

Jerry Rudibaugh

Municipal Tax Hearing Officer

DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: February 20, 2002

Decision: MTHO #1

Taxpayer: Taxpayer

Tax Collector: City of Phoenix

Hearing Date: December 11, 2001

DISCUSSION

On September 22, 2000, ("Taxpayer") filed a protest of the City of Phoenix ("City") tax assessment. After review of the protest, the City determined that the protest was timely and in the proper form. Taxpayer requested a hearing on their protest. The Chief Hearing Officer for the City Audit Department ordered the City to file a response to the protest on or before November 13, 2000. The City requested and was granted additional time until December 13, 2000 to file its response. The City filed its response on November 21, 2000. The scheduling of the hearing was delayed as Taxpayer had requested the matter be heard by the newly established Tax Hearing Officer. The hearing was subsequently scheduled for August 28, 2001. At the request of Taxpayer, the hearing was rescheduled for December 11, 2001. Taxpayer failed to appear for the December 11, 2001 hearing. The Taxpayer called on that day and indicated he would not be appearing and to hold the hearing without him. On December 24, 2001, a letter was sent to the Taxpayer giving him until January 8, 2002 to provide additional written evidence on this matter. The Taxpayer failed to provide any additional information.

In November of 1996, Taxpayer entered into a construction contract to construct thirteen apartment buildings and other associated structures. The contractor was paid \$7,740,415.07 for the construction which was completed in October 1997. The final Certificate of Occupancy was issued on October 25, 1997. Taxpayer began to lease out the apartments and was close to being fully leased-up when it entered into a contract in July 1999 to sell the apartment buildings for \$12,500,000.00. This amount was subsequently reduced to \$12,425,000.00.

On August 10, 2000, the City issued a Notice of Tax Assessment to Taxpayer for sales and use tax liability for the period August 1997 through September 1999. The Taxpayer was assessed for unreported residential rental and commercial rental income. In addition, a speculative builder tax was assessed on the sale of the apartments. A penalty was assessed on the unreported rental income.

The City assessed the sale pursuant to Phoenix City Code Section 14-416(a)(1)("Section 416") which provides that "the gross income of a speculative builder considered taxable shall include the total selling price from the sale of improved real property at the time of closing of escrow or transfer of title". The total amount of the assessment including interest was \$47,053.46.

The Taxpayer did not protest the rental income assessment but protested the speculative builder portion of, the assessment. The apartments were close to being 100% leased up at the time they were sold. Those leases were assigned to the purchaser, along with the income stream from the leases. Taxpayer asserted that the sale was of an ongoing business and not just the sale of a building and land. Further, Taxpayer asserted that the leases were assigned to the purchaser of the property and such leases are intangibles. Taxpayer argued that the portion of the purchase price attributable to those leases is not subject to the speculative builder tax. Taxpayer also requested all the penalties associated with the speculative builder tax to be abated.

ANALYSIS:

Section 416 requires that the total selling price from the improved real property at the time of closing of escrow or transfer of title to be taxable gross income of a speculative builder. Further, Section 14-100 ("Section 100") defines a speculative builder as an owner-builder who sells or contracts improved real property before the expiration of twenty-four (24) months after the improvements of the property are substantially complete. "Substantially Complete" means the construction contracting or reconstruction contracting:

- (1) has passed final inspection or its equivalent; or
- (2) certificate of occupancy or its equivalent has been issued; or
- (3) is ready for immediate occupancy or use.

In this case, the improved real property was sold within 24 months of the Certificate of Occupancy. As a result the total selling price of \$12,425,000.00 is taxable gross income. Further, City Code Section 14-400 ("Section 400") sets forth a presumption that all gross income as subject to the tax until the contrary is established by the taxpayer.

Clearly, the apartment buildings were sold within 24 months from the date of substantial completion. It is also clear that the selling price was \$12,425,000.00. The Taxpayer has argued that a portion of the sales price was for the leases that were assigned to the purchaser and since such leases are intangibles not subject to the tax. We do not find it necessary to decide the Taxpayer's argument. Even if we agreed with the Taxpayer's argument, there was absolutely no evidence presented as to what portion, if any, of the sales price was attributable to the leases. As a result we do not find it necessary to rule on the Taxpayer's argument since even if we agree, with the Taxpayer, we have no evidence as to the value of the leases. Accordingly, we must deny the Taxpayer's protest on the speculative builder assessment. Further, the request to abate penalties must be denied since there were no penalties associated with the speculative builder assessment.

FINDINGS OF FACT

1. In November of 1996, Taxpayer entered into a construction contract to construct thirteen apartment buildings and other associated structures.
2. The contractor was paid \$7,740,415.07 for the construction that was completed in October 1997.
3. The final Certificate of Occupancy was issued on October 25, 1997.
4. Taxpayer began to lease out the apartments and was close to being fully leased-up when it entered into a contract in July 1999 to sell the apartment buildings for \$12,500,000.00.
5. The contract price was subsequently reduced to \$12,425,000.00 and the sale finalized in September 1999.
6. The Escrow Settlement Statement and the Affidavit of Property Value both established the sales price to be \$12,425,000.00.
7. On August 10, 2000, the City issued a Notice of Tax Assessment to Taxpayer in the amount of \$47,053.46 for sales and use tax liability for the period August 1997 through September 1999.
8. The City assessed a penalty on the unreported rental income.
9. A speculative builder tax was assessed on the sale of the apartments.
10. There was no penalty assessed on the speculative builder tax.
11. On September 22, 2000, Taxpayer filed a protest of the City Tax assessment.
12. Taxpayer protested the speculative builder portion of the assessment and any penalty applied to the speculative builder tax.
13. Taxpayer asserted that the sale was of an ongoing business and that the leases assigned are intangibles not subject to the speculative builder tax.
14. There was no evidence presented as to what value, if any, the leases had when they were assigned to the purchaser of the apartments.
15. The sale of the apartments was made within 24 months from the date of substantial completion.
16. After review of the protest, the City determined that the protest was timely in the proper form.

17. The City filed its response on November 21, 2000.
18. The hearing was scheduled for August 28 - 2001.
19. At the request of Taxpayer, the hearing was rescheduled for December 11, 2001.
20. Taxpayer failed to appear at the December 11, 2001 hearing.
21. Taxpayer was given until January 8, 2002 to provide additional written evidence on this matter but failed to do so.

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 requires that the total selling price from the improved real property at the time of closing of escrow or transfer of title to be taxable gross income of a speculative builder.
3. Section 100 defines a speculative builder as an owner-builder who sells improved real property within 24 months after the improvements are substantially complete.
4. Section 400 sets forth a presumption that the entire amount of gross income is subject to the tax until the contrary is established by the Taxpayer.
5. The Taxpayer failed to provide any evidence that the assigned leases had any value.
6. The protest should be denied.

ORDER

It is therefore ordered that the September 22, 2000 protest request of Taxpayer is hereby denied.

It is further ordered that this decision is effective immediately.

Jerry Rudibaugh,

Municipal Tax Hearing Officer