DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: July 27, 2004
Decision: MTHO #77
Tax Collector: City of Phoenix
Hearing Date: February 19, 2004

DISCUSSION

Introduction

On October 21, 2002, ***Taxpayer*** (Taxpayer") filed a protest of a tax assessment made by the City of Phoenix ("City"). After review, the City concluded on October 24, 2002, that the protest was timely and in the proper form. On October 28, 2002, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before December 12, 2002. Subsequently, the Taxpayer filed a letter indicating it would be amending its protest petition. On December 6, 2002, the Hearing Officer stayed the City's response and ordered the Taxpayer to file its amended petition on or before January 20, 2003. On January 17, 2003, the Taxpayer filed its amended petition. On January 21, 2003, the Hearing Officer lifted the stay and ordered the City to file a response on or before March 7, 2003. On February 18, 2003, the city requested an extension until April 7, 2003. On February 24, 2003, the Hearing Officer granted the extension request. On April 3, 2003, the City filed its response. On April 11, 2003, the Hearing Officer ordered the Taxpayer to file a reply on or before May 6, 2003. A Notice of Tax Hearing ("Notice") was issued setting the matter for hearing commencing on May 14, 2003. On May 8, 2003, the Taxpayer filed a reply along with a Motion to Continue Hearing to May 29, 2003 or thereafter ("Motion"). On May 9, 2003, the Hearing Officer granted the Motion. The hearing was rescheduled to July 9, 2003. In a July 1, 2003 email, the City requested the hearing be continued until September 2003. On July 2, 2003, the Hearing Officer granted the City's request. The hearing was rescheduled for September 16, 2003. In a September 11, 2003 email, the Taxpayer requested the hearing be continued for another sixty days in order to allow the parties to meet and attempt to resolve some issues. On September 11, 2003, the Hearing Officer granted the request and ordered the Taxpayer to provide an updated status report on or before October 16, 2003. The parties informed the Hearing Officer during an October 1, 2003 telephone conference call that they believed they could stipulate to the facts and that no hearing would be necessary. The Hearing Officer ordered the parties to file their stipulated facts on or before November 3, 2003. On November 3, 2003, the parties sent an email requesting an extension until November 17, 2003 in which to file the stipulated facts. On November 10, 2003, the Hearing Officer granted the extension request.

After review of additional information supplied by the Taxpayer, the City agreed that certain parcels that had been taxed were not taxable. On November 21, 2003, the parties filed an agreement setting forth specific parcels that should not have been taxed. On November 29, 2003, the Hearing Officer ordered the City to reverse the tax assessment to reflect the removal of parcels that should not have been taxed. A hearing on the remaining fourteen disputed parcels was held on February 19, 2004. On February 23, 2004, the Hearing Officer set forth the briefing schedule agreed upon by the parties. The City was to file a closing brief on or before April 5,

2004 and the Taxpayer would file its closing brief on or before May 5, 2004. On April 5, 2004, the City requested an extension to file their brief. The Taxpayer opposed the extension. A conference call was held on April 7, 2004 to discuss the request. On April 12, 2004, the Hearing Officer set forth the revised briefing dates agreed upon by the parties. The City would file a closing brief on or before May 14, 2004, the Taxpayer would file a closing brief on or before June 28, 2004, and the Hearing Officer would issue a decision within fifteen days of receipt of the Taxpayer's brief. The City filed its brief on May 14, 2004 and the Taxpayer filed its brief on June 28, 2004. On July 7, 2004, the Hearing Officer indicated the record was closed and a written decision would be issued on or before July 28, 2004.

The City conducted an audit of the Taxpayer for the period August 1996 through December 2000. As a result of that audit, the City assessed the Taxpayer for taxes due of $649,551.77 for unreported speculative builder revenue pursuant to City Code Section 416 ("Section 416"). In addition, interest was assessed up through June 2002 in the amount of $252,052.61. Subsequent to filing a protest in this matter, the Taxpayer provided additional information to the City. After review of the information, the City agreed with the Taxpayer that certain parcels that had been assessed were not taxable transfers. The City agreed the following parcels should be removed from the assessment: 4A, 4B-2, 4B-3, 4B-4, 4C-2, 4C3-1, 4C3-4, 4C-4, 4D, 5B-1, 5B-2, 5B-2A, 5D-1/5D-2, land surrounding Parcel 3B-1A, and 1A and 1B. As a result, the assessment was reduced by $481,920.39 in tax as well as reductions in the associated interest. The remaining fourteen parcels remain in dispute: 5D-3, 17A-2, 4C-1, 3B-1A, 3C-2A, 4C-3B, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1.

