

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: September 30, 2004

Decision: MTHO #165

Tax Collector: City of Phoenix

Hearing Date: May 13, 2004

DISCUSSION

Introduction

On December 22, 2003, *Taxpayer*, Inc. ("*Newspaper*" or "Taxpayer") filed a protest of a denial made by the City of Phoenix ("City") of portions of a tax refund requested by the Taxpayer. After review, the City concluded on December 23, 2003 that the protest was timely and in the proper form. On December 26, 2003, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before February 9, 2004. The City filed a response on February 3, 2004. On February 9, 2004, the Hearing Officer ordered the Taxpayer to file a reply on or before March 1, 2004. On March 1, 2004, the Taxpayer filed a reply. On March 8, 2004, a Notice of Tax Hearing ("Notice") was issued setting the matter for hearing commencing on May 13, 2004. Both parties appeared and presented evidence at the May 13, 2004 hearing.

On May 14, 2004, the Hearing Officer ordered the Taxpayer to provide additional information to the City on or before May 28, 2004; the City would file comments to the additional information and a closing brief on or before June 28, 2004; and, the Taxpayer would file a reply brief on or before July 28, 2004. The Taxpayer provided the additional information on May 27, 2004. On June 25, 2004, the Hearing Officer granted an unopposed request by the City for comments/brief until July 15, 2004; and, the Taxpayer's reply deadline was extended to August 15, 2004. The City filed its brief on July 15, 2004. The Taxpayer filed a reply brief on August 13, 2004. On August 16, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before September 30, 2004.

City Position

The City approved the Taxpayer's request for a refund with adjustments made by the City. Subsequently, the Taxpayer filed a protest of adjustments made by the City. The City had adjusted the refund in the amount of \$XXX for tax the City determined was due to other jurisdictions. The City argued that the Taxpayer was engaged in publishing a newspaper and was also engaged in the advertising business. The Taxpayer received revenues for direct mail advertising services referred to as "database marketing". City Code Section 405 ("Section 405") imposes a tax on advertising. City Regulation 405.2 ("Regulation 405.2") provides the following guideline for advertising activity within the City:

(a) In general. Except as provided elsewhere in this regulation, a person engaged in advertising activity shall be considered to be doing business entirely within the City if all or a major portion of the dissemination facilities such as broadcasting studios, printing plants, or distribution centers are located within the City limits. . . .

According to the City, the “database marketing” customers pay a per-piece fee for the following:

- A list, names and addresses, of intended recipients in a specific target consumer group.
- In some cases, the design of advertisements (mailers).
- In some cases, the printing of mailers.
- When mailers were printed, the printing was subcontracted to printers located in Phoenix, Chandler and Scottsdale.
- Printer mailers, regardless of who printed them, were delivered to a Tempe company contracted by the taxpayer to apply labels and postage to the advertisements and put them in the U.S. mail.

The City indicated the per-piece fee appeared to cover a range of activities. Since the purpose of the transaction for the customer was advertising, the City considered the entire amount of revenues as advertising. According to the City, the printing and distribution facilities the Taxpayer maintains within the City are not used in generating advertising revenue, but are used for the publishing business of the Taxpayer. The City asserted that the distribution center used for the “database marketing” was in the City of Tempe. As a result, the City argued that the “database marketing” revenues are taxable to the City of Tempe in its entirety. According to the City, the Taxpayer’s suggestion that because these items were mailed in the City, the items are taxable to the City has no legal support. The City asserted the Taxpayer was not in business with the U.S. Post Office.

The Taxpayer also had income from “shared mail”. This category involved the distribution of printed advertising inserts and flyers on behalf of business customers. The term “shared mail” was derived from the fact that advertising inserts and flyers representing various businesses are enclosed together in a “*Mailer*” jacket and mailed directly to selected residences. The City argued that the printing and distribution facilities the Taxpayer maintains within the City are not used in generating advertising revenue, but are used for the publishing business of the Taxpayer. The City believes the jurisdictions where the Taxpayer delivers or disseminates local advertising by means of direct mail have the right to levy their tax on the Taxpayer. The City estimated how much of the tax was owed each city jurisdiction using circulation information available to the City

Taxpayer Position

The Taxpayer argued that the revenues from “database marketing” were properly taxable by the City and not the City of Tempe. The Taxpayer acknowledged that during the refund period the Taxpayer engaged a third party business located in the City of Tempe to label and mail the direct mail pieces. However, the Taxpayer asserted that salespeople, graphic designers and project managers were located in the City. The Taxpayer also indicated that the third party providers utilize the central post office facility located on _____ in the City to process 98 percent of all printed materials. The Taxpayer asserted that Regulation 405.2 states that a “person” engaged in advertising activity is considered to be doing business entirely within a

particular city of “all or a major portion of the dissemination facilities... and are located within the City limits.” The Taxpayer argued that the “persons” performing the “database marketing” was the Taxpayer, and the majority of the Taxpayer’s dissemination facilities are located within the City.

According to the Taxpayer, there is no mention in Regulation 405.2 of a requirement to distinguish business activities. Further, Regulation 405.2 states that a “person” engaged in advertising activity is considered to be doing business entirely within a particular city if “all or a major portion of the dissemination facilities ... are located within the City. The Taxpayer is the “person” performing the direct mail and shared mail activities. The Regulation does not apply to a “segment” of a person as argued by the City.

The Taxpayer had “shared mail” revenues which involved the distribution of the *Mailer* advertising jacket with various advertising inserts enclosed. According to the Taxpayer, these jackets were assembled and distributed in the City of Tempe. The Taxpayer argued the design and administrative activities associated with the “shared mail” services occurred primarily at its City offices. The Taxpayer also noted that the third party provider from the City of Tempe delivers the *Mailer* product to post offices located throughout Maricopa County (“County”). According to the Taxpayer, 37 percent of all deliveries were made within the City.

Since the Taxpayer is the publisher of “The *Newspaper*”, they argued the majority of the Taxpayer’s dissemination activities occur in the City. Based on the above, the Taxpayer argued Regulation 405.2 dictates the “database marketing” and “shared mail” revenues should be located to the City. In response to the City, the Taxpayer noted that it contracts directly with the Postal Service for the mailing of shared mail and database marketing materials.

ANALYSIS

“Database Marketing”

Based on the evidence presented, the “database marketing” revenues resulted from the business activity of advertising. We also note that there was no argument made that this activity was an integral part of the newspaper business. As a result, no consideration was given to whether or not it was an integral part of the business. That leaves us with Regulation 405.2 and whether or not all or a major portion of the dissemination facilities such as broadcasting studios, printing plants, or distribution centers are located within any city. Since it was not concluded that “database marketing” was an integral part of the newspaper business, we can not agree with the Taxpayer that the major portion of the dissemination facilities were located in the City. Since all the printed mailers were delivered to a Tempe company to apply labels and postage, we find it reasonable to conclude that a major portion of the dissemination facilities such as distribution centers are located within the City of Tempe limits. Accordingly, we find the “database marketing” revenues shall be considered entirely within the City of Tempe.

“Shared Mail”

Based on the evidence presented, the “shared mail” revenues resulted from the business activity of advertising. Again, there was no argument made and thus no consideration given as to

whether or not this activity was an integral part of the newspaper business. Since the “*Mailer*” jackets are directly mailed to selected residences, we conclude that the delivery point would be the address of the direct mailer pursuant to Section 405. The Taxpayer has presented evidence that 37 percent of all deliveries were made within the City. Accordingly, we conclude that 37 percent of the “shared mail” revenues should be taxable to the City.

