

**Jerry Rudibaugh  
Municipal Tax Hearing Officer**

**DECISION OF MUNICIPAL TAX HEARING OFFICER**

Decision Date: December 8, 2003  
Decision: MTHO #133  
Tax Collector: City of Phoenix  
Hearing Date: None

**DISCUSSION**

**Introduction**

On July 2, 2003, *Taxpayer* ("Taxpayer") filed a protest of a tax assessment made by the City of Phoenix ("City"). After review, the City concluded on July 28, 2003 that the protest was timely, and in the proper form. On August 2, 2003, the Municipal Tax Hearing Officer ("Hearing Officer") classified this matter as a redetermination and ordered the City to file a response on or before September 16, 2003. On September 9, 2003, the City requested a continuance until October 16, 2003. On September 11, 2003, the Hearing Officer granted the continuance. On October 9, 2003, the City filed its response. On October 17, 2003, the Hearing Officer ordered the Taxpayer to file any reply on or before November 17, 2003. On November 24, 2003, the Hearing Officer filed a letter indicating no reply had been received and that the record was being closed with a written decision to be issued on or before January 8, 2004.

**City Position**

The Taxpayer filed their March 2003 tax returns claiming a retail deduction for tanning service for \$11,552.99. The City disallowed the deduction and assessed the Taxpayer for unpaid tax and penalty totaling \$228.75. According to the City, tanning services are taxable as rental, leasing or licensing for use of tangible personal property pursuant to City Code Section 14-450 ("Section 450"). The City asserts that City Code Section 100 ("Section 100") contains the following definition:

"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."

According to the City, the Taxpayer's customers use the Taxpayer's personal property under terms that do not qualify as a sale, lease or rental agreement. The City argued that case law provides that a license is only a privilege to enter a certain premises for a specific purpose. The City asserted that the Taxpayer's reliance on Energy Squared, Inc., Arizona Department of Revenue, 203 Ariz 507, 509, P15, 56 P.3d 686, 688 (App. 2002) is not appropriate since that case dealt with renting and leasing of tangible personal property. The City argued that licensing

for use of property is much broader than the definitions of rental or leasing. Based on the above, the City requested the tax and interest assessed should be upheld. The City did agree that the penalties should be waived since the Taxpayer had a reasonable belief that the tax was not due.

### **Taxpayer Position**

The Taxpayer indicated that it operated a tanning salon within the City. The Taxpayer acknowledged that it sold tanning supplies and clothing items, which were subject to the transaction business tax. The Taxpayer asserted that it has consistently reported such transactions and does not dispute they are subject to the tax. The Taxpayer did dispute the City's determination that the use of tanning beds is subject to transaction privilege tax pursuant to Section 450.

The Taxpayer asserted that they operate a variety of tanning beds and booths that allow the customer to obtain their desired tan in a safe manner. The Taxpayer relied on the Energy Squared case whereby the Court concluded the essence of renting was not present due to the lack of "exclusive use and control". According to the Taxpayer, they maintain control over the tanning equipment to insure the safety of their customers. The Taxpayer argued that their business is substantially similar in nature to other non-taxable services such as x-ray and imaging businesses, dental hygienists and hairdressers. As a result, the Taxpayer asserted tanning services are entitled to be treated as exempt professional services pursuant to City code Section 14-460.

### **ANALYSIS**

Based on the evidence presented, the customers of the Taxpayer do not purchase, lease or rent tangible personal property from the Taxpayer. However, the customer does appear to have an exclusive right to the use of tangible personal property (tanning beds and/or booths) for the period necessary to receive the desired tan. That use falls within the business activity set forth in Section 450. As a result, we must uphold the City's denial of the Taxpayer's claimed deduction. We also concur with the City that the Taxpayer has demonstrated a reasonable basis for their belief and all penalties should be waived.

### **FINDINGS OF FACT**

1. On July 2, 2003, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on July 28, 2003 that the protest was timely and in proper form.
3. On August 2, 2003, the Hearing Officer classified this matter as a redetermination and ordered the City to file a response on or before September 16, 2003.
4. On September 9, 2003, the City requested a continuance until October 16, 2003.

5. On September 11, 2003, the Hearing Officer granted the continuance.
6. On October 9, 2003, the City filed its response.
7. On October 17, 2003, the Hearing Officer ordered the Taxpayer to file any reply on or before November 17, 2003.
8. On November 24, 2003, the Hearing Officer filed a letter indicating no reply had been received and that the record was closed and a written decision would be issued on or before January 8, 2004.
9. The Taxpayer operates a tanning salon within the City.
10. The Taxpayer filed their March 2003 tax return claiming a rental deduction for tanning service for \$11,552.99.
11. The City disallowed the deduction and assessed the Taxpayer for unpaid tax and penalty totaling \$228.75.
12. The Taxpayer's customers use the Taxpayer's personal property under terms that do not qualify as a sale, lease or rental agreement.
13. The Taxpayer operates a variety of tanning beds and booths that allow the customer to obtain their desired tan in a safe manner.
14. The Taxpayer's customers have exclusive use of a tanning bed and/or booth while obtaining their desired tan.

### **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 City imposes a tax on the rental, leasing or licensing for use of tangible personal property pursuant to Section 450.
3. Section 100 defines licensing for use to mean an agreement between the user and the owner for the use of the owner's property whereby the owner receives consideration.
4. The use of the Taxpayer's tangible personal property by its customers falls within the business activity set forth in Section 450.
5. The Taxpayer's claimed deduction should be denied.
6. The Taxpayer demonstrated a reasonable basis for its position and all penalties should

be waived.

7. With the exception of the penalties, the Taxpayer's protest should be denied.

**ORDER**

It is therefore ordered that the July 2, 2003 protest of *Taxpayer* of a tax assessment made by the City of Phoenix should be denied with the exception of the penalties as discussed herein.

It is further ordered that the City of Phoenix shall remove all penalties assessed in this matter.

It is further ordered that this Decision shall be effective immediately.

Jerry Rudibaugh  
Municipal Tax Hearing Officer