

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: August 31, 2005

Decision: MTHO #234

Tax Collector: City of Phoenix

Hearing Date: July 21, 2005

DISCUSSION

Introduction

On February 21, 2005, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Phoenix (“City”). After review, the City concluded on March 24, 2005 that the protest was timely and in the proper form. On March 28, 2005, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response on or before May 12, 2005. On May 4, 2005, the City filed a response. On May 9, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before May 31, 2005. On May 20, 2005, a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing on July 21, 2005. Both parties appeared and presented evidence at the July 21, 2005 hearing. On July 22, 2005, the Hearing Officer indicated the City was going to re-allocate tax payments made by the Taxpayer and provide a detailed summary of the results to the Taxpayer on or before August 4, 2005. The Taxpayer was to file any comments/disagreements with the summary and/or the May 4, 2005 response of the City on or before August 18, 2005. Subsequently, the City filed a detailed summary. On August 22, 2005, the Hearing Officer indicated the Taxpayer had not filed any comments/disagreements and that the record was now closed and a written decision would be issued on or before October 6, 2005.

City Position

The City of Avondale (“Avondale”) conducted a multi-jurisdictional audit of the Taxpayer for the Arizona Department of Revenue (“DOR”), Avondale, and the City. The audit covered the period September 2000 through June 2003. The audit concluded that the Taxpayer had unreported speculative builder revenue in the City during the audit period with City taxes due of \$31,493.85. The Taxpayer was also assessed interest up through February 2005 in the amount of \$6,367.09 plus penalties for failing to timely pay and timely file sales tax reports totaling \$7,873.47.

The City noted that the Taxpayer did not protest the tax assessment made pursuant to City Code Section 14-416 (“Section 416”). Since the Taxpayer did not protest the assessment of tax, the City asserted the Taxpayer is required to pay interest on the taxes pursuant to City Code Section 14-540 (a) (“Section 540 (a)”). The City argued that interest cannot be waived by the City nor abated by the Hearing Officer. The City also recommended the assessment of penalties be upheld. According to the City, the

Taxpayer was previously audited for the same business activity for the period March 1994 through November 1997 resulting in a tax assessment of \$10, 417.06 on the Taxpayer at that time. As a result, the City argued the Taxpayer was fully aware of the speculative builder tax. The City also informed the Taxpayer at the previous audit that interest would continue to accrue on any unpaid taxes.

Taxpayer Position

The Taxpayer requested the penalties and interest be abated. According to the Taxpayer, outside management and its employees abruptly resigned on February 15, 2003. At that time, the Taxpayer found there was a problem with the accounting computer software and that the consultant had not reconciled the books since the beginning of the fiscal year (October 1, 2002). Subsequently, the Taxpayer discovered that the sales tax had not been filed since September 30, 2002. According to the Taxpayer, they wanted to pay taxes and file returns during the audit but were told by the Avondale auditor to not file tax returns at that time. For that reason as well as the fact that they were at the mercy of the previous management and its' employees, the Taxpayer requested the penalties be abated. The Taxpayer asserted the Avondale audit was completed in November 2003. According to the Taxpayer, the City was contacted at that time in order to file a protest letter. The Taxpayer asserted they were told no protest could be filed because the City audit was not complete. Because the audit results from the City were not provided to the Taxpayer until September 2004, the Taxpayer requested the interest be abated. At the hearing the Taxpayer requested the City re-allocate tax payments made by the Taxpayer so the payments were used to offset the audit results and not used against previous unpaid balances. We note the City provided a summary of the re-allocation to the Taxpayer and the Taxpayer did file any disagreements with the summary.

ANALYSIS

Section 540 (a) provides that interest shall be accrued on unpaid taxes until paid. Further, "interest may be neither waived by the Tax Collector nor abated by the Hearing Officer except as it might relate to a tax abated . . .". Since no taxes have been abated in this matter, the interest may not be waived. While the City audit results may have been delayed, the Taxpayer did have the use of any unpaid taxes during that time period.