FINDINGS OF FACT

1. On December 22, 2003, the Taxpayer filed a denial made by the City of Phoenix (“City”) of portions of a tax refund requested by the Taxpayer.
2. After review, the City concluded on December 23, 2003 that the protest was timely and in proper form.
3. On December 26, 2003, the Hearing Officer ordered the City to file a response to the protest on or before February 9, 2004.
4. The City filed a response on February 3, 2004.
5. On February 9, 2004, the Hearing Officer ordered the Taxpayer to file a reply on or before March 1, 2004.
6. On March 1, 2004, the Taxpayer filed a reply.
7. On March 8, 2004, a Notice was issued setting the matter for hearing commencing on May 13, 2004.
8. Both parties appeared and presented evidence at the May 13, 2004 hearing.
9. On May 14, 2004, the Hearing Officer ordered the Taxpayer to provide additional information to the City on or before May 28, 2004; the City would file comments to the additional information and a closing brief on or before June 28, 2004, and, the Taxpayer would file a reply brief on or before July 28, 2004.
10. The Taxpayer provided the additional information on May 27, 2004.
11. On June 25, 2004, the Hearing Officer granted an unopposed request by the City for comments/brief until July 15, 2004, and the Taxpayer’s reply deadline was extended to August 15, 2004.
12. The City filed its brief on July 15, 2004.
13. The Taxpayer filed a reply brief on August 13, 2004.

14. On August 16, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before September 30, 2004.
15. The City adjusted the Taxpayer's refund request by \$XXX for tax the City determined was due to other jurisdictions.
16. The Taxpayer was in the business of publishing a newspaper.
17. The Taxpayer was also engaged in the advertising business.
18. The Taxpayer received revenues for direct mail advertising services referred to as "database marketing".
19. The "database marketing" customers pay a per-piece fee for the following:
 - A list, names and addresses, of intended recipients in a specified targeted consumer group.
 - In some cases, the design of advertisements (mailers).
 - In some cases, the printing of mailers.
 - When mailers were printed, the printing was subcontracted to printers located in Phoenix, Chandler and Scottsdale.
 - Printed mailers, regardless of who printed them, were delivered to a Tempe company contracted by the taxpayer to apply labels and postage to the advertisements and put them in the U.S. mail.
20. The per-piece fee covered a range of activities.
21. The printing and distribution facilities the Taxpayer maintains within the City are used for publishing a newspaper.
22. The distribution center used for the "database marketing" revenues was located in the City of Tempe.
23. The items associated with the "database marketing" revenues were mailed primarily from a post office located in the City.
24. The Taxpayer had income from "shared mail".
25. "Shared mail" involved the distribution of printed advertising inserts and flyers on behalf of business customers.
26. The term "shared mail" was derived from the fact that advertising inserts and flyers representing various businesses are enclosed together in a "**Mailer**" jacket and mailed directly to selected residences.
27. The City estimated how much of the tax on "shared mail" was owed each city jurisdiction by using circulation information available to the City.

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. During the refund period, the Taxpayer was in the publishing business pursuant to City Code Section 14-435.
3. During the refund period, the Taxpayer was in the advertising business pursuant to Section 405.
4. There was no evidence that the “database marketing” and “shared mail” revenues were an integral part of the newspaper business.
5. A major portion of the dissemination facilities such as distribution centers for the “database marketing” activity were located within the City of Tempe limits.
6. The delivery points of the “*Mailer*” jackets were the address of the direct mailer pursuant to Section 405.
7. Pursuant to Section 405, it is reasonable to conclude that 37 percent of the “shared mail” revenues for the refund period would be taxable by the City.
8. The Taxpayer’s December 22, 2003 protest should be granted to the extent it is consistent with the Discussion, findings, Conclusions, herein.

ORDER

It is therefore ordered that the December 22, 2003 protest of *Taxpayer*, Inc. of a denial made by the City of Phoenix of portions of a tax refund requested by *Taxpayer*, Inc. in hereby denied, in part, and granted in part, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Phoenix shall make what revisions are necessary to its denial of portions of the *Taxpayer*, Inc. refund request to reflect the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer