

## **DECISION OF MUNICIPAL TAX HEARING OFFICER**

Decision Date: September 29, 2008

Decision: MTHO # 437

Taxpayer: *ABC Taxpayer*

Tax Collector: City of Peoria

Hearing Date: August 13, 2008

### **DISCUSSION**

#### **Introduction**

On April 12, 2008, *ABC Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Peoria (“City”). After review, the City concluded on April 25, 2008 that the protest was timely and in the proper form. On April 28, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file any response to the protest on or before June 12, 2008. On June 11, 2008, the City filed a response to the protest. On June 16, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before July 2, 2008. On July 9, 2008, a Notice of Tax Hearing (“Notice”) scheduled the matter for a hearing commencing on August 11, 2008. On July 10, 2008, a Notice rescheduled the hearing to commence on August 13, 2008. The City appeared and presented evidence at the August 13, 2008 hearing. Taxpayer failed to appear at the August 13, 2008 hearing. On August 13, 2008, the Hearing Officer granted Taxpayer until September 12, 2008 in which to submit any additional written evidence. On September 17, 2008, the Hearing Officer indicated Taxpayer had failed to file any response and as a result the record was closed and a written decision would be issued on or before October 31, 2008.

#### **City Position**

The City conducted an audit of Taxpayer for the period October 2006 through April 2007. As a result, the City assessed Taxpayer for additional taxes in the amount of \$46,837.00, penalties in the amount of \$11,709.26, a license fee of \$120.00, and interest up through February 2008 in the amount of \$3,950.05.

According to the City, Taxpayer purchased parcel two at *123 Location* in April 2005. The City indicated that Taxpayer had improvements made on the real property and sold ten improved lots during the period of October 2006 through April 2007. The City assessed Taxpayer as a speculative builder pursuant to City Code Section 100 (“Section 100”) and the sale of improved real properties as speculative builder sales pursuant to City Code Section 416 (“Section 416”). The City asserted that Taxpayer received a total of \$4,050,000.00 for the sale of improved real property during the audit period. The City noted that Taxpayer was given nearly a full year to gather and produce any

documentation regarding deductions, exclusions, exemptions and/or credits. According to the City, no documentation was ever provided.

The City indicated penalties were assessed pursuant to City Code Section 540 (“Section 540”) for Taxpayer’s failure to timely file reports and failure to timely pay taxes. The City concluded that Taxpayer was aware of the taxing provisions of the City Code based on a Land Development Subcontractor Agreement (“Agreement”) which was dated August 22, 2005 and was signed by the Managing Member of Taxpayer. The following was extracted from that Agreement: “With respect to the Municipality’s transaction privilege taxes, Owner declares that they are improving the property for sale, and that each builder purchasing the individual parcels will be liable for the Municipality’s transaction privilege taxes on the payments made by the Owner unless the builder’s property is sold to a speculative builder who assumes liability for such tax. Accordingly, Subcontractor shall not be liable for the Municipality’s transaction privilege taxes with respect to Subcontractor receipts.”

In response to Taxpayer, the City argued that Section 416 does not take into consideration whether there was a profit made. The City asserted Section 416 imposes a tax on the gross income from the speculative builder sales. Further, the City indicated that City Code Section 550 (“Section 550”) authorizes the City to issue the assessment in this matter.

### **Taxpayer Position**

Taxpayer requested the entire assessment be abated. According to Taxpayer, there never was any indication that the speculative builder tax was in existence. Taxpayer indicated the project was sold at practically cost without any profit. Taxpayer asserted the sales occurred over two years ago and it is unfair to now assess the sales. Taxpayer argued that because of the lateness of the assessment it could no longer retrieve information from past contractors and vendors for the project. According to Taxpayer, the proposed assessment would create a great hardship as it no longer has assets.

### **ANALYSIS**

Section 100 defines a speculative builder as an owner builder of improved real property which is sold within twenty-four months of substantial completion of the improvements. In this case, Taxpayer purchased parcel two at ***123 Location*** in April 2005. Subsequently, ten lots were improved and sold on or before April 2007. As a result, we must conclude that Taxpayer was a speculative builder pursuant to Section 100. Accordingly, those sales were taxable pursuant to Section 416. While Section 416 permits certain deductions, exclusions, exemptions or credits, City Code Section 360 (“Section 360”) provides that any deductions, exclusions, exemptions, or credits are conditional upon adequate proof being provided by Taxpayer. In this case, the City granted Taxpayer almost a year to provide adequate proof but none was ever provided. As a result, we must conclude that

Taxpayer failed to meet its burden of proof pursuant to Section 360. While it is unclear whether or not Taxpayer made a profit on the sales, Section 416 assesses a tax on the gross income and does not take into consideration whether or not there was any profit.

As far as the statute of limitations are concerned, Section 550 authorizes the City to assess additional taxes due at any time within four years after the date on which the return was required to be filed or within four years after the date the return was filed, whichever comes later. Since Taxpayer failed to file returns, the statute of limitations has not run and the City's assessment was timely pursuant to Section 550.

Since Taxpayer failed to file returns or failed to timely pay taxes, the City was authorized pursuant to Section 540 to assess penalties. Those penalties may be waived if Taxpayer demonstrates reasonable cause for failing to timely file and timely pay. The City provided evidence based on the Agreement that Taxpayer either knew or should have known of the speculative builder tax. While Taxpayer was given an opportunity to reply to the City's evidence, no reply was ever filed. As a result, we conclude that Taxpayer failed to provide reasonable cause for waiving of the penalties. Based on all the above, we conclude Taxpayer's protest should be denied.

### **FINDINGS OF FACT**

1. On April 12, 2008, Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on April 25, 2008, that the protest was timely and in the proper form.
3. On April 28, 2008, the Hearing Officer ordered the City to file a response to the protest on or before June 12, 2008.
4. On June 11, 2008, the City filed a response to the protest.
5. On June 16, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before July 2, 2008.
6. On July 9, 2008, a Notice scheduled the matter for a hearing commencing on August 11, 2008.
7. On July 10, 2008, a Notice rescheduled the hearing to commence on August 13, 2008.
8. The City appeared and presented evidence at the August 13, 2008 hearing.
9. Taxpayer failed to appear at the hearing.

10. On August 13, 2008, the Hearing Officer granted Taxpayer until September 12, 2008 in which to submit any additional written evidence.
11. On September 17, 2008, the Hearing Officer indicated Taxpayer had failed to file any response and as a result the record was now closed and a written decision would be issued on or before October 31, 2008.
12. The City conducted an audit of Taxpayer for the period October 2006 through April 2007.
13. The City assessed Taxpayer for additional taxes in the amount of \$46,837.00, penalties in the amount of \$11,709.26, a license fee of \$120.00, and interest up through February 2008 in the amount of \$3,950.05.
14. Taxpayer purchased parcel two at *123 Location* in April 2005.
15. Taxpayer had improvements made on parcel two and sold ten improved lots during the period of October 2006 through April 2007.
16. Taxpayer received gross income in the amount of \$4,050,000.00 from the sale of the ten improved lots.
17. The City granted Taxpayer almost a full year to gather and produce any documentation regarding deductions, exclusions, exemptions and/or credits.
18. No documentation was ever provided by Taxpayer.
19. The Agreement referred to a transaction privilege tax being paid to the City when improved property was sold.

### **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. Pursuant to Section 100, Taxpayer was a speculative builder since Taxpayer was the owner of real property on which improvements were made.
3. During the audit period, Taxpayer sold improved real property within twenty-four months of substantial completion of the improvements which were speculative builder sales pursuant to Sections 100 and 416.

4. Taxpayer failed to meet its burden of proof pursuant to Section 360 that it was entitled to certain deductions, exclusions, exemptions, or credits.
5. Section 550 authorizes the City to assess additional taxes due at any time within four years after the date on which the return was required to be filed or within four years after the date the returns were filed, whichever occurs later.
6. The City's assessment was timely pursuant to Section 550.
7. The City was authorized pursuant to Section 540(b) to assess penalties for failure to timely file and failure to timely pay taxes.
8. Taxpayer was either aware or should have been aware of the speculative builder tax.
9. Taxpayer failed to provide reasonable cause to have the penalties waived.
10. Taxpayer's protest should be denied.

### **ORDER**

It is therefore ordered that the April 12, 2008 protest by *ABC Taxpayer* of a tax assessment made by the City of Peoria is hereby denied,

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh  
Municipal Tax Hearing Officer