Regulation 14-450.4(e) a rental, lease, or license agreement which specifies that the item in question shall remain, under the terms of the agreement, located within the same city or town for more than one hundred eighty consecutive days shall be sufficient evidence that such rented, leased, or licensed item is "permanently or semi-permanently installed" in said city or town, except when the item is mobile transportation equipment or other type of portable equipment.
15. Maintenance is defined as the act of maintaining; the state of being maintained; the upkeep of property or equipment. *See, Webster's on-line dictionary; Merriam-Webster On-line Dictionary.*
16. Taxpayer's separately stated sanitation service performed on portable toilets constitutes maintenance under PCC § 14-450(c)(6).
17. Taxpayer's separately stated charges for sanitation service is not subject to the City's privilege tax on the rental of tangible personal property. PCC § 14-450(c)(6).
18. Taxpayer is subject to city privilege tax on the rental of temporary fencing and panels whether those items are permanently or semi-permanently installed.
19. The rental of fencing that required alterations to the premises for its installation and rental of fencing where the term of the agreement was for a period of more than one hundred eighty consecutive days located in cities other than the City that levy an equivalent excise tax on the transaction are not subject to tax by the City.
20. The rental of fencing that was permanently installed in a city that does not levy an equivalent excise tax on the transaction are subject to tax by the City.
21. Based on the record in this case, leases of free standing panels for periods of 180 days or less and leases of fencing semi-permanently or permanently installed in the City or within a city that does not levy an equivalent excise tax are properly sourced to the City.

Ruling

The protest by Taxpayer of the City's denial of its claim for refund for the period June 2008 through July 2008 and the City's proposed assessment for the period May 2008 through May 2013 is granted in part.

The City shall modify its denial of Taxpayer's claim for refund and the proposed assessment consistent with this decision.

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: *City Attorney*  
Municipal Tax Hearing Office