

Jerry Rudibaugh

Municipal Tax Hearing Officer

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: April 22, 2002

Decision: MTHO #17

Taxpayer: Taxpayer

Tax Collector: City of Marana

Hearing Date: March 5, 2002

DISCUSSION

Introduction

On August 21, 2001, Taxpayer filed a protest of the Town of Marana ("Town") tax assessment. After review, the Town filed its November 6, 2001 finding that the protest was timely and in the proper form. On November 15, 2001, the Municipal Tax Officer ("Hearing Officer") ordered the Town to file its response to the protest on or before January 3, 2002. On December 17, 2001, the Town filed its response. On December 31, 2001, the Municipal Tax Hearing Office scheduled the matter for hearing on March 5, 2002 in the Town. The Taxpayer and Town both appeared at the March 5, 2002 hearing and presented evidence.

The Taxpayer is in the construction business and entered into a May 7, 1998 agreement with Investments Co. to do construction work within the Town. On February 3, 1998, the Town adopted Ordinance 98.02 that raised the transaction privilege tax rate on contracting activities from 2% to 3% effective May 1, 1998. Section 4 of the Ordinance states that the new rate shall not apply to contracts entered into prior to May 1, 1998. The Town conducted an audit of the Taxpayer for the period July 1, 1997 through March 31, 2001. The Town concluded that the Taxpayer only collected and paid 2% tax on the construction work for Investments Co. The audit resulted in an assessment of \$25,870.83 including tax, penalty, and interest through June 30, 2001. The penalty was for failure to pay tax when due pursuant to Code Section 9-540(b)(2) ("Section 540(b)(2)").

City Position

The contract date is clearly May 7, 1998 as stated in the agreement. In addition, the Application and Certification for Payment ("Certification") indicates the contract date was May 7, 1998. The Town also provided a copy of the final type 2 grading permit which was dated May 29, 1998. The Town concluded that since the contract was not entered into prior to May 1, 1998, then the appropriate tax rate was 3% pursuant to Marana Ordinance 98.02. The Town asserted that it would be a nightmare for them to attempt to utilize some other start date other than the actual contract date. Based on the above, the City requested its assessment be upheld in the entirety.

Taxpayer Position

According to the Taxpayer there was work in progress on the Investments Co project as of April 20, 1998, which would have been prior to the effective date of the 3% tax. The Taxpayer applied for a preliminary grading permit from the Town on April 20, 1998. Investments Co provided the Town with an assurance check in the amount of

\$6,622.00 that was to be returned when a type 2 grading was obtained. The Taxpayer also provided a Jobsite Daily Report ("Daily Report") dated April 13, 1998 which contained notes regarding starting the job. Based on the above, the Taxpayer argued the contracting activity commenced prior to May 1, 1998 and should be taxed at the 2% rate.

ANALYSIS

It is clear from Ordinance No. 98.02 that construction contracts entered into on or after May 1, 1998 are to be taxed at a three percent rate. The issue in this case is whether or not the preliminary activity by the Taxpayer for Investments Co prior to May 1, 1998 was sufficient to conclude their contract was entered into prior to May 1, 1998. The Hearing Officer cannot reach that conclusion. There was clear evidence that Investments Co and the Taxpayer were in negotiations and were in agreement on some things prior to May 1, 1998. However, the May 7, 1998 contract between Investments Co and the Taxpayer is the earliest document that makes it clear Investments Co and the Taxpayer had reached a final agreement. The Taxpayer provided testimony that if they would have known about the May 1, 1998 date they could have signed an earlier contract date. Unfortunately, that did not happen and the Hearing Officer must conclude the construction activity entered into because of the May 7, 1998 contract is taxable at the three percent rate.

While the interest cannot be waived, the penalty for failure to pay the tax can be waived if the failure was due to reasonable cause. Under the facts of this case, the Hearing Officer concludes the Taxpayer did have reasonable cause to believe the proper tax rate was two percent. For that reason, the Hearing Officer shall waive the penalty for failure to pay the tax on a timely basis. Based on the above, the Taxpayer's protest is denied with the exception of the penalty for failure to pay tax in a timely manner.

FINDINGS OF FACT

1. On August 21, 2001, Taxpayer filed a protest of the tax assessment of the Town.
2. On November 6, 2001 the Town filed its conclusions that the protest was timely and in the proper form.
3. On November 15, 2001 the Hearing Officer ordered the Town to file its response to the protest on or before January 3, 2002.
4. On December 17, 2001, the Town filed its response.
5. On December 31, 2001, the Municipal Tax Hearing Office scheduled the hearing for March 5, 2002.
6. The Taxpayer and the Town both appeared at the hearing and presented evidence.
7. On February 3, 1998, the Town adopted Ordinance 98.02 that raised the transaction privilege tax rate on contracting activities from 2% to 3%, effective May 1, 1998.
8. The Taxpayer is in the construction business and entered into a May 7, 1998 agreement with Investments Co to do construction within the Town.
9. The Certification indicates the contract date was May 7, 1998.
10. The final type 2 grading permit was dated May 29, 1998.
11. There was preliminary activity by the Taxpayer for Investments Co prior to May 1, 1998.

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. Town Ordinance 98.02 imposes a tax rate of three percent on construction activity within the Town, effective on May 1, 1998.
3. Section 540 (b)(1) imposes a penalty for failure to file a timely return unless taxpayer shows that the failure is due to reasonable cause and not willful neglect.
4. The Taxpayer entered into a May 7, 1998 contract with Investments Co to perform construction activity within the Town.
5. The Taxpayer has demonstrated reasonable cause for failure to pay the tax in a timely manner.
6. The Taxpayer's protest should be denied with the exception of the penalty for failure to pay in a timely manner.

ORDER

It is therefore ordered that the August 21, 2001 protest filed by Taxpayer is hereby denied with the exception of the penalty for failure to pay in a timely manner.

It is further ordered that the Town of Marana shall remove the penalty for failure to pay in a timely manner from the assessment for Taxpayer.

It is further ordered that this decision is effective immediately.

Dated: April 22, 2002

Jerry Rudibaugh

Municipal Tax Hearing Officer