

## DECISION OF MUNICIPAL TAX HEARING OFFICER

July 20, 2015

*Taxpayer's Representative*  
*Address of Taxpayer's Representative*

*Taxpayer*  
MTHO #872

*Dear Taxpayer's Representative:*

We have reviewed the evidence presented by *Taxpayer* and the City of Scottsdale (Tax Collector or City) at the hearing on June 19, 2015. The review period covered was February 2014. 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 constructed in the City. Taxpayer is a corporation owned solely by a *married couple (MC)*, who used the home as a vacation home. The City does not tax the sale of a home built by a taxpayer if the taxpayer used the home as his principal place of family residence or vacation residence for the six (6) months next prior to the offer for sale. The *MC* used the home as their vacation residence for over two years after the home was completed. Because the *MC* are the sole owners of Taxpayer, the corporation should be disregarded, the *MC* should be considered the owners and sellers of the home and the sale should be exempt from the speculative builder's tax.

### Tax Collector's Response

Taxpayer was the owner of record of the Property on which the home was constructed. Taxpayer met the definition of a speculative builder. The exclusion for a taxpayer's bona fide sale of his principal residence only applies to individuals. The home was owned by a corporation, not the individual owners of the corporation. Under the Scottsdale City Tax Code (STC) the corporation is a separate taxable entity. The corporation cannot be disregarded by the Tax Collector. Taxpayer is therefore not entitled to the exclusion for a taxpayer's bona fide sale of his personal residence.

### Discussion

Taxpayer acquired vacant land (Property) in the City in September of 1999. Taxpayer obtained a permit to construct a home which was finished in 2011. Taxpayer was listed as the owner of the Property on the City Building Permit and the Certificate of Occupancy that was issued. The Property was used by the *MC* as a vacation home for themselves and their guests. The Property was not leased to others or used for any other purpose. Taxpayer sold the Property in February 2014.

The Tax Collector audited Taxpayer for the period February 2014 and assessed Taxpayer for City privilege tax under the speculative builder classification. The Tax Collector considered Taxpayer to be a speculative builder when it sold the Property in February 2014.

Taxpayer timely protested the assessment contending that:

- a. Taxpayer was not a speculative builder because it did not build or sell more than one home.
- b. Taxpayer was exempt from the speculative builder tax because *MC* were the only shareholders of Taxpayer and the *MC* used the residence as a vacation home for over a year.

### **Was Taxpayer a speculative builder?**

The first question presented is whether Taxpayer was a speculative builder when it sold the Property in February 2014. 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.

An owner-builder is defined as including 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. Taxpayer held title to the Property and had an improvement constructed on the Property. Taxpayer was an owner-builder and the Property was improved real property.

Taxpayer argues that it was not a speculative builder because it did not sell more than one home. Taxpayer reasons that since the relevant definition of a speculative builder refers to the sale of improved real property consisting of custom **homes**, it does not apply to the sale of a single home. The City contends that the definition includes the sale of a single home.

The City's position finds support in A.R.S. § 1-214(B). Subsection (B) provides that words in the plural number include the singular. While A.R.S. § 1-214(B) is not mandatory, it allows us to interpret the plural as including the singular if that interpretation will carry out legislative intent. Therefore the use of a plural term does not prevent an interpretation that the definition of speculative builder includes the sale of a single home.

Here, Regulation § 416.1 established the City's interpretation. Regulation § 416.1 has been in the Tax Code for at least over 20 years (the Code indicates Regulation § 416.1 was amended effective January 31, 1995 by Ordinance 2728.) Since that time both STC § 100 and STC § 416 were amended numerous times. The presumption is that the legislature (City Council) knew of the Tax Collector's construction and adopted it in re-enacting STC § 100 and STC § 416. Taxpayer has not cited, and our research has not revealed, any authority suggesting the City Council intended otherwise. When Taxpayer sold the Property in February 2014, it was therefore a speculative builder under the Code.

### **Was the sale exempt as a homeowner's bona fide non-business sale?**

The second question presented is whether the sale of the Property may be considered a homeowner's bona fide non-business sale notwithstanding the fact that the Property was owned by a corporation and not an individual. 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 owner for the six (6) months next prior to the offer for sale.

The Tax Collector argues that under Regulations § 416.1 the terms "Owner" and "Homeowner" only mean an individual, and no other entity. The exemption therefore only applies to individuals. Here a corporation owned the Property at the time of the sale, not the individual shareholders of the corporation. Taxpayer, being a corporation, does not qualify for the exemption.

The Code imposes the privilege tax on every person engaging or continuing in business as a speculative builder. A "person" is defined by the code as including an individual, firm, partnership, corporation, estate or trust. The code further provides that for the purposes of the tax, a person is to be considered a distinct and separate person from any general or limited partnership or joint venture or other association with which such person is affiliated. Therefore, the corporation and the *MC* are separate entities for purposes of the city privilege tax.

Taxpayers are free to use whatever form of business they choose, but in choosing a form they must accept its advantages and disadvantages. While Taxpayers may have owned the corporation, the corporation was a separate legal entity. The corporation cannot be disregarded for the City's privilege tax purposes. Taxpayer's sale was not a homeowner's bona fide non-business sale.

Taxpayer relies on a recent Arizona Court of Appeals case that held that a revocable trust qualified as a person injured under A.R.S. § 32-1131(3) for purposes of the Contractor's Recovery Fund.<sup>1</sup> The statute defined a person injured as the owner of residential real property who occupies or intends to occupy the residence. The Court reasoned that since the residence was occupied by the trustor/trustee/beneficiary of the trust and the trustee was acting on behalf of the trust, the trust met the owner-occupant requirement of the statute. Taxpayer contends the same conclusion should be reached here because the occupants of the Property were the sole shareholders of the owner of the Property. We do not find the case persuasive.

First, the language of Regulation § 416.1 is specific in stating it applies only to individuals and not to any other entity. It is doubtful the court would have reached the same result if A.R.S. § 32-1131 had contained that same level of specificity. Second, the Contractor's Recovery Fund provisions are remedial. Remedial statutes are entitled to liberal construction. Tax statutes on the other hand are construed strictly against a party who claims an exemption or a credit. Therefore a liberal construction of a remedial statute is not persuasive in construing an exemption from tax.

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 is a corporation incorporated in Canada in 1998.
2. The corporation was created as an estate planning device.
3. The only shareholders of Taxpayer are *a married couple*.

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<sup>1</sup> *Pinnamaneni v. Ariz. Registrar of Contractors*, 1 CA-CIV 14-0006, (April 9, 2015).

4. Taxpayer purchased the Property at issue in September of 1999.
5. The Property was vacant land at the time Taxpayer acquired it.
6. Taxpayer had a new home constructed on the Property which was finished in 2011.
7. Taxpayer was listed as the owner of the Property on the City Building Permit and the Certificate of Occupancy that was issued.
8. The Property was used by a *MC* as a vacation home for themselves and their guests. The Property was not leased to others or used for any other purpose.
9. Taxpayer sold the Property in February 2014.
10. The Tax Collector conducted an audit assessment of Taxpayer for the period February 2014 and assessed Taxpayer for city privilege tax under the speculative builder classification.<sup>2</sup>
11. Taxpayer timely protested the assessment contending:
  - a. Taxpayer was not a speculative builder because it did not build or sell more than one home.
  - b. Taxpayer was exempt from the speculative builder tax because the *MC* were the only shareholders of Taxpayer and the *MC* used the residence as a vacation home for over a year.

#### Conclusions of Law

1. 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. STC § 100.
2. Taxpayer had title to the Property and had an improvement constructed on the Property.
3. Taxpayer was an owner-builder.
4. STC § 416 imposes the city privilege tax on a person engaging in business as a speculative builder.
5. 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.
6. Improved real property includes any real property upon which a structure has been constructed. STC § 416(a)(2)(A).
7. Taxpayer sold improved real property when it sold the Property.
8. City charters and ordinances are to be construed by the same rules and principles which govern construction of statutes. *Rollo v. City of Tempe*, 120 Ariz. 473, 586 P.2d 1285 (1978).

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<sup>2</sup> Taxpayer does not disagree with the calculations in the assessment, but questions whether it is subject to the tax..

9. Words in the plural number include the singular. A.R.S. § 1-214(B).
10. A.R.S. § 1-214(B) is a permissive statute and is used to effectuate legislative intent. *Estate of McGill ex rel. McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384, 388 (2002).
11. The Tax Code's plural references to "homes" does not require a construction that it only applies to multiple sales. *See, Long v. Napolitano*, 203 Ariz. 247, 53 P.3d 172 (App. 2002).
12. The same principles of construction that apply to statutes also apply to administrative rules and regulations. *Kimble v. City of Page*, 199 Ariz. 562, 20 P.3d 605 (App. 2001).
13. The construction placed on a statute by the City that the speculative builder provisions apply to the sale of a single home has been acquiesced in for a long period of time, is not manifestly erroneous and will not be disturbed. *See, State ex rel. Arizona Dept. of Revenue v. Magma Copper Co.*, 138 Ariz. 322, 674 P.2d 876 (App. 1983).
14. Taxpayer was a speculative builder during the audit period when it sold the Property.
15. A sale of a custom home is considered a "homeowner's bona fide non-business sale" and is excluded from the tax on speculative builders if, among other things, 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. Regulation § 416.1(a)(1).
16. As used in the regulation, the terms "Owner" and "Homeowner" only mean an individual, and no other entity, association, or representative, other than an administrator, executor, personal representative, or guardian, qualifies. Regulation § 416.1(d).
17. Taxpayer is a corporation and not an individual.
18. Person means an individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, broker, the Federal Government, this State, or any political subdivision or agency of this State. STC § 100.
19. A person is considered a distinct and separate person from any general or limited partnership or joint venture or other association with which such person is affiliated. STC § 100.
20. Taxpayers are free to use whatever form of business they choose, but in choosing a form they must accept its advantages and disadvantages. *Higgins v. Smith*, 308 U.S. 473 (1940). While the **MC** may have owned Taxpayer, Taxpayer was a separate legal entity.
21. Tax statutes are construed strictly against a party who claims an exemption or a credit. *Davis v. Arizona Dept. of Revenue*, 197 Ariz. 527, 4 P.3d 1070 (App. 2000).
22. A remedial statute is entitled to liberal construction. *Arizona Civil Rights Div., Dept. of Law v. Hughes Air Corp.*, 139 Ariz. 309, 678 P.2d 494 (App. 1983).
23. Statutes designed to redress existing grievances and introduce regulations conducive to the public good are remedial. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974).
24. The Contractor's Recovery Fund provisions are remedial.

25. Taxpayer corporation is a separate and distinct person from the *MC*, the sole shareholders of Taxpayer.
26. Taxpayer is not an owner or homeowner within the meaning of Regulation § 416.1(a)(1).
27. Taxpayer's sale was not a homeowner's bona fide non-business sale excluded from the tax on speculative builders. Regulation § 416.1(a)(1).
28. The City's privilege tax assessment against Taxpayer was proper.

Ruling

The protest by Taxpayer of an assessment made by the City of Scottsdale for the period February 2014 is denied.

The Tax Collector's Notice of Assessment for the period February 2014 is upheld.

The Taxpayer has 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: *City of Scottsdale*  
Municipal Tax Hearing Office