

## DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: September 16, 2004

Decision: MTHO #178

Tax Collector: City of Surprise

Hearing Date: None

### DISCUSSION

#### Introduction

On October 9, 2003, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Surprise (“City”). After review, the City concluded on February 13, 2004 that the protest was timely and in the proper form. On March 3, 2004, the Municipal Tax Hearing Officer (“Hearing Officer”) ordered the City to file a response on or before April 19, 2004. On March 5, 2004, the City filed a response to the protest. On March 8, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before March 29, 2004. On March 26, 2004, the Taxpayer sent an email indicating they had not received a copy of the City’s response. On March 29, 2004, the Hearing Officer ordered the City to provide the Taxpayer a copy of their response on or before April 2, 2004 and the Taxpayer to file a reply on or before April 23, 2004. On April 13, 2004 the Taxpayer indicated they had received no City response and requested an order concluding the City conceded the issues. On April 20, 2004, the Hearing Officer again ordered the City to provide a copy of their response to the Taxpayer on or before May 4, 2004. On June 2, 2004, the Taxpayer filed a Petition for Abatement of Notice of Successor Liability based on the City’s Lack of Prosecution (“Petition”). On June 10, 2004, the Hearing Officer again ordered the City to provide a copy of their response to the Taxpayer on or before June 25, 2004. On June 24, 2004, the City sent the Taxpayer a copy of the City’s response to the protest. On June 29, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before July 22, 2004. On July 20, 2004, the Taxpayer filed a reply. On July 26, 2004, the Hearing Officer indicated the matter was ready to be set for hearing. On July 29, 2004, the Taxpayer requested the matter be reclassified as a redetermination without a hearing. On August 2, 2004, the Hearing Officer reclassified the matter as a redetermination and indicated a written decision would be issued on or before September 16, 2004.

#### City Position

On May 5, 2003, the City sent a final audit assessment to *Seller* LLC (“*Seller*”) for a tax assessment for the period January 1999 through December 2002 in the amount of \$67,779.29 plus interest and penalties. The assessment was for understated revenues as an owner builder pursuant to City Code Section 3.14-417 (“Section 417”). According to the City, *Seller* did not protest the assessment or pay the assessment. On August 25, 2003, the City sent a Notice to the Taxpayer that, pursuant to the successor liability provision of City Tax Code Section 3.14-595

(“Section 595”), the tax assessment against **Seller** was applicable to the Taxpayer as a “successor” to **Seller**. Section 595 provides as follows:

- (a) In addition to any remedy provided elsewhere in this City Code that may apply, the Tax Collector may apply the provisions of subsections (b) through (d) below concerning the collection of taxes when there is succession in and/or cessation of business.
- (b) The taxes imposed by this Chapter are a lien on the property of any person subject to this Chapter who sells his business or stock of goods, or quits his business, if the person fails to make a final return and payment of the tax within fifteen (15) days after selling or quitting his business.
- (c) Any person who purchases, or who acquires by foreclosure, by sale under trust deed or warranty deed in lieu of foreclosure, or by any other method, improved real property or a portion of improved real property for which the Privilege Tax imposed by this Chapter has not been paid shall be responsible for payment of such tax as a speculative builder or owner builder, as provided in Sections 3.14-416 and 3.14-417.

According to the City, the building permit dated January 21, 1998, shows the owner of the property to be **Seller**. The City noted the construction price of the building was \$12,418,415.00. The Affidavit of Property (“Affidavit”), dated January 1999, shows a sale from **Seller** to **Seller** for \$18,676,222.00. Based on all the above, the City concluded **Seller** was liable for the tax assessed to **Seller**.

### **Taxpayer Position**

According to the Taxpayer, **XYZ, Inc.** (“**XYZ**”) and **Seller** developed an apartment complex within the City known as The Village at Sun City. The Taxpayer asserted that **ABC Construction** (“**ABC**”) was the general contractor and paid all applicable state and city tax with respect to the construction project. **Seller** contributed the real estate and **XYZ** contributed the development costs for the project. Within two years of the completion of the construction of the apartment complex, the property was transferred to the Taxpayer. **Seller**’s transfer of the complex to the Taxpayer was a contribution to the capital of the Taxpayer in exchange for a membership interest.

The Taxpayer argued that the speculative builder tax did not apply in the first place as there was no sale of improved real property that would be taxed under the speculative builder tax. The Taxpayer cited two prior decisions by hearing officers that reached the same conclusions on similar facts. The Taxpayer argued that any questions whether transfers to contribute capital in a partnership or limited liability company fall within “taxable” sales for sales tax purposes should be resolved by finding such transfers outside the reach of municipal sales tax. The Taxpayer argued that ambiguous language in tax statutes must be construed in favor of the taxpayer. The Taxpayer asserted the substance of the transfer and the rules for construing tax statutes require that **Seller** owe no speculative builder tax because it was making a capital contribution of the apartment complex to a limited liability company in exchange for consideration.

The Taxpayer indicated that Section 559 imposes successor liability on the successor as “a speculative builder”. The Taxpayer argued that since it did not sell the apartment complex, within 24 months after substantial completion, it could not be treated as a speculative builder.

The Taxpayer argued that even if the speculative builder tax applied to *Seller*, successor liability does not apply to *Seller* because *ABC* paid privilege license tax with respect to the construction of the apartment complex. The Taxpayer asserted that because the tax paid by *ABC* qualifies as privilege tax paid on the improved real property for purposes of successor liability, the Taxpayer cannot be held liable for City tax as a successor to *Seller*.

According to the Taxpayer, successor liability arises only if an “unpaid” tax liability existed at the time the Taxpayer took title to the apartment complex. The Taxpayer asserted that *Seller*’s tax was not “due and payable” until the twentieth day of the month following the month in which *Seller* transferred the complex. As a result, the Taxpayer argued there was not tax owed when *Seller* took title. Additionally, the Taxpayer argued there was no tax due because *ABC* had paid all the taxes with respect to the construction of the project.

The Taxpayer argued that successor liability only attaches when there have been either a “succession in ... business” or a “cessation of business,” or both. According to the Taxpayer, *Seller*’s business activity did not cease upon transfer of that apartment project to *Seller*. While *Seller* received a business asset that belonged to *Seller*, the Taxpayer argued that it did not succeed to *Seller*’s business of developing real estate.

The Taxpayer argued that even if the speculative builder tax applied to *Seller*, the successor liability did not apply to the Taxpayer because the Taxpayer did not purchase *Seller*’s “business or stock of goods.” According to the Taxpayer, the transfer of the apartment complex to the Taxpayer was a transfer of real property and not a transfer of all the business assets of *Seller*. Based on all the above, the Taxpayer requested the City’s assessment against *Seller* is erroneous and should be abated in its entirety.

### ANALYSIS

Much of the Taxpayer’s arguments revolved around whether or not *Seller* was a speculative builder and whether there was a taxable sale. The Hearing Officer does not find authority to review those matters. There was no timely appeal of the assessment to *Seller* and as a result the tax assessment to *Seller* is final. The only issue this Hearing Officer has the authority to determine is whether or not the Taxpayer is successor in interest and thus liable for the tax liability of *Seller*. We think it does. In this case, the apartment complex was the business activity of *Seller* which was transferred to *Seller*. While the tax may not have been due and payable at the time of transfer, certainly the transfer itself caused an immediate tax liability on *Seller* resulting in an “unpaid” tax liability at the time of transfer. Whether the builder, *ABC*, had paid taxes on the construction of the apartment complex that would offset taxes owed was an issue that should have been raised by *Seller*. Since it was not timely raised by *Seller*, we do not find

jurisdiction to determine that matter here. Based on all the above, we find the Taxpayer's protest should be denied.

### **FINDINGS OF FACT**

1. On October 9, 2003, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on February 13, 2004 that the protest was timely and in proper form.
3. On March 3, 2004, the Hearing Officer ordered the City to file a response on or before April 19, 2004.
4. On March 5, 2004, the City filed a response to the protest.
5. On March 8, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before March 29, 2004.
6. On March 26, 2004, the Taxpayer sent an email indicating they had not received a copy of the City's response.
7. On March 29, 2004, the Hearing Officer ordered the City to provide the Taxpayer a copy of their response on or before April 2, 2004 and the Taxpayer to file a reply on or before April 29, 2004.
8. On April 13, 2004, the Taxpayer indicated they had received no City response and requested an order concluding the City conceded the issues.
9. On April 20, 2004, the Hearing Officer again ordered the City to provide a copy of their response to the Taxpayer on or before May 4, 2004.
10. On June 2, 2004, the Taxpayer filed a Petition.
11. On June 10, 2004, the Hearing Officer again ordered the City to provide a copy of their response to the Taxpayer on or before June 25, 2004.
12. On June 24, 2004, the City sent the Taxpayer a copy of the City's response to the protest.
13. On June 29, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before July 22, 2004.
14. On July 20, 2004, the Taxpayer filed a reply.
15. On July 26, 2004, the Hearing Officer indicated the matter was ready to be set for hearing.

16. On July 29, 2004, the Taxpayer requested the matter be reclassified as a redetermination without a hearing.
17. On August 2, 2004, the Hearing Officer reclassified the matter as a redetermination and indicated a written decision would be issued on or before September 16, 2004.
18. On May 5, 2003, the City sent a fixed audit assessment to **Seller** for a tax assessment for the period January 1999 through December 2002 in the amount of \$67,779.29 plus interest and penalties.
19. The assessment was for understated revenues as an owner builder pursuant to Section 417.
20. **Seller** did not protest the assessment or pay the assessment.
21. On August 25, 2003, the City sent a notice to the Taxpayer that pursuant to the successor liability provisions of Section 595, the tax assessment against **Seller** was applicable to the Taxpayer as a “successor” to **Seller**.
22. The building permit, dated January 21, 1998, shows **Seller** to own the property at \_\_\_\_\_ within the City.
23. The construction price of the apartment building at \_\_\_\_\_ was \$12,418,415.00.
24. The Affidavit, dated January 1999, shows a sale from **Seller** to **Seller** for \$18,676,222.00.
25. The apartment complex was the business activity of **Seller** which was transferred to **Seller**.

### 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 City tax assessment against **Seller** for the period January 1999 through December 2002 became final when **Seller** did not timely file a protest.
3. The Taxpayer became liable for the tax assessment against **Seller** pursuant to Section 595.
4. The Taxpayer’s protest should be denied.

**ORDER**

The October 9, 2003 protest by *Taxpayer* of a tax assessment made by the City of Surprise is hereby denied.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh  
Municipal Tax Hearing Officer