

DECISION OF MUNICIPAL TAX HEARING OFFICER

December 31, 2012

Taxpayer's Representative

Address to Taxpayer's Representative

Taxpayer
MTHO #735

Dear *Taxpayer's Representative*:

We have reviewed the evidence submitted for redetermination by *Taxpayer* and the City of Scottsdale (Tax Collector or City). The review period covered was June 2011. 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 based on its sale of property it had acquired at a trustee's sale. Taxpayer is not a speculative builder. In addition, the property was commercial property and Taxpayer's sale occurred more than 24 months after the property was substantially complete. Therefore no taxes were due on Taxpayer's sale under either Scottsdale Tax Code (STC) § 416 or 595(c).

Tax Collector's Response

MB Bank (Bank) was the lender on a project to develop real property. The Bank foreclosed on the property and Taxpayer acquired the property through a trustee's sale. The developer of the project was assessed tax as a speculative builder on the sale of the property at the trustee's sale. The developer did not protest or pay the assessment. Taxpayer subsequently became liable for the payment of the tax as a successor under STC § 595. Taxpayer is liable for the tax that was assessed.

Discussion

The Bank was the lender on a project to develop real property. The property was platted for 38 single family residential units contained in 7 master structures. The developer completed construction on some of the parcels but was unsuccessful in selling them. The structures that were completed were converted to apartments and rented.

The project was not completed and the Bank foreclosed on the property. Taxpayer acquired the property through the resulting trustee's sale. Taxpayer then sold the property in a subsequent sale.

The City assessed the developer, **VCH Housing**, as a speculative builder reasoning that transfers facilitated by a trustee's sale are taxable based on the successful bid price. The developer did not protest or pay the assessment.

The Tax Collector also issued an assessment to Taxpayer under STC § 595(c) as the developer's successor. Taxpayer protested the assessment arguing that Taxpayer was not a speculative

builder and that the property was commercial property and Taxpayer's sale occurred more than 24 months after the property was substantially complete. Thus Taxpayer is not subject to any tax.

Taxpayer acquired the property by sale under a trust deed. The privilege tax imposed by the City code was not paid. STC § 595(c) makes the person acquiring the property liable for the privilege tax that had not been paid on the property. To be liable, the successor is not required to independently be a speculative builder. If the property was acquired by a creditor or an affiliate of a creditor, the code has special provisions regarding the calculation and due date of the tax.

Taxpayer here was a creditor of or an affiliate of a creditor of **VCH Housing**. Because Taxpayer was a creditor or an affiliate of a creditor, Taxpayer's liability for the tax under STC § 595(c) is to be computed under STC § 595(c)(1). Under paragraph (1) Taxpayer is required to pay the tax based on the amount received by Taxpayer in a subsequent sale of the property to a party unrelated to the creditor. The tax is payable in the month following the month of the sale by the creditor to the unrelated party. The City's assessment complied with STC § 595(c)(1).

Taxpayer contends that the sale by Taxpayer took place more than 24 months after the improvements were substantially completed as demonstrated by the Certificates of Occupancy issued by the City. First, STC § 595(c)(1) applies regardless of when the subsequent sale by the creditor takes place. Second, neither **VCH Housing LLC** nor Taxpayer sold individual parcels that had been completed. While some of the parcels were completed more than 24 months before the sale, both sales were of the entire project, some of which had not been completed. The sales therefore took place before the property was substantially complete.

Based on the above, the City's assessment against Taxpayer is upheld.

The City stated in its response that pursuant to a contractual agreement with Taxpayer, a copy of which was included as Exhibit J, the purchaser from Taxpayer, **VCH Housing LLC**, became obligated to and paid the assessment. The City contends, however, that STC § 595(c)(4) only allows a credit of a payment if made by the debtor subsequent to payment of the tax by the creditor. Since no credit has been made as of the date of the City's response, no credit may be allowed.

Exhibit J only provides that the purchaser agreed to pay any transaction privilege tax due as a result of the transaction. The record is unclear whether the purchaser from Taxpayer actually paid the tax resulting from the transaction or paid the assessment against Taxpayer.

A taxpayer cannot contract away his tax liability. Contracts between a taxpayer and a third party regarding payment of taxes cannot shift the legal incidence of the tax as between the state (here the City) and the taxpayer. *Continental Inn of Albuquerque, Inc. v. New Mexico Tax. & Rev. Dept.*, 113 N.M. 588, 829 P.2d 946 (1992). The incidence of the tax remains on Taxpayer. If the purchaser has not paid the assessment, then Taxpayer is still liable for the assessment irrespective of the private agreement between Taxpayer and the purchaser.

If, however, the purchaser paid the assessment to the City pursuant to the agreement with Taxpayer, then the payment should be applied towards Taxpayer's liability.

Based on all the above, Taxpayer's protest is denied. However, to the extent any privilege taxes were paid to the City for the benefit of Taxpayer, those payments are to be applied against Taxpayer's liability under the assessment.

Findings of Fact

1. **123 Equities, LLC** owned real property located in the City.
2. The property was platted for 38 single family residential units contained in 7 master structures and included 4 common area parcels.
3. **123 Equities, LLC** transferred title to the parcels to **VCH Housing, Inc.** by special warranty deed dated February 2, 2007.
4. City building permits were issued for construction on parcels 7–24 in July 2007.
5. The construction contractor on the project was **456 Homes, LLC**.
6. Construction on lots 7–24 was completed and certificates of occupancy were issued by the City between May 8, 2008 and February 9, 2009.
7. **456 Homes** did not pay City privilege tax on its construction activity on the project.
8. **VCH Housing** was not successful in selling the completed residential units and the project was converted into an apartment complex.
9. The first tenant signed a lease on December 23, 2008.
10. The Bank, a lender on the project, filed a notice of trustee’s sale related to the property in November 2010.
11. The project was sold at the trustee’s sale on February 15, 2011.
12. The successful bidder at the trustee’s sale was **Taxpayer**, an affiliate of the Bank.
13. The successful bid price at the trustee’s sale was \$3,275,000.
14. On the date of the trustee’s sale, three of the seven master structures were completed. The remaining structures were not completed.
15. All of the parcels were conveyed to Taxpayer as a result of the trustee’s sale.
16. **VCH Housing** was assessed tax on April 18, 2012 as a speculative builder measured by the successful bid price of \$3,275,000.
17. The assessment specifically stated that transfers facilitated by a trustee’s sale are taxable based on the successful bid price.
18. **VCH Housing** did not protest the assessment and has not paid the assessment. The assessment is unpaid.
19. Taxpayer sold the property to **VCH Housing LLC** on June 15, 2011 for \$2,900,000.
20. The Tax Collector issued Taxpayer an assessment dated May 23, 2012 pursuant to STC § 595(c)(1). The assessment was based on the \$2,900,000 sale price of the property by Taxpayer to **VCH Housing LLC**.
21. Taxpayer timely protested the assessment.
22. The City included in its response as Exhibit J a copy of page 12 of a purchase agreement wherein the purchaser agreed to pay any transaction privilege tax due as a result of the transaction.
23. The City stated in its response that pursuant to a contractual agreement with Taxpayer, the purchaser, **VCH Housing LLC**, became obligated to and paid the assessment.

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. STC § 100.
2. A speculative builder also includes an owner-builder who sells, at any time, improved real property other than custom or model homes or improved residential lots without a structure prior to completion or within 24 months after the improvements of the real property sold are substantially complete. STC § 100.
3. While some of the improvements to the property were completed more than 24 months before the trustee's sale, the property was sold before the project was completed.
4. **VCH Housing** was a speculative builder liable for tax at the time the property was sold at the trustee's sale.
5. Taxpayer acquired by sale under a trust deed improved real property for which the privilege tax imposed by the City code was not paid.
6. STC § 595(c) makes the person acquiring the property liable for the privilege tax that had not been paid on the property.
7. STC § 595(c) does not require the purchaser to independently be a speculative builder.
8. Taxpayer was a creditor of or an affiliate of a creditor of **VCH Housing**.
9. Because Taxpayer was a creditor or an affiliate of a creditor, Taxpayer's liability for the tax under STC § 595 is to be computed under STC § 595(c)(1).
10. Under STC § 595(c)(1), Taxpayer is required to pay the tax in the month following the month of a subsequent sale by the creditor to an unrelated party based on the amount Taxpayer received in the subsequent sale.
11. Under STC § 595(c)(1) the tax applies regardless of when the subsequent sale by the creditor takes place.
12. Taxpayer was liable for the tax assessed by the City.
13. A taxpayer cannot contract away his tax liability. Contracts between a taxpayer and a third party regarding payment of taxes cannot shift the legal incidence of the tax as between the state (here the City) and the taxpayer. *Continental Inn of Albuquerque, Inc. v. New Mexico Tax. & Rev. Dept.*, 113 N.M. 588, 829 P.2d 946 (1992).
14. The incidence of the tax fell on Taxpayer under STC § 595(c)(1).
15. The City's assessment of privilege tax against Taxpayer was proper.
16. The agreement by the purchaser of the property from Taxpayer to pay any transaction privilege tax due as a result of the transaction referenced in the City's Exhibit J was a private agreement between the parties to the agreement.
17. To the extent any privilege taxes were paid to the City pursuant to the agreement for the benefit of Taxpayer, such payments should be applied to Taxpayer's liability under the assessment.

Ruling

Taxpayer's protest of an assessment of privilege tax made by the City of Scottsdale for the period June 2011 is denied.

The Tax Collector's Notice of Assessment to Taxpayer dated May 23, 2012 for the period June 2011 is upheld.

To the extent any privilege taxes were paid to the City for the benefit of Taxpayer, the Tax Collector shall apply those payments to Taxpayer's liability under the assessment.

Both parties have timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section -575.

Sincerely,

Hearing Officer

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c: Scottsdale Senior Tax Auditor
Municipal Tax Hearing Office