The City was authorized pursuant to Section 540 (b) to assess penalties for failure to timely file tax returns and failure to timely pay taxes. The penalties may be waived when the Taxpayer demonstrates "reasonable cause" for failure to timely file and/or timely pay. While the Taxpayer had prior knowledge of the speculative builder tax, the evidence demonstrated that the Taxpayer relied on a management company to properly report and pay City sales tax. The Taxpayer did not discover there was a reporting and payment problem until after the management company abruptly resigned. The issue before us is whether or not the Taxpayer "exercised ordinary business care and prudence". We conclude that the Taxpayer did exercise ordinary business care and prudence by relying on the management company timely filing monthly tax returns but do not conclude that the Taxpayer exercised ordinary business care and prudence by relying on the

management company to timely pay the City taxes. Ordinary care and prudence would have required the Taxpayer to have established some checks and balances to insure the taxes were being paid. That clearly was not done in this case. Based on the above, we will waive the penalties for failure to timely file but will uphold the penalties for failure to timely pay.

FINDINGS OF FACT

1. On February 21, 2005, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on March 24, 2005 that the protest was timely and in the proper form.
3. On March 28, 2005, the Hearing Officer ordered the City to file a response on or before May 12, 2005.
4. On May 4, 2005, the City filed a response.
5. On May 9, 2005, the Hearing Officer ordered the Taxpayer to file any reply on or before May 31, 2005.
6. On May 20, 2005, a Notice scheduled the matter for hearing on July 21, 2005.
7. Both parties appeared and presented evidence at the July 21, 2005 hearing.
8. On July 22, 2005, the Hearing Officer indicated the City was going to re-allocate tax payments made by the Taxpayer and provide a detailed summary of the results to the Taxpayer on or before August 4, 2005.
9. The Taxpayer was to file any comments/disagreements with the summary on or before August 4, 2005.
10. Subsequently, the City filed a detailed summary.
11. On August 22, 2005, the Hearing Officer indicated the Taxpayer had not filed any comments/disagreements and that the record was now closed and a written decision would be issued on or before October 6, 2005.
12. The Taxpayer had speculative builder revenues within the City for the period December 2002 through June 2003.
13. The Taxpayer failed to timely file tax reports or timely pay City taxes during the period December 2002 through June 2003.
14. Avondale conducted a multi-jurisdictional audit of the Taxpayer for the DOR,

Avondale, and the City.

15. The audit covered the period September 2000 through June 2003.
16. The Taxpayer was assessed City taxes in the amount of \$31,493.85.
17. The Taxpayer was also assessed interest up through February 2005 in the amount of \$6,367.09 plus penalties for failing to timely pay and timely file sales tax reports totaling \$7,873.47.
18. The Taxpayer did not protest the tax assessment for the speculative builder revenues.
19. The Taxpayer was previously audited for the same business activity for the period March 1994 through November 1997 resulting in a tax assessment of \$10,417.06.
20. The Taxpayer was aware of the speculative builder tax.
21. The Taxpayer was informed at the previous audit that interest would continue to accrue on any unpaid taxes.
22. The Taxpayer relied on a outside management company to timely file monthly sales tax forms and timely pay sales tax to the City.
23. On February 15, 2003, the management company and its employees abruptly quit.
24. The Taxpayer discovered there was a problem with the accounting computer software and that the management company had not reconciled the books since the beginning of the fiscal year (October 1, 2002).
25. Subsequently, the Taxpayer discovered that the sales tax had not been filed since September 30, 2002.
26. The Avondale audit was completed in November 2003.
27. The City audit was completed in September 2004.
28. After the hearing, the City re-allocated tax payments made by the Taxpayer which resulted in a reduction of interest for the audit assessment.

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 audit, the Taxpayer failed to report and pay City taxes on speculative builder revenues pursuant to Section 416.
3. The Taxpayer did not protest to tax on the speculative builder revenues.
4. Section 540 (a) provides that interest shall be accrued on unpaid taxes until paid.
5. Pursuant to Section 540 (a), interest may not be abated by the Hearing Officer for the month of July 2004.
6. The City was authorized pursuant to Section 540 (b) to assess penalties for failure to timely file tax returns and failure to timely pay taxes.
7. The Taxpayer demonstrated “reasonable cause” for failing to timely file tax reports.
8. The Taxpayer did not demonstrate “reasonable cause” for failing to timely pay taxes.
9. The penalty for failing to timely file tax reports should be abated.
10. The interest accrued should be adjusted to reflect the City’s re-allocation of tax payments made by the Taxpayer.

ORDER

It is therefore ordered that the February 21, 2005 protest by *Taxpayer* of a tax assessment made by the City of Phoenix is partly denied and partly granted consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Phoenix shall remove the penalties for failing to timely file tax reports.

It is further ordered that the City of Phoenix shall revise the interest accrued to reflect the City’s re-allocation of tax payments made by *Taxpayer*.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer