

DECISION OF MUNICIPAL TAX HEARING OFFICER

June 1, 2010

Taxpayer

Taxpayer's Address

Taxpayer
MTHO #556

Dear Taxpayer:

We have reviewed the evidence presented by *Taxpayer* and the City of Scottsdale (Tax Collector or City) at the hearing on May 19, 2010. The review period covered was September 2005. Taxpayer's protest, Tax Collector's response, and our findings and ruling follow.

Taxpayer's Protest

Taxpayer was assessed City of Scottsdale privilege tax under the speculative builder classification for the sale of a home Taxpayer had partially constructed in the City. Taxpayer had not intended the residence to be a speculative home but wanted it to be his personal residence. Unforeseen circumstances required him to sell the home when it was only partially completed. Because his intent was for the home to be his residence, Taxpayer does not believe he should be considered a speculative builder.

Tax Collector's Response

Taxpayer was the owner of record to the Property on which the home was being constructed before Taxpayer sold it. Taxpayer met the definition of a speculative builder. The Tax Collector cannot take into consideration Taxpayer's original intent. Therefore the sale of Taxpayer's improved real property is subject to the privilege tax. Taxpayer is liable for the tax that was assessed.

Discussion

Taxpayer owned vacant land and intended to build a single-family residence on the property. Taxpayer signed on Owner-Builder Declaration dated September 2, 2004 stating that he did not intend to sell the improved real property. The declaration also stated that Taxpayer understood the sale of the improved real property might result in additional taxes that will become his responsibility.

A building permit was issued September 2, 2004 and Taxpayer began construction of the home. Taxpayer experienced delays in construction and had concerns over financing and meeting the bank's time frame for completing the construction of the house. Because of the delays and Taxpayer's concerns, Taxpayer sold the house in September 2005 while it was only partially completed. Taxpayer had not lived in the house. The affidavit of value for the sale showed the sales price as \$781,500.00.

The Tax Collector conducted an audit assessment of Taxpayer for the period July 2005 and issued an assessment which Taxpayer timely protested. The Tax Collector considered Taxpayer a speculative builder. Based on additional information the Tax Collector issued a Notice of Revised Assessment dated September 25, 2009 for the period September 2005 assessing privilege tax, interest and penalties and allowing applicable deductions and credit. Taxpayer continued to protest the assessment. By letter dated October 30, 2009, the Tax Collector waived the penalties that had been assessed.

Whether and to what extent a person is taxable is governed by the Scottsdale City Code. Taxpayer was assessed as a speculative builder. A speculative builder is defined by the code as including an owner-builder who sells, at any time, improved real property consisting of custom homes regardless of the stage of completion. To be a speculative builder, a person has to be an owner-builder and the property has to be improved real property.

An Owner-Builder is defined as an owner or lessor of real property who, by himself or by or through others, constructs or has constructed or reconstructs any improvement to real property. Improved real property includes any real property upon which a structure has been constructed. Taxpayer was an owner-builder who sold improved real property. Taxpayer was therefore a speculative builder liable for the city privilege tax under the speculative builder classification.

Whether Taxpayer initially intended the house to be his principal place of residence cannot be taken into consideration. The house had not been used as a residence before Taxpayer's sale. A sale of a custom home is considered a homeowner's bona fide non-business sale and not subject to the speculative builder tax if, among other requirements, the property was actually used as the principal place of family residence or vacation residence by the immediate family of the seller for the six (6) months next prior to the offer for sale. Taxpayer's sale was not a homeowner's bona fide non-business sale.

Based on all the above, we conclude Taxpayer's protest should be denied. The City's privilege tax assessment against Taxpayer was proper.

Findings of Fact

1. Taxpayer owned property on which he intended to build a single-family residence.
2. Building permit No. *ABCDE* was issued September 2, 2004.
3. Taxpayer signed on Owner-Builder Declaration dated September 2, 2004.
4. The declaration stated Taxpayer did not intend to sell the improved real property.
5. The declaration provided further that Taxpayer understood that the sale of the improved real property might result in additional taxes that will become his responsibility.
6. Taxpayer began construction of the house in 2004.
7. Taxpayer experienced delays in construction and had concerns over financing and meeting the bank's time frame for completing the construction of the house.
8. Because of the delays and Taxpayer's concerns, Taxpayer sold the partially completed house in September 2005.

9. Taxpayer had not lived prior to the sale.
10. The affidavit of value for the sale showed the sales price as \$781,500.00.
11. The Tax Collector conducted an audit assessment of Taxpayer for the period July 2005 and issued an assessment for city privilege tax under the speculative builder classification dated July 27, 2009.
12. The assessment was based on the recorded affidavit of value amount of \$781,500.00.
13. The Tax Collector assessed city privilege tax deficiency in the amount of \$12,962.85 including related interest and penalties.
14. Taxpayer timely protested the assessment and provided additional information.
15. The Tax Collector issued a Notice of Revised Assessment dated September 25, 2009 for the period September 2005 allowing certain deductions and credit based on additional information.
16. The revised notice assessed a deficiency in the amount of \$11,670.62, comprised of privilege tax in the amount of \$7,621.13, interest in the amount of \$2,144.21 and penalties in the amount of \$1,905.13.
17. By letter dated October 30, 2009, the Tax Collector waived the penalties that were assessed.
18. Taxpayer continued to protest the assessment of the privilege tax and interest by letter dated November 5, 2009.

Conclusions of Law

1. A speculative builder includes an owner-builder who sells, at any time, improved real property consisting of custom homes regardless of the stage of completion. Sec. 100.
2. Improved real property includes any real property upon which a structure has been constructed. Sec. 416(a)(2)(A).
3. The Property was improved real property.
4. An Owner-Builder is defined as an owner or lessor of real property who, by himself or by or through others, constructs or has constructed or reconstructs any improvement to real property. Sec. 100.
5. Taxpayer was the owner of the property and had improvement constructed on the property.
6. Taxpayer was an owner-builder.
7. Sale of improved real property includes any form of transaction which in substance is a transfer of title of improved real property. Sec. 416(a)(3).
8. Taxpayer sold improved real property in September 2005.
9. Taxpayer was a speculative builder during the audit period.
10. Taxpayer's sale was not a homeowner's bona fide non-business sale not subject to the tax on speculative builders. Regulation 416.1(a)(1).

11. The Revised Assessment included all applicable deductions and credit.
12. The City's revised privilege tax assessment against Taxpayer was proper.

Ruling

The August 30, 2009 protest and November 5, 2009 supplement to protest by Taxpayer of an assessment made by the City of Scottsdale are denied.

The Tax Collector's Notice of Revised Assessment is upheld except that the Tax Collector shall exclude the penalties that were waived in his letter dated October 30, 2009.

The Taxpayer has timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section -575.

Sincerely,

Hearing Officer

HO/7100.doc/10/03

c: ***Tax Audit Manager***
Municipal Tax Hearing Office