

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: March 24, 2014

Decision: MTHO # 813

Taxpayer:

Tax Collector: City of Scottsdale

Hearing Date: February 6, 2014

DISCUSSION

Introduction

On July 29, 2013, ***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 February 6, 2014. Appearing for the City were a ***Senior Tax Auditor*** and the ***Deputy City Attorney***. Taxpayer failed to make an appearance. On February 7, 2014, the Hearing Officer granted Taxpayer until March 5, 2014 in which to provide any additional written evidence. On March 10, 2014, the Hearing Officer indicated there was no response from Taxpayer and as a result closed the record. The Hearing Officer indicated a written decision would be issued to the parties on or before April 25, 2014.

DECISION

On July 9, 2013, the City issued an assessment to Taxpayer for additional taxes in the amount of \$15,192.13, penalties in the amount of \$3,798.03, license fees in the amount of \$465.75, and interest up through May 2013 in the amount of \$1,940.54. The audit period was for the months of September and October 2009. The assessment was based on unreported speculative builder sales pursuant to City Code Section 416 (“Section 416”).

On June 12, 2007, Taxpayer purchased ***Lot ABC*** at ***DM Place***. On October 25, 2007, City building permit #***AAA*** was issued to Taxpayer as an owner-builder for the construction of a single family residence on ***Lot ABC***. On September 8, 2009, ***Big Buyer LLC (“BB”)*** acquired the property from Taxpayer as the highest bidder at a trustee’s sale for \$659,375.00. The property transferred at the trustee sale was only partially improved. On July 9, 2013; the City assessed the transfer of ***Lot ABC*** as a speculative builder sale

pursuant to Section 416.

On April 13, 2005, Taxpayer acquired *Lot ABCD* at *LT Place* (“*LT*”). On December 28, 2005, City building permit #*BBB* (“*BBB*”) was issued to Taxpayer as an owner-builder for the construction of a single family residence on *Lot ABCD*. On December 28, 2007, a certificate of occupancy (“*COO*”) was issued for completion of the project. The property was listed on the Arizona Regional Multiple Listing Service (“*ARMLS*”) on several occasions with the first commencing on August 28, 2007 and the last ending on November 13, 2009. On October 1, 2009, the improved *Lot ABCD* was sold by Warranty Deed to *Mr. Man* for \$770,000.00. On July 9, 2013, the City assessed the transfer of *Lot ABCD* as a speculative builder sale pursuant to Section 416.

Taxpayer protested the assessment and argued all the homes built were “owner-builder” homes. Taxpayer further argued that taxes have been paid on all products, services, etc. Taxpayer noted that all tax returns were prepared by a CPA and all returns showed a loss. Taxpayer indicated that one of the homes in question was foreclosed on as Taxpayer was unable to meet the mortgage payments. Subsequently, the City reviewed additional information provided by Taxpayer and on November 27, 2013 issued a revised assessment to allow tax credits on the transfer of *Lot ABC* at *DM*. The City also allowed the cost of development fees and factored tax. The City issued a revised assessment to Taxpayer for additional taxes in the amount of \$14,435.48, license fees in the amount of \$465.75, and interest up through October 2013 in the amount of \$1,948.12.

Section 416 authorizes a tax on the total selling price from the sale of improved real property by a speculative builder. 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 custom homes regardless of the stage of completion of such homes. Section 100 defines an owner-builder as an owner who, by himself or by or through others, has constructed any improvements to real property. In this case, Taxpayer had improvements made to *Lot ABC* which was partially completed on or before September 8, 2009 when it was transferred at a trustee sale for \$659,375.00. As a result, Taxpayer meets the definition of an owner-builder pursuant to Section 100. The primary issue regarding *Lot ABC* is whether or not the trustee sale constituted a sale pursuant to Section 416 resulting in a speculative builder sale. Section 100 defines a “sale” to mean any transfer of title or possession in any manner or by any means whatsoever, including consignment transactions and auctions of property for a consideration. Based on the above, we conclude that the trustee sale resulted in a “sale” pursuant to Section 100. The remaining issue was whether or not there was consideration as required for a “sale” in Section 100. City Code Section 200 (“*Section 200*”) defines “gross income” to include a “reduction of or forgiveness of indebtedness”. As a result of the trustee sale, Taxpayer had a reduction or forgiveness of its indebtedness. That reduction in indebtedness represented gross income to Taxpayer pursuant to Section 416. While Taxpayer has argued that all of the homes built were for primary residence, we conclude *Lot ABC* could not have been legally occupied since it was foreclosed prior to completion.

Sections 416 and 100 also apply to *Lot ABCD*. Taxpayer meets the definition of an

owner-builder pursuant to Section 100 who sold or contracted to sell a custom home before the expiration of twenty-four months after the improvements of the real property sold are substantially complete. In this case, Taxpayer had improvements made to **Lot ABCD** which were substantially completed on December 28, 2007 as evidenced by a COO being issued. While Taxpayer has argued that all homes were built for primary residence, we have received no evidence to corroborate that **Lot ABCD** was utilized as a primary residence. In fact, **Lot ABCD** was listed on the ARMLS prior to the COO being issued.

Lastly, we note that the City was authorized pursuant to City Code Section 540 (“Section 540”) to assess penalties for failure to file and failure to timely pay taxes. Those penalties may be waived for reasonable cause pursuant to Section 540. As part of the City’s review, the City did conclude there was reasonable cause to waive the penalties in this case.

Based on all the above, we conclude that Taxpayer’s protest should be denied, consistent with the Discussion, Findings, and Conclusions, herein.

FINDINGS OF FACT

1. On July 9, 2013, the City issued an assessment to Taxpayer for additional taxes in the amount of \$15,192.13, penalties in the amount of \$3,798.03, license fees in the amount of \$465.75, and interest up through May 2013 in the amount of \$1,940.54.
2. The audit period was for the months of September and October 2009.
3. The assessment was based on unreported speculative builder sales pursuant to Section 416.
4. On July 29, 2013, Taxpayer filed a letter of protest for a tax assessment made by the City.
5. On June 12, 2007, Taxpayer purchased **Lot ABC** at **DM** located in the City.
6. On October 25, 2007, City Permit #AAA was issued to Taxpayer as an owner-builder for the construction of a single family residence on **Lot ABC**.
7. On September 8, 2009, **Big Buyer, LLC** acquired the partially improved **Lot ABC** at a trustee sale for \$659,375.00.

8. On July 9, 2013, the City assessed the transfer of *Lot ABC* as a speculative builder sale pursuant to Section 416.
9. On April 13, 2005, Taxpayer acquired *Lot ABCD* at *LT Place* in the City.
10. On December 28, 2005, City Permit *#BBB* was issued to Taxpayer as an owner-builder for the construction of a single family residence on *Lot ABCD*.
11. On December 28, 2007, a COO was issued for the completion of the improvements to *Lot ABCD*.
12. The improved *Lot ABCD* was listed on ARMLS on several occasions with the first commencing on August 28, 2007 and the last ending on November 13, 2009.
13. On October 1, 2009, the improved *Lot ABCD* was sold by Warranty Deed to *Mr. Man* for \$770,000.00.
14. On July 9, 2013, the City assessed the transfer of *Lot ABCD* as a speculative builder sale pursuant to Section 416.
15. Subsequent to Taxpayer's protest, the City reviewed additional documentation provided by Taxpayer and as a result the City allowed tax credits on the transfer of *Lot ABC* at *DM*.
16. The City also allowed the cost of development fees and factored tax.
17. On November 27, 2013, the City issued a revised assessment to Taxpayer for additional taxes in the amount of \$14,435.48, license fees in the amount of \$465.75. and interest up through October 2013 in the amount of \$1,948.12.
18. The City removed all penalties from the assessment.

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 upon every person engaging in the business of speculative building within the City.

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 custom homes regardless of the stage of completion of such homes.
4. Section 100 defines an owner-builder as an owner who, by himself or by or through others, has constructed any improvements to real property.
5. Section 100 defines a “sale” to mean any transfer of title or possession in any manner or by any means whatsoever, including consignment transactions and auctions of property for a consideration.
6. The trustee sale of *Lot ABC* resulted in a “sale” as there was a transfer of title or possession of improved real property for a consideration pursuant to Section 100.
7. Section 200 defines “gross income” to include a “reduction of or forgiveness of indebtedness”.
8. As a result of the trustee sale, Taxpayer had a reduction of its indebtedness which resulted in gross income to Taxpayer pursuant to Section 200.
9. The trustee sale of *Lot ABC* was a speculative builder sale as Taxpayer was an owner-builder who sold a partially improved custom home pursuant to Sections 100 and 416.
10. *Lot ABC* could not have been legally occupied since it was foreclosed prior to completion.
11. The sale of *Lot ABCD* meets the definition of a speculative builder sale pursuant to Sections 100 and 416 as Taxpayer sold or contracted to sell a custom home before the expiration of twenty-four months after the improvements of the real property sold are substantially complete.
12. We have no evidence that *Lot ABCD* was utilized as a primary residence.
13. The City was authorized pursuant to Section 540 to assess penalties for failure to file and failure to timely pay taxes.
14. Taxpayer has demonstrated reasonable cause to have all penalties waived in this matter pursuant to Section 540.
15. Taxpayers protest should be denied, consistent with the Discussion, Findings, and Conclusions, herein.
16. The parties have timely appeal rights pursuant to Model City Tax Code Section 575.

ORDER

It is therefore ordered that the July 29, 2013 protest by *Taxpayer* of a tax assessment made by the City of Scottsdale is hereby denied consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that this Decision is effective immediately.

Municipal Tax Hearing Officer