City Position

The City asserted that City Code Section 100 ("Section 100") defines a "speculative builder" as an owner-builder who sells or contracts to sell improved real property on or before the expiration of 24 months after the improvement's substantial completion. Further, City Code Section 14-416 (a)(1) ("Section 416 (a)(1)") provides that the tax liability for a speculative builder is based on the total selling price from the sale of the improved real property. In this case, the City argued that the Taxpayer sold improved real property within 24 months after improvements were substantially complete and thus were taxable speculative builder sales.

With regard to all fourteen parcels still in dispute, the City acknowledged that the purchasers of the parcels were required to do additional work (providing electrical specification needs regarding the use of the property, bringing wires, determining what phase power to use, etc…). The City argued that the fourteen parcels that remain in dispute are all taxable as speculative builder sales pursuant to 14-416. The speculative builder tax is imposed on taxpayers who improve and then sell real property. City Code Section 14-416 (a)(2) sets forth what is meant by "improved real property":

> "(2) "Improved real property means any real property:
> (A) . . .
> (B) . . .
> (C) . . .
> (D) where water, power, and streets have been constructed to the property line."

In this case, the City asserted that there was no dispute between the parties that water and streets "had been constructed to the property line." The City disputed the Taxpayer's argument that there was not power to the property line for the fourteen parcels in dispute. According to the City, there was an electrical power distribution line passing in front of all of the parcels in dispute. The City acknowledged that it would have posed additional costs to the Taxpayer to utilize the power line to the front of the property of four of the parcels. According to the City, Arizona Public Service Company ("APS") brought an additional underground feed line to the rear of the four parcels for the convenience of the customers that purchased each of the four parcels. The City argued that whether additional lines were brought in for the convenience of APS or the property purchasers has no bearing on whether the parcel was improved for purposes of the speculative builder tax.

The City asserted that all fourteen of the disputed parcels had construction of the infrastructure for power to the property line at the time the transaction or sale of the property occurs. As a result, the City argued the requirement of having power constructed to the property line was satisfied. According to the City, it would not be possible in most instances to complete the type of service that is needed without knowing the specific customer needs. The City argued if the intent were to only tax those transactions in which electrical service was provided to the site, which conformed to the exact use of the property, the City Code would have included such language. Since that language was not included, the City asserted that having the necessary conduit to the property line to provide electrical service was sufficient enough to meet the Code requirements of having power constructed to the property line.

Taxpayer Position

The Taxpayer asserted that fourteen of the parcels within the overall ***Project*** were still in dispute with the City. According to the Taxpayer, Section 14-416 (a)(2) requires power to be constructed to the property line in order for there to be "improved real property" subject to the speculative builder tax. The Taxpayer argued that taxing statutes are not and should not be extended to embrace objects bearing the burden of taxation by a strained construction or implication. Further, the Taxpayer argued Arizona law requires that a tax provision that defines the scope of a tax must be construed in favor of the taxpayer. Section 416 (a)(2) also requires water and streets to be constructed to the property line in order for it to be "improved real property." The Taxpayer acknowledged that the necessary water and streets were constructed to the property line of the fourteen disputed parcels. Additionally, each of the parcels had an electrical power distribution line passing by the property.

The Taxpayer asserted that the buyer of each of the fourteen parcels in dispute had to do many things subsequent to the sale in order to have "power" for its property. According to the Taxpayer, none of the disputed parcels had useable power at the property at the time of transfer until the new owner requested services from Arizona Public Service ("APS"). For eleven of the parcels, there was empty conduit running to the property. In those instances, the property buyer was required to have an electrical design consultant prepare electrical plans, and then APS would have to set a transformer and pull wire to the site. While several of the parcels (parcels 5D-3, 17A-2, 3C-2A) had power lines running to the property, the Taxpayer asserted those were "long haul" lines which did not have service points available for use. According to the Taxpayer, those lines could not be used to provide power to a property without significant additional work. In fact, for each of the three parcels, the power lines eventually used by APS to service the parcels originated from a source that was not available to the parcels at the time of transfer.

ANALYSIS

The only issue to resolve in this matter is whether or not the fourteen disputed parcels had "power to the property line" at the time they were sold and thus were taxable sales of improved property pursuant to Section 416 (a)(2). There was no dispute that water and streets had been constructed to the property line for each of the disputed parcels. We concur with the Taxpayer's assessment that Arizona law requires a tax provision that defines the scope of a tax to be construed in favor of the taxpayer. While Section 416 (a)(2) does not specifically state that the "power to the property line" must be useable, we find that any other reading of Section 416 (a)(2) would result in a strained construction. As a result, we conclude that the "power to the property line" must be useable. Otherwise the "power to the property line" would not be an improvement to the property and, in fact, one could argue it was a detriment to the property.

