

**Jerry Rudibaugh
Municipal Tax Hearing Officer**

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: July 31, 2003
Decision: MTHO #112
Tax Collector: City of Tucson
Hearing Date: None

DISCUSSION

Introduction

On December 18, 2003, *Taxpayer* filed a protest of a tax assessment made by the City of Tucson (“City”). After review, the City concluded on December 20, 2002 that the protest was timely and in the proper form. On April 11, 2003, the Municipal Tax Hearing Officer (“Hearing Officer”) classified the matter as a redetermination and ordered the City to file any response on or before May 26, 2003. On May 20, 2003, the City filed a response to the protest. On May 23, 2003, the Hearing Officer ordered the Taxpayer to file any reply on or before June 23, 2003. On June 20, 2003, the Taxpayer requested and was granted an extension until June 27, 2003. On June 25, 2003, the Taxpayer filed a reply. On June 26, 2003, the Hearing Officer filed a letter indicating a written Decision would be issued on or before August 11, 2003.

The Taxpayer sells and installs insulated replacement windows. The installation or replacement of windows is taxable as construction contracting pursuant to City Code Section 19-415(a) (“Section 415”). The City conducted an audit of the Taxpayer for the period September 1, 1998 through May 31, 2002. The audit results concluded that the Taxpayer owed additional tax of \$887.31 plus interest for underreported income, credit for a subcontracting job reported as taxable, and sales tax collected amounts deducted twice. The Taxpayer did not have a clear understanding of the tax law and collected excess tax during the audit period for construction contracting activities in unincorporated areas of Cochise County, Pima County, Pinal County, and Santa Cruz County (collectively, referred to as “Counties”).

City Position

The Taxpayer’s main office is located in the City. The Taxpayer also had business locations in the Cities of Tempe and Phoenix during the audit period. While the Taxpayer performed construction contracting in twenty-five Arizona cities, it was only licensed with and reporting to the State and to the cities of Phoenix, Tempe, and Tucson. The Taxpayer collected tax at the City rate and remitted the tax to the City for many of the Arizona cities in which the Taxpayer performed construction contracting. The City subsequently transferred the tax paid to the correct cities. Similarly, for work performed in unincorporated areas, (and New Mexico), the Taxpayer

collected tax at the City rate and remitted the tax to the City. According to the City, this tax becomes excess tax collected and must be paid to the taxing jurisdiction pursuant to Regulation 19-250.1 (“Regulation 250”). Regulation 250 provides as follows:

“If a taxpayer collects taxes in excess of the combined tax from any customer in any transaction, all such excess tax shall be paid to the taxing jurisdictions in proportion to their effective rates.”

Since the State of Arizona (“State”) declined to access the excess tax collected, the City assessed the entire amount of excess tax collected on construction contracting performed in Southern Arizona. The City asserted that if the Taxpayer can provide documentation showing the excess tax was refunded to their customers, the City would refund the tax.

The City recommended the Taxpayer’s request to abate the final audit billing of tax due of \$887.31 plus interest be denied. According to the City, these are amounts due because of underreported income, credit for a subcontracting job reported as taxable, and sales tax collected amounts deducted twice. The underreported income was from deposits or payments for jobs within the City limits that were not reported.

Taxpayer Position

The Taxpayer agreed that excess tax was erroneously collected by the company. However, the Taxpayer argued that the excess tax should not be paid to the City, but instead it should be paid to the State. The Taxpayer also requested a closing statement to abate the final audit billing of tax of \$887.31 plus interest. The Taxpayer asserted that it was unjust to require them to pay additional taxes when it has already overpaid taxes in the amount of \$27,702.06.

ANALYSIS

There was no dispute that the Taxpayer collected excess taxes and had remitted them to the City. We must disagree with the Taxpayer’s conclusion that it had overpaid taxes. The Taxpayer erroneously collected the tax from its customers and then remitted those monies to the City. As a result, the customers are the only ones that can argue they had overpaid taxes. The City has indicated its willingness to refund those taxes if the Taxpayer can provide documentation to show the excess taxes were refunded to its customers. Absent such documentation, the Hearing Officer concludes the City has the authority to keep the excess taxes pursuant to Regulation 250. The excess collected was as a result of an erroneous City tax charged to customers in unincorporated areas. As a result, the only city that has a legitimate claim for the excess taxes is the City. As to the Taxpayer’s request for abatement of the final audit, the Hearing Officer can find no basis for abating the taxes. That portion of the audit was separate from the excess tax issue and was based on the Taxpayer underreporting taxable income to the City. Based on all the above, the Taxpayer’s protest should be denied.

FINDINGS OF FACT

1. On December 18, 2002, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on December 20, 2002 that the protest was timely and in proper form.
3. On April 11, 2003, the Hearing Officer classified the matter as a redetermination and ordered the City to file a response to the protest on or before May 26, 2003.
4. On May 20, 2003, the City filed a response to the protest.
5. On May 23, 2003, the Hearing Officer ordered the Taxpayer to file any reply on or before June 23, 2003.
6. On June 20, 2003, the Taxpayer requested and was granted an extension until June 27, 2003.
7. On June 25, 2003, the Taxpayer filed a reply.
8. On June 26, 2003 the Hearing Officer filed a letter indicating a written Decision would be issued on or before August 11, 2003.
9. The Taxpayer sells and installs insulated replacement windows.
10. The installation or replacement of windows is taxable pursuant to Section 415.
11. The City conducted an audit of the Taxpayer for the period September 1, 1998 through May 31, 2002.
12. The audit results concluded that the Taxpayer owed additional tax of \$887.31 plus interest for underreported income, credit for a subcontracting job reported as taxable, and sales tax collected amounts deducted twice.
13. The Taxpayer did not have a clear understanding of the tax law and collected excess tax during the audit period for construction contracting activities in unincorporated areas of the Counties.
14. The Taxpayer's main office is located in the City.
15. The Taxpayer also had business locations in the Cities of Tempe and Phoenix during the audit period.
16. While the Taxpayer performed construction contracting in twenty-five Arizona cities, it

was only licensed and reporting to the State and to the cities of Phoenix, Tempe, and Tucson.

17. The Taxpayer collected tax at the City rate and remitted the tax to the City for many of the Arizona cities in which the Taxpayer performed construction contracting.
18. The City subsequently transferred the tax paid to the correct cities.
19. Similarly, for work performed in unincorporated areas (and New Mexico), the Taxpayer collected tax at the City rate and remitted the tax to the City.

CONCLUSIONS OF LAW

1. Pursuant to ARS Section 42-605 6, the Municipal Tax Hearing Officer is to hear all reviews of petitions for hearing or redetermination under the Model City Tax Code.
2. During the audit period, the Taxpayer was in the business of construction contracting within the City pursuant to Section 415.
3. During the audit period, the Taxpayer underreported construction income with the City.
4. During the audit period, the Taxpayer erroneously charged City tax to customers whose construction activity was located in unincorporated areas.
5. Pursuant to Regulation 250, the City is authorized to assess the excess City taxes paid by the Taxpayer's customers located in unincorporated areas.
6. The City is the only taxing jurisdiction to assess the excess City taxes paid.
7. Pursuant to City Code Section 19-560(c), the City can refund the excess taxes paid by customers if the Taxpayer can provide documentation showing the excess tax was refunded to its customers.
8. The Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the December 18, 2002 protest of *Taxpayer* of a tax assessment made by the City of Tucson is hereby denied.

It is further ordered that this decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer