

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: September 29, 2008

Decision: MTHO #446

Taxpayer: *Taxpayer*

Tax Collector: Town of Marana

Hearing Date: September 3, 2008

DISCUSSION

Introduction

On March 5, 2008, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the Town of Marana (“Town”). After review, the Town concluded on June 1, 2008 that the protest was timely and in the proper form. On June 27, 2008, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the Town to file any response to the protest on or before August 11, 2008. On July 3, 2008, the Town filed a response to the protest. On July 7, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before July 28, 2008. On July 30, 2008, a Notice of Tax Hearing (“Notice”) scheduled the matter for a hearing commencing on September 3, 2008. Both parties appeared and presented evidence at the September 3, 2008 hearing. On September 4, 2008, the Hearing Officer indicated the record was now closed and a written decision would be issued on or before October 17, 2008.

Town Position

The Town conducted an audit of Taxpayer for the period April 2005. The Town assessed Taxpayer for taxes due in the amount of \$9,090.49, penalties in the amount of \$2,272.62, and interest up through January 2008 in the amount of \$2,109.17. The Town indicated they notified Taxpayer of the audit based on address information available at the time of the sale.

The Town assessed Taxpayer on the sale of a spec home located at *123 W Address* for \$599,000.00. The Town noted that a building permit was issued on June 14, 2004 and the completed home was sold on April 12, 2005. As a result, the Town concluded the improved real property was sold within twenty-four months of substantial completion. For that reason, the Town assessed Taxpayer as a speculative builder pursuant to Town Section 9-416 (“Section 416”).

In response to Taxpayer, the Town noted that Town Section 9-100 (“Section 100”) provides a definition of “business” and “casual sale”. “Business” means all activities or acts, personal or corporate, engaged in and caused to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, but not casual activities or sales.

“Casual Activity or Sale” means a transaction of an isolated nature made by a person who neither represents himself to be nor is engaged in a business subject to a tax imposed by this Chapter. However, no sale, rental, license for use, or lease transaction concerning real property nor any activity entered into by a business taxable by this Chapter shall be treated, or be exempt, as casual. This definition shall include sales of used capital assets, provided that the volume and frequency of such sales do not indicate that the seller regularly engages in selling such property.

The Town concluded the sale of the spec home was a business activity pursuant to Section 100. Further, the Town indicated the sale of real property is not considered “casual” pursuant to Section 100. While Taxpayer argued their intent was to live in the home, the Town asserted intent was not a consideration in Section 416.

The Town imposed penalties pursuant to ARS Section 42-1125 (“Section 1125”) for failure to timely file a return and for failure to timely pay taxes. While Taxpayer indicated they were unaware of the speculative builder tax, the Town argued it is a well established fact that ignorance of the law is no excuse.

The Town imposed interest pursuant to ARS Section 42-1123 (“Section 1123”). The Town argued that Section 1123 requires interest to be collected on any tax owed. Based on all the above, the Town requested the assessment be upheld.

Taxpayer Position

Taxpayer indicated they had bought a four acre parcel and planned to build a home at **123 W Address** to live in. According to Taxpayer, there was never any intent to be in business as a subdivider or as a speculative builder. Taxpayer noted the house was built inverted from the plans and at the same time, **Taxpayer** were going through a separation. Subsequently, **Taxpayer** reconciled but decided to sell the home at **123 W Address**. Taxpayer noted they had an agreement with **ABC Homes** to construct the home at **123 W Address**. Taxpayer indicated the agreement referred to “customer agrees to pay for any appropriate sales tax, 9.6% going to the Town of Marana.” Based on the above, Taxpayer opined all taxes had been paid.

Taxpayer criticized the Town for not notifying Taxpayer regarding the tax assessment at an earlier date. Taxpayer indicated they had taken a capital gain after selling the property in 2005 and didn’t receive the Town’s assessment until two years later. Taxpayer asserted they should not be assessed penalties as they were unaware of the speculative builder tax. For the same reason, Taxpayer argued they should not be assessed interest. According to Taxpayer, an employee of the Town Finance Department informed Taxpayer that all interest would be stopped at the time a protest was filed.

ANALYSIS

The sale of the home at *123 W Address* was a business activity pursuant to Section 100. Because it was a sale of real property, it was not a casual sale pursuant to Section 100. Since the sale occurred within twenty-four months of the substantial completion of the improvements, the sale was a taxable speculative builder sale pursuant to Section 416. We concur with the Town that Taxpayer's intent when constructing the home does not matter as to the taxability pursuant to Section 416. The Town's tax assessment is upheld.

The Town was authorized pursuant to Section 1125 to assess penalties for late filing and late payment of taxes. Those penalties may be waived for reasonable cause. We conclude Taxpayer has demonstrated reasonable cause since they were unaware of the speculative builder tax. Accordingly, we will waive the penalties. As to the interest, Section 1123 makes it clear that interest cannot be waived unless the underlying tax is abated. Since the underlying tax was upheld, none of the interest can be waived. For an exception to the interest rule, there must have been written advice furnished to Taxpayer from the Town. There was no evidence of any such written advice. Accordingly, we must uphold the interest assessment.

FINDINGS OF FACT

1. On March 5, 2008, Taxpayer filed a protest of a tax assessment made by the Town.
2. After review, the Town concluded on June 1, 2008, that the protest was timely and in the proper form.
3. On June 27, 2008, the Hearing Officer ordered the Town to file a response to the protest on or before August 11, 2008.
4. On July 3, 2008, the Town filed a response to the protest.
5. On July 7, 2008, the Hearing Officer ordered Taxpayer to file any reply on or before July 28, 2008.
6. On July 30, 2008, a Notice scheduled the matter for a hearing commencing on September 3, 2008.
7. Both parties appeared and presented evidence at the September 3, 2008.
8. On September 4, 2008, the Hearing Officer indicated the record was now closed and a written decision would be issued on or before October 17, 2008.

9. The Town performed an audit of Taxpayer for the period April 2005.
10. The Town assessed Taxpayer for taxes in the amount of \$9,090.49 penalties of \$2,272.62, and interest up through January 2008 in the amount of \$2,109.17.
11. The Town notified Taxpayer of the audit based on address information available at the time of the home sale.
12. The Town assessed Taxpayer on the sale of a spec home at ***123 W Address*** for \$599,000.00.
13. A building permit was issued on June 14, 2004 and the completed home was sold on April 12, 2005.
14. The Town imposed penalties for Taxpayer failing to timely file a tax return and for failure to timely pay taxes.
15. Taxpayer bought a four acre parcel and planned to build a home at ***123 W Address*** to live in.
16. Taxpayer had no intent to build a home to sell at ***123 W Address***.
17. Taxpayer was not aware of the speculative builder tax until the assessment was made by the Town.

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. The sale of the home at ***123 W Address*** was a business activity pursuant to Section 100.
3. Because it was a sale of real property, it was not a casual sale pursuant to Section 100.
4. The sale of the home at ***123 W Address*** was a speculative builder sale pursuant to Section 416.
5. The Town was authorized pursuant to Section 1125 to assess penalties for late filing of a return and for late payment of taxes.
6. Taxpayer demonstrated reasonable cause to have the penalties waived.

7. Section 1123 does not permit waiver of interest unless the underlying tax is abated.
8. Taxpayer provided no written evidence from the Town indicating all interest charges would stop when a protest was filed.
9. The interest assessment is upheld.
10. Taxpayer's protest should be partly upheld and partly denied, consistent with the Discussion, Findings, and Conclusions, herein.

ORDER

It is therefore ordered that the March 5, 2008 protest by *Taxpayer* of a tax assessment made by the Town of Marana is hereby partly denied, and partly granted, consistent with the Discussion, Findings, and Conclusions, herein.

It is further ordered that the Town of Marana shall waive all penalties assessed in this matter.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh
Municipal Tax Hearing Officer