Based on the evidence presented, we do not find parcels 5D-3, 17A-2, and 3C-2A had useable "power to the property line." In each case, the buyers did not use power from a power distribution line in place on the south side of the property but utilized power from another source that did not exist at the time each of the parcels was sold. This was done because the costs of utilizing the line in place made it economically prohibitive to run useable power to any of the three parcels. As a result, we conclude that parcels 5D-3, 17A-2, and 3C-2A were not improved real property pursuant to Section 416 (a)(2).

The other eleven disputed parcels had high voltage distribution lines running on or near the property line along with conduit service stubs running to the property. The conduit service stubs did not contain any wire. These lots eventually used power from the high voltage distribution lines in place but only after the lot buyer had prepared electrical plans to APS. APS then had to pull lines through the conduit, install and set transformers, and install meters. We note that part of the difficulty in this matter arises because we are dealing with commercial property instead of residential property. The power needs for residential property are basically all the same and as a result the wires are actually run through the conduit to the property. In this case, the power needs of the commercial property are not known until it is sold to a specific type of commercial customer. In this case, the Taxpayer has taken the power as far as they could without knowing the actual needs of the purchasers of the parcels. Was this enough to conclude there was useable "power to the property line" pursuant to Section 416 (a)(2)? We think it does. The fact that the distribution line and conduit were to the property line at the time of sale of each of the parcels and the parcel purchasers utilized the same to provide power leads us to conclude there was useable power to the parcels at the time of sale. As a result, we conclude parcels 4C-1, 3B-1, C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1 were improved real property pursuant to Section 416 (a)(2).

Based on all the above, we find that with the exception of these eleven parcels, the Taxpayer's October 21, 2002 protest shall be granted.

FINDINGS OF FACT

1. On October 21, 2002, the Taxpayer filed a letter of protest of a tax assessment made by the City.

2. After review, the City concluded on October 24, 2002, that the protest was timely and in the proper form.

3. On October 28, 2002, the Hearing Officer ordered the City to file a response to the protest on or before December 12, 2002.

4. Subsequently, the Taxpayer filed a letter indicating it would be amending its protest petition.

5. On December 6, 2002, the Hearing Officer stayed the City's response and ordered the Taxpayer to file its amended petition on or before January 20, 2003.

6. On January 17, 2003, the Taxpayer filed its amended petition.

7. On January 21, 2003, the Hearing Officer lifted the stay and ordered the City to file a response on or before March 7, 2003.

8. On February 18, 2003, the City requested an extension until April 7, 2003.

9. On February 24, 2003, the Hearing Officer granted the extension request.

10. On April 3, 2003, the City filed its response.

11. On April 11, 2003, the Hearing Officer ordered the Taxpayer to file a reply on or before May 6, 2003.

12. A Notice was issued setting the matter for hearing commencing on May 14, 2003.

13. On May 8, 2003, the Taxpayer filed a reply along with a Motion.

14. On May 9, 2003, the Hearing Officer granted the Motion.

15. The hearing was rescheduled to July 9, 2003.

16. In a July 1, 2003 email, the City requested the hearing be continued until September 2003.

17. On July 2, 2003, the Hearing Officer granted the City's request.

18. The hearing was rescheduled for September 16, 2003.

19. In a September 11, 2003 email, the Taxpayer requested the hearing be continued for another sixty days in order to allow the parties to meet and attempt to resolve some issues.

20. On September 11, 2003, the Hearing Officer granted the request and ordered the Taxpayer to provide updated status report on or before October 16, 2003.

21. The parties informed the Hearing Officer during an October 1, 2003 telephone conference call that they believed they could stipulate to the facts and that no hearing would be necessary.

22. The Hearing Officer ordered the parties to file their stipulated facts on or before November 3, 2003.

23. On November 3, 2003, the parties sent an email requesting an extension until November 17, 2003 in which to file the stipulated facts.

24. On November 10, 2003, the Hearing Officer granted the extension request.

25. After review of additional information supplied by the Taxpayer, the City agreed that certain parcels that had been taxed were not taxable.

26. On November 21, 2003, the parties filed an agreement setting forth specific parcels that should not have been taxes.

27. On November 29, 2003, the Hearing Officer ordered the City to revise the tax assessment to reflect the removal of parcels that should not have been taxed.

