

## DECISION OF MUNICIPAL TAX HEARING OFFICER

Decision Date: November 19, 2004

Decision: MTHO #198

Tax Collector: City of Phoenix

Hearing Date: None

### DISCUSSION

#### Introduction

On July 15, 2004, *Taxpayer* (“Taxpayer”) filed a protest of a tax assessment made by the City of Phoenix (“City”). After review, the City concluded on July 26, 2004, that the protest was timely and in proper form. On July 28, 2004, the Municipal Tax Hearing Officer (“Hearing Officer”) classified this matter as a redetermination and ordered the City to file a response to the protest on or before September 13, 2004. On September 3, 2004, the City filed a response to the protest. On September 13, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before October 13, 2004. On September 29, 2004, the Taxpayer filed a reply. On October 22, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before December 6, 2004.

#### City Position

The City conducted an audit of the Taxpayer for the period October 2002 through February 2004. The City had discovered that the Taxpayer improved and sold real property which is taxable pursuant to City Code Section 14-416 (“Section 416”) as a speculative builder. The Taxpayer was not licensed with the City and failed to file any City sales tax returns or pay any City sales tax during the audit period. As a result, the City estimated the amount of taxable revenues and assessed the Taxpayer for taxes due in the amount of \$73,869.42 plus interest up through May 2004 in the amount of \$8,148.50. The City also assessed the Taxpayer for failure to timely file and failure to timely pay penalties in the amount of \$17,514.57 pursuant to City Code Sections 14-540 (b)(1) and (b)(2) (“Sections 540 (b)(1) and (b)(2)”).

The City applied the penalties because *Mr. A*, Member, was also a member of another entity that was licensed as a speculative builder that had been previously audited by the City. According to the City, this demonstrates that *Mr. A* had knowledge of the speculative builder tax. In addition, the City noted that *Mr. A* had completed an exemption certificate on behalf of the Taxpayer that exempted the contractor and placed the tax liability on the Taxpayer. Based on the above, the City requested the penalties be upheld.

## **Taxpayer Position**

The Taxpayer asserted that Mr. *A* was not active in the financial affairs of the Taxpayer and as a result there would be no reason for Mr. *A* to have communicated a tax liability to the Taxpayer. According to the Taxpayer, Mr. *A* was not responsible for any financial matters for the Taxpayer or the previous entity referred to by the City. The Taxpayer indicated that Mr. *A* was strictly construction related. The Taxpayer asserted the exemption certificate signed by Mr. *A* resulted from a multitude of documents being proffered by the contractors' accountant and the Taxpayer requested Mr. *A* execute the stack of documents even though he was not familiar with what he was signing. This was done because the person in charge of the financial affairs of the Taxpayer was located in Houston, Texas. In addition, the Taxpayer asserted the other LLC for which Mr. *A* was a member related to land preparation costs and not homebuilding. The Taxpayer argued that the City's position is circumstantial and that it is not fair to penalize the Taxpayer for ignorance of the speculative builder tax.

## **ANALYSIS**

The Taxpayer did not dispute the assessment of a speculative builder tax but did protest the assessment of penalties in the amount of \$17,514.57. It is clear the City was authorized to assess the penalties pursuant to Sections 540 (b)(1) and (b)(2) as the Taxpayer failed to timely file tax returns and failed to timely pay the taxes when due. These penalties can be waived if the Taxpayer can demonstrate they had reasonable cause for failing to timely file and to timely pay.

We do not find the Taxpayer has demonstrated reasonable cause in this case. In response to the City's argument that Mr. *A* was involved in a previous speculative builder assessment, the Taxpayer asserted that Mr. *A* was not responsible for any financial matters. However, Mr. *B* was the Managing Member for the current Taxpayