

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MARA W. ELLIOTT
CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: February 28, 2018
TO: Gail Granewich, City Treasurer
FROM: City Attorney
SUBJECT: Right to Transient Occupancy Tax Appeal as to Late Penalties

INTRODUCTION

The Office of the City Treasurer (Treasurer) is responsible for the administration and collection of Transient Occupancy Tax (TOT) assessments under the San Diego Municipal Code¹ (Municipal Code or SDMC). Operators² of properties rented to transients³ must remit TOT monthly. Operators are assessed a late payment penalty of one percent of the TOT assessment due for the first delinquent day, plus one-third of one percent for each additional day, not to exceed 25 percent of the amount of the tax due and payable for the entire reporting period. SDMC § 35.0116. Your office has asked whether an operator can appeal only the late penalties portion of the TOT assessment.

QUESTION PRESENTED

Can an operator appeal only the late penalties associated with the TOT assessment without contesting the underlying TOT itself?

SHORT ANSWER

Yes. Municipal Code section 35.0118 allows an operator to request a hearing on the tax and the penalties assessed. It does not require that both be appealed. Rather an operator can appeal either or both.

¹ Chapter 3, Article 5 Division 1 of the Municipal Code entitled: "Transient Occupancy Tax."

² "'Operator' means the Person who is the proprietor of the Hotel, Recreational Vehicle Park, or Campground, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other capacity." SDMC § 35.0102.

³ A "Transient" is any person who exercises occupancy or is entitled to occupancy for less than one month. SDMC § 35.0102.

BACKGROUND

Operators who wish to challenge the tax and penalty assessed have several remedies available. Informally, the operator may call the Treasurer's office to discuss the tax and penalties assessed. More formally, the operator may, within 14 days after the serving or mailing of notice from the Treasurer, apply in writing to the Treasurer for a hearing on the amount assessed. SDMC § 35.0118. The hearing is before a board consisting of appointed representatives from the Treasurer, the Comptroller, and the Financial Management Director.

If, after the hearing, the amount in dispute does not exceed \$750, the decision of the hearing board is final and the operator's administrative remedies are exhausted. When an operator appeals a hearing board decision for taxes and penalties exceeding \$750.00, the City Manager "shall" appoint and assign the appeal to a hearing officer. SDMC § 35.0118(b). The hearing officer is authorized to rule upon issues of law or fact and to determine the amount of the tax or penalty duly imposed. SDMC § 35.0118(d).

In both informal and formal processes, some operators have requested to appeal late penalties without challenging the underlying assessment.

ANALYSIS

I. ARTICLE 5 OF THE MUNICIPAL CODE GOVERNS THE APPEAL PROCESS

A. Operators May Appeal the Tax and Penalties Assessed.

To determine whether an operator can appeal only the penalty associated with the TOT, we first consider the rules of statutory construction. Under these rules, we must determine the intent of the Council so as to effectuate the purpose of the law. *Kane v. Hurley*, 30 Cal. App. 4th 859, 862 (1994); *Crespin v. Kizer*, 226 Cal. App. 3d 498, 509 (1990). To determine legislative intent, a court will look to the "plain and common-sense meaning" of the words of the statute. *Flannery v. Prentice*, 26 Cal. 4th 572, 577 (2001). When reviewing plain language, courts look at the ordinary usage of words, as reflected in a dictionary and construed in context. *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990). If the plain meaning of the statute's text does not resolve the interpretation question, a court will then consider extrinsic sources such as legislative history, public policy, settled rules of statutory construction, and an examination of the evils to be remedied and the legislative scheme encompassing the statute in question. *Day v. City of Fontana*, 25 Cal. 4th 268, 272, (2001); *People v. Connor*, 115 Cal. App. 4th 669, 678 (2004).

Chapter 3, Article 5, Division 1 of the Municipal Code describes the process by which an operator can appeal the assessed TOT. Section 35.0118 states: "(a) The operator may within fourteen (14) days after the serving or mailing of such notice make application in writing to the Treasurer for a hearing on the amount assessed pursuant to Municipal Code section 35.0117." SDMC § 35.0118. The amount assessed includes both tax and penalties.⁴

⁴ The general rule is that a statutory penalty for failure to pay a tax assessment becomes part of the tax. *Sonleitner v. Superior Court*, 158 Cal. App. 2d 258, 263 (1958); 16 McQuillin Mun. Corp § 44.169 (3d ed.).

SDMC § 35.0117. However, nothing in the Municipal Code suggests that the operator must appeal the *full amount* of the assessment.

This is further supported in the provisions describing the basis for appeal. The Municipal Code states that in a hearing before the board, “the operator may appear and offer evidence why the *specified tax and penalties* should not be so fixed.” (Emphasis added.) SDMC § 35.0118. If the appeal is escalated to a hearing officer⁵ the Municipal Code states: “[t]he Hearing Officer is authorized to rule upon issues of law or fact and to determine the amount of the *tax or penalty* in accordance with this Article.” (Emphasis added.) SDMC § 35.0118(d). “The Hearing Officer shall not have any jurisdiction to waive, mitigate or suspend the collection of any tax or penalty found to be duly⁶ imposed.” SDMC § 35.0118(d). Accordingly, at the hearing, the operator may offer evidence that the tax and penalties are a mistake or miscalculation and therefore not “duly imposed.” Nothing in the plain language of these sections limit an operator’s ability to appeal only the late penalties.

B. The Assessment of Penalties is Not Ministerial and Does Not Preclude an Operator from Appealing the Penalties.

It has been suggested that the Treasurer’s action in assessing the penalty is purely ministerial and therefore the operator must also appeal the underlying tax. An act is ministerial if the act “that involves obedience to instructions or laws instead of discretion, judgment, or skill...” *Black's Law Dictionary* (10th ed. 2014).

The Treasurer’s role is not purely ministerial. If an operator fails to remit the TOT due or maintains inadequate records, the Treasurer “shall forthwith assess the tax and penalties provided for by this Article against the operator.” SDMC § 35.0117. This requires the Treasurer to exercise her discretion to determine the tax and penalties due by estimating dates and amounts. It is possible that the Treasurer’s Office could estimate the underlying tax correctly, but incorrectly estimate the date the tax becomes due. In such cases, the operator could offer evidence that only the penalties need to be corrected. SDMC § 35.0118.

C. Correcting Penalties Assessed in Error is Not a Waiver of Penalties

The Treasurer is not authorized to waive penalties associated with the TOT, but may correct penalties assessed in error at the hearing. SDMC § 35.0118. As noted above, the process of assessing the penalties on an underlying tax could lead to a situation in which the underlying tax is correct but the penalties are incorrect. Additionally, there is the potential for staff error in calculating the penalties. The correction of these errors would not constitute an impermissible waiver of penalties, but a permissible correction based upon evidence presented at the hearing. SDMC § 35.0118.

⁵ SDMC § 35.0118(b).

⁶ Duly: “In a proper manner; in accordance with legal requirements.” *Black's Law Dictionary* (10th ed. 2014).

CONCLUSION

An operator may request a hearing on only the late penalties assessed for failure to pay the TOT, and not the underlying TOT assessment. If there is a concern over the number of formal administrative hearings to appeal TOT, there are legislative changes that could be made to remedy this issue. Currently, a hearing officer is required when an operator disputes TOT and penalties exceeding \$750. This threshold could be increased, which would limit the number of appeals that would need to go through the more formal hearing officer process.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Monica A. Willian
Monica A. Willian
Deputy City Attorney

MAW:hm:jdf:cm
ML-2018-3
Doc. No. 1697069_2