28. A hearing on the remaining fourteen disputed parcels was held on February 19, 2004.

29. On February 23, 2004, the Hearing Officer set forth the briefing schedule agreed upon by the parties.

30. The City was to file a closing brief on or before April 5, 2004 and the Taxpayer would file its closing brief on or before May 5, 2004.

31. On April 5, 2004, the City requested an extension to file their brief.

32. The Taxpayer opposed the extension.

33. A conference call was held on April 7, 2004 to discuss the request.

34. On April 12, 2004, the Hearing Officer set forth the revised briefing dates agreed upon by the parties.

35. The City would file a closing brief on or before May 14, 2004, the Taxpayer would file a closing brief on or before June 28, 2004, and the Hearing Officer would issue a decision within fifteen days of receipt of the Taxpayer's brief.

36. The City filed its brief on May 14, 2004 and the Taxpayer filed its brief on June 28, 2004.

37. On July 7, 2004, the Hearing Officer indicated the record was closed and a written decision would be issued on or before July 28, 2004.

38. The City conducted an audit of the Taxpayer for the period August 1996 through December 2000.

39. As a result of that audit, the City assessed the Taxpayer for taxes due of $649,551.77 for unreported speculative builder revenue pursuant to Section 416.

40. In addition, interest was assessed up through June 2002 in the amount of $252,052.61.

41. Subsequent to filing a protest in this matter, the Taxpayer provided additional information to the City.

42. After review of the information, the City agreed the following parcels should be removed from the assessment: 4A, 4B-2, 4B-3, 4B-4, 4C-2, 4C3-1, 4C-4, 4D, 5B-1, 5B-2, 5D-1/5D-2, land surrounding Parcel 3B-1A, and 1A and 1B.

43. As a result, the assessment was reduced by $481,920.39 in tax as well as reductions in the associated interest.

44. The remaining fourteen parcels remained in dispute: 5D-3, 17A-2, 4C-1, 3B-1A, 3C-2A, 4C-3B, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1.

45. During the audit period, the Taxpayer sold improved real property within 24 months after improvements were substantially complete.

46. All fourteen parcels in dispute had water and streets to the property line and an electrical distribution line running by the property.

47. Three parcels (parcels 5D-3, 17A-2, and 3C-2A) had power lines running by the property but did not have service points available for use.

48. The lot purchasers were unable to utilize the power lines running by the property for parcels 5D-3, 17A-2, and 3C-2A without incurring substantial additional work/costs.

49. The power lines used by APS to service parcels 5D-3, 17A-2, and 3C-2A originated from a source that was not available to the parcels at the time of transfer by the Taxpayer.

50. Parcels 4C-1, 3B-1, C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1, all had power distribution lines running by the property along with conduit running to the property line at the time of sale of each of the parcels.

51. Parcels 4C-1, 3B-1, C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1, were eventually provided service by APS from the power distribution lines that were available to the parcels at the time of transfer by the Taxpayer.

52. Parcels 5D-3, 17A-2, and 3C-2A did not have power to the property line at the time of transfer by the Taxpayer.

53. Parcels 4C-1, 3B-1, C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1 all had power to the property line at the time of transfer by the Taxpayer.

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. Speculative builder revenues are taxable pursuant to Section 416.

3. The Taxpayer had unreported speculative builder revenues during the audit period.

4. "Improved real property," means any real property where water, power, and streets have been constructed to the property line pursuant to Section 416 (a)(2).

5. Parcels 4C-1, 3B-1A, 4C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1 were improved real property pursuant to Section 416 (a)(2).

6. Parcels 5D-3, 17A-2, and 3C-2A were not improved real property pursuant to Section 416 (a)(2).

7. With the exception of the assessment on parcels 4C-1, 3B-1A, 4C-3b, 4B-1, 4B-5, 5A-3, 5C-1, 5E, 16A, 16A-1, and 17A-1, the Taxpayer's October 21, 2002 protest should be granted.

ORDER

It is therefore ordered that the ***Taxpayer***'s October 21, 2002 protest is hereby granted consistent with Paragraphs 5 and 6 of the January 2004 Agreement between the City of Phoenix and ***Taxpayer***, and Conclusions of Law Nos. 5, 6, and 7, herein.

It is further ordered that the City of Phoenix shall revise the tax assessment consistent with Paragraphs 5 and 6 of the January 2004 Agreement between the City of Phoenix and ***Taxpayer***.

It is further ordered that the City of Phoenix shall revise the tax assessment to remove parcels 5D-3, 17A-2, and 3C-2A.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer