

## DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: September 22, 2011

Decision: MTHO # 614

***Taxpayer:***

Tax Collector: City of Scottsdale

Hearing Date: August 11, 2011

### DISCUSSION

#### Introduction

On November 23, 2010, a letter of protest was filed by ***Taxpayer*** of a tax assessment made by the City of Scottsdale (“City”). A hearing was commenced before the Municipal Tax Hearing Officer (“Hearing Officer”) on August 11, 2011. Appearing for the City were ***Assistant City Attorney, Tax Audit Supervisor, and Senior Tax Auditor***. Appearing for Taxpayer was ***his representative***. At the conclusion of the August 11, 2011 hearing, the parties were granted an opportunity to file post-hearing memorandum. Subsequently, the parties agreed post-hearing memorandums were not necessary. On August 23, 2011, the Hearing Officer indicated the record was closed and a written decision would be issued on or before October 9, 2011.

### DECISION

On May 13, 2010, the City issued a compliance assessment of Taxpayer. The assessment was for the period August 2006 (“Compliance Period”). The assessment was for additional taxes in the amount of \$5,348.04, interest up through September 2010 in the amount of \$1,357.65, and penalties in the amount of \$1,337.01.

Taxpayer purchased ***lot #49*** in the City from ***Builders Corporation*** on 3/30/2004. The Builders obtained permit ***#1234*** on May 25, 2004 for the construction of a single family residence. The Certificate of Occupancy (“COO”) for the newly constructed home was issued on August 9, 2006. On that same day, the improved Lot 49 was transferred by Trustee’s Deed to ***Funding Company*** at a bid price of \$504,000.00. The City assessed Taxpayer on the transfer as a speculative builder pursuant to City Code Section 416 (“Section 416”).

Taxpayer argued that the assessment should be reduced to zero. Taxpayer indicated Builders failed to honor its financial obligations to the lender for the property. As a result, the property was subsequently foreclosed and involuntarily sold at a trustee’s sale.

Taxpayer reacquired the property on September 22, 2006 for \$555,000.00. Taxpayer argued that he never contracted to sell, nor intended to sell Lot 49. Further, the statutory intent of Section 416 does not encompass individuals in Taxpayer's predicament.

The City asserted Taxpayer met the definition of an owner-builder and a speculative builder and was subject to the Section 416 tax. The City argued that intent to sell the property and/or become a speculative builder was not relevant.

City Code Section 100 ("Section 100") defines "owner-builder" as an owner of real property who, by himself or by or through others, constructs or has constructed any improvement to real property. In this case, Taxpayer had Builders construct a single family residence on Lot 49. As a result, Taxpayer was an owner-builder pursuant to Section 100. Section 100 defines "speculative builder" to mean an owner-builder who sells improved real property consisting of a custom, model, or inventory home. Section 100 defines "sale" to mean any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of property for a consideration. We conclude that the transfer of improved Lot 49 by Trustee's Deed was a sale by Taxpayer pursuant to Section 100 and would have resulted in Taxpayer becoming a speculative builder pursuant to Section 100. Section 416 imposes a tax on the gross income from the business activity upon every person engaging in business as a speculative builder. Based on the above, we conclude that Taxpayer was engaged in business as a speculative builder and the tax assessment on the sale of Lot 49 was proper. Taxpayer argued there was no intent to become an owner-builder and/or speculative builder. Taxpayer cited SDC Management, Inc. v. State ex rel. Arizona Dept. of Revenue , 167 Ariz. 491, 808 P.2d 1243 (1991) to support his argument. The City argued SDC Management was not instructive as it dealt with state privilege tax and not municipal privilege tax. The City cited RDB Thomas Road Partnership v. City of Phoenix, 180 Ariz. 194, 883 P.2d 431 (1994) to support the City position. After review of those cases, we concur with the City that RDB Thomas Road distinguishes SDC Management and supports the City's position in this case.

While there was little discussion regarding the penalties imposed in this matter, we note that City Code Section 540 ("Section 540") provides that the Hearing Officer may abate the penalties when Taxpayer demonstrates reasonable cause. Reasonable cause is defined in Section 540 that a taxpayer exercised ordinary business care and prudence, i.e. had a reasonable basis for believing that the tax did not apply to the business activity. Although we disagreed with Taxpayer on the underlying tax issue, we do find Taxpayer has demonstrated reasonable cause to have all penalties abated. Based on all the above, we conclude that Taxpayer's protest should be partly denied, partly granted, consistent with the Discussion, Findings, and Conclusions, herein.

### FINDINGS OF FACT

1. On November 23, 2010, Taxpayer filed a protest of a tax assessment made by the City.
2. On May 13, 2010, the City issued a compliance assessment of Taxpayer.
3. The Compliance Period was for the period of August 2006.
4. The assessment was for additional taxes in the amount of \$5,348.04, interest up through September 2010 in the amount of \$1,357.65, and penalties totaling \$1,337.01.
5. Taxpayer purchased Lot 49 in the City from Builders on March 30, 2004.
6. The Builders obtained permit #94610 on May 25, 2004 for the construction of a single family residence.
7. The COO for the newly constructed home was issued on August 9, 2006.
8. On August 9, 2006, the improved Lot 49 was transferred by Trustee's Deed to **Funding Company** at a bid price of \$504,000.00.
9. Taxpayer reacquired improved Lot 49 on September 22, 2006 for \$555,000.00.

### 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. Taxpayer was an owner-builder of Lot 49 pursuant to Section 100.
3. Taxpayer was a speculative builder of Lot 49 pursuant to Section 100.
4. The transfer of Lot 49 by Trustee's Deed to **Funding Company** was a speculative builder sale by Taxpayer pursuant to Sections 100 and 416.

5. The City was authorized pursuant to Section 540 to assess penalties.
6. Taxpayer demonstrated reasonable cause to have the penalties waived for failing to timely file or timely pay taxes.
7. Taxpayer's November 23, 2010 protest should be partly granted and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.
8. The parties have timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section 575.

### **ORDER**

It is therefore ordered that the November 23, 2010 protest by *Taxpayer* of a tax assessment made by the City of Scottsdale should be partly granted and partly denied consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Scottsdale shall remove all penalties assessed in this matter.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer