

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: March 30, 2009
Decision: MTHO #462
Taxpayer: *Taxpayer*
Tax Collector: City of Chandler
Hearing Date: February 23, 2009

DISCUSSION

Introduction

On September 29, 2008, *Taxpayer* (“Taxpayers”) filed a protest of a tax assessment made by the City of Chandler (“City”). After review, the City concluded on October 24, 2008 that the protest was timely and in the proper form. On October 27, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file any response to the protest on or before December 11, 2008. The City sent a December 11, 2008 email requesting an extension for the City response. On December 15, 2008, the Hearing Officer granted the City an extension until December 22, 2008 to file a response. On December 15, 2008, the City filed a response to the protest. On December 22, 2008, the Hearing Officer ordered Taxpayers to file any reply on or before January 12, 2009. On January 9, 2009 a Notice of Tax Hearing (“Notice”) scheduled the matter for hearing commencing on February 23, 2009. Both parties appeared and presented evidence at the February 23, 2009 hearing. On February 24, 2009, the Hearing Officer indicated the record was closed and a written decision would be issued on or before April 10, 2009.

City Position

The City issued an estimated tax assessment against Taxpayers for the month of May 2008 for additional taxes in the amount of \$4,633.36, interest up through December 2008 in the amount of \$108.11, and penalties totaling \$695.00. Subsequently, the City waived the penalties. According to the City, Taxpayers by themselves or through others made improvements to real property to construct a custom home at *Location*. The City determined there was a final inspection of the *Location* on May 1, 2008 and it was sold on May 8, 2008 for \$990,000.00. As a result, the City concluded the sale was a taxable speculative builder sale pursuant to City Code Section 62-416 (“Section 416”). The City noted the tax pursuant to Section 416 is on the gross income from the business activity upon every person engaging in business as a speculative builder within the City. The City indicated “speculative builder” is defined in City Code Section 62-100 (“Section 100”) as an owner-builder who sells improved real property consisting of a custom house. The City concluded that Taxpayers were speculative builders pursuant to Section 100 as they

were the owners that had a custom house constructed and completed on May 1, 2008 and then sold on May 8, 2008.

The City acknowledged that City Regulation 62-416.1 (“Regulation 416.1”) provides for an exemption for a homeowner’s bona fide non-business sale of a family residence.

The City indicated that in order to qualify for the exemption, Regulation 416.1 sets forth three requirements that must be met. First, the property must have actually been used as the principle place of family residence of the seller for the six months next prior to the offer for sale. Second, the seller must not have sold more than two residences within the thirty-six months immediately prior to the offer for sale. Third, the seller must not have licensed, leased, or rented the sold premises for any period within the twenty-four months prior to the offer for sale. The City asserted that Taxpayers failed to meet the first of the three requirements and thus the exemption was not available.

In response to Taxpayers’ request for waiver of penalties and interest, the City waived penalties in the amount of \$695.00. The City noted that interest could not be waived pursuant to city Code Section 62-540 (“Section 540”).

Taxpayer Position

Taxpayers protested the City’s assessment on the sale of the *Location*. Taxpayers disputed that they were engaged in any “business activity” when they sold *Location*. Taxpayers asserted the property was never intended to be an income producing “business activity” but was meant to be their home. According to Taxpayers, they ran into severe financial circumstances and had to sell the *Location* when it was completed.

Taxpayers disputed the City’s characterization they were “speculative builders.” Taxpayers opined that their sale of *Location* should be exempt as a bona fide non-business sale of a family residence pursuant to Regulation 416.1. Taxpayers asserted they built their home with every intention to live there but got caught in the real estate collapse and had to sell their new home at completion. Taxpayers indicated they could have let *Location* go into foreclosure but did not believe that was the honorable thing to do. Taxpayers sold *Location* to a buyer from Canada; however, the purchase price was “short” of what Taxpayers owed on the construction loan. As a result, Taxpayers had to borrow \$30,900.00 to close the sale. Taxpayers argued they did the honorable thing by selling *Location* at a loss rather than allowing it to go into foreclosure. Taxpayers asserted they should not suffer further loss by having to pay tax, interest, and penalties.

ANALYSIS

The issue to be resolved in this matter is whether or not Taxpayers’ sale of *Location* was a taxable speculative builder sale pursuant to Section 416. We note that City code Section 62-100 (“Section 100”) provides a very broad definition of “business.” “Business” means all activities or acts, personal or corporate, engaged in and caused to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, but not casual activities

or sales. We further note that the definition of “casual activities” in Section 100 makes it clear that a sale of real property cannot be a casual activity. There doesn’t have to be any intent to make a profit or for there to be any profit for an activity to meet the business definition of Section 100. We conclude that Taxpayers’ sale of **Location** resulted in a benefit or advantage, either direct or indirect, pursuant to Section 100.

The fact that a single sale of real property cannot be a casual activity supports the conclusion that the City Code intended a single sale be a taxable activity.

Section 100 defines a “speculative builder” as an owner-builder who sells improved real property consisting of a custom home. Taxpayers were owner-builders that had a custom home built at the **Location** and would be speculative builders pursuant to Section 100. As a result, we conclude that the gross income from the sale of **Location** was a taxable transaction pursuant to Section 416. While there is an exemption set forth in Regulation 416.1 for a homeowner’s bona fide non-business sale, Taxpayers do not qualify because the property was never used as a their principal place of family residence

We understand Taxpayers’ frustration of being assessed for taxes on a custom home they intended to live in and had to sell at a loss; however, the Code does not allow us to take intent into consideration or whether the sale resulted in a loss. Based on all the above, Taxpayers’ protest should be denied.

FINDINGS OF FACT

1. On September 29, 2008, Taxpayers filed a protest of a tax assessment made by the City.
2. After review, the City concluded on October 24, 2008 that the protest was timely and in the proper form.
3. On October 27, 2008, the Hearing Officer ordered the City to file any response to the protest on or before December 11, 2008.
4. The City sent a December 11, 2008 email requesting an extension for the City response.
5. On December 15, 2008, the Hearing Officer granted the City an extension until December 22, 2008 to file a response.
6. On December 15, 2008, the City filed a response to the protest.
7. On December 22, 2008, the Hearing Officer ordered Taxpayers to file any reply on or before January 12, 2009.
8. On January 9, 2009, a Notice scheduled the matter for hearing commencing on

February 23, 2009.

9. Both parties appeared and presented evidence at the February 23, 2009 hearing.
10. On February 24, 2009, the Hearing Officer indicated the record was closed and written decision would be issued on or before April 10, 2009.
11. The City issued an assessment against Taxpayer for the month of May 2008 for additional taxes in the amount of \$4,633.36, interest up through December 2008 in the amount of \$108.11, and penalties totaling \$695.00.
12. Subsequently, the City waived penalties in the amount of \$695.00.
13. Taxpayers had improvements made to real property to construct a custom home at *Location*.
14. There was final inspection of the *Location* on May 1, 2008 and it was sold on May 8, 2008 for \$990,000.00.
15. Taxpayers intended to live in the *Location* but had to sell it because of the real estate collapse.
16. Taxpayers never lived in the *Location*.
17. Taxpayers sold the *Location* at a loss and had to borrow \$30,900.00 to close the sale.

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. Taxpayers' sale of *Location* resulted in a benefit or advantage, either direct or indirect, resulting in a business act pursuant to Section 100.
3. A single sale of real property cannot be a casual activity pursuant to Section 100.
4. Taxpayers were speculative builders pursuant to Section 100.
5. The sale of *Location* was a speculative builder sale pursuant to Section 416.
6. Because Taxpayers never used the *Location* as their principal place of family residence, they cannot qualify for a homeowner's bona fide non-business sale

pursuant to Regulation 416.1.

7. Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the September 29, 2008 protest by *Taxpayer* of a tax assessment made by the City of Chandler is hereby denied consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer