

## DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: August 19, 2013

Decision: MTHO # 770

***Taxpayer***

Tax Collector: City of Scottsdale

Hearing Date: July 2, 2013

### DISCUSSION

#### Introduction

On December 28, 2012, ***Taxpayer*** filed a letter of protest for a tax assessment made by the City of Scottsdale (“City”). A hearing was commenced before the Municipal Tax Hearing Officer (“Hearing Officer”) on July 2, 2013. Appearing for the City was the ***Assistant City Attorney*** and a ***Senior Tax Auditor***. Appearing telephonically for Taxpayer was his ***representative***. The parties agreed that Taxpayer would file a post hearing brief on or before July 5, 2013 and the City would file a response brief on or before July 12, 2013. On July 12, 2013, the Hearing Officer indicated both parties had filed briefs and the record was closed with a written decision to be issued on or before August 26, 2013.

### DECISION

On November 16, 2012, the City issued a jeopardy assessment to Taxpayer for additional taxes in the amount of \$12,074.30. The assessment was issued pursuant to City Code Section 595 (“Section 595”) and City Code Section 571 (“Section 571”).

The ***Newberrys*** had a home constructed at ***12345 N. Eastwick Place (“Eastwick Property”)*** located in the City. Subsequently, the improved ***Eastwick Property*** was acquired by Taxpayer at a December 7, 2009 trustee sale for \$1,149,049.93. The City assessed the ***Newberrys*** for a speculative builder sale pursuant to City Code Section 416 (“Section 416”). After failing to collect the taxes from the ***Newberrys***, the City assessed Taxpayer pursuant to Section 595 as a successor in liability. Section 595 provides as follows: “Any person who purchases, or who acquires by foreclosure, by sale under deed trust deed or warranty deed in lieu of foreclosure, or by any other method, improved real

property or a portion of improved real property for which the Privilege Tax imposed by this Chapter has not been paid shall be responsible for payment of such tax as a speculative builder or owner builder, as provided in Sections-416 and -417.”

Taxpayer argued it was merely an investor and did not engage in the business of contracting. Further, there was no notice to Taxpayer at the time of its purchase of the Hedgehog Property that any taxes were due on the property. Taxpayer asserted the privilege tax is based on the privilege of engaging in business. Taxpayer cited various Arizona court decisions for the proposition that a transaction privilege tax may be imposed against only the party actually engaged in the business for which tax is due.

City Code Section 100 (“Section 100”) defines a “speculative builder” as an owner builder who sells or contracts to sell, at any time, improved real property consisting of a custom home. “Sale” is defined in Section 100 to mean any transfer of title or possession in any manner or by any means whatsoever. In this case, the *Newberrys* were owner builders who had a custom home constructed which was then transferred at a trustee sale. The definition of sale would include a trustee sale. Section 416 imposes a tax on the gross income of a speculative builder which includes the total selling price from the sale of improved real property. Based on the above, the *Newberrys* were properly assessed taxes on the transfer of the *Eastwick Property* at the trustee sale. After failing to collect from the *Newberrys*, the City assessed Taxpayer pursuant to Section 595. Clearly, the first portion of Section 595 is met as Taxpayer acquired improved real property for which the Privilege Tax imposed by this Chapter has not been paid. The last part of the subsection tells us how the tax is to be imposed. The person who has acquired the improved real property for which the taxes have not been paid shall be responsible for payment of such tax as a speculative builder as provided in Section 416. The subsection does not say the person acquiring the improved real property will be subject to tax as if they were speculative builders. It also doesn’t say the person acquiring the improved real property will be assessed a speculative builder tax. It clearly states that persons acquiring the improved real property will be assessed as a speculative builder. We conclude the “plain and ordinary meaning” of the subsection requires Taxpayer to be a speculative builder in order to be assessed. There was absolutely no evidence that Taxpayer acted as a speculative builder in this matter. Based on all the above, we conclude the protest of Taxpayer should be granted, consistent with the Discussion, Findings, and Conclusions, herein.

## FINDINGS OF FACT

1. On November 16, 2012, the City issued a jeopardy assessment to Taxpayer for additional taxes in the amount of \$12,074.30.
2. The *Newberrys* had a home constructed at the *Eastwick Property* located in the City.
3. Subsequently, the improved *Eastwick Property* was acquired by Taxpayer at a December 7, 2009 trustee sale for \$1,149,049.93.
4. The City assessed the *Newberrys* for a speculative builder sale pursuant to Section 416.
5. After failing to collect the taxes from the *Newberrys*, the City assessed Taxpayer pursuant to Section 595 as a successor in liability.
6. There was no evidence that Taxpayer acted as a speculative builder.

## 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. Section 416 imposes a tax on the gross income from the business activity of speculative building.
3. Section 100 defines a “speculative builder” as an owner builder who sells or contracts to sell, at any time, improved real property consisting of a custom home.
4. Pursuant to Section 100, the *Newberrys* were “owner-builders” of the *Eastwick Property*.
5. The definition of sale set forth in Section 100 would include a trustee sale.
6. The transfer of the improved *Eastwick Property* at a trustee sale resulted in a speculative builder sale pursuant to Section 416.

7. The *Newberrys* did not pay the speculative builder tax on the transfer of the *Eastwick Property*.
8. The unpaid speculative builder tax on the transfer to Taxpayer was assessed against Taxpayer as if Taxpayer was a speculative builder pursuant to Section 595 and Section 416.
9. The “plain and ordinary meaning” of Section 595 requires Taxpayer to be a speculative builder in order to be assessed.
10. There was no evidence that Taxpayer acted as a speculative builder in this matter.
11. Consistent with the conclusion that Taxpayer was not a speculative builder in this matter, the assessment should be abated.
12. Taxpayers protest should be granted, consistent with the Discussion, Findings, and Conclusions, herein.
13. The parties have timely appeal rights pursuant to Model City Tax Code Section 575.

### **ORDER**

It is therefore ordered that the December 28, 2012 protest by *Taxpayer* of a tax assessment made by the City of Scottsdale is hereby granted consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the City of Scottsdale shall abate the assessment in this matter.

It is further ordered that this Decision is effective immediately.

*Municipal Tax Hearing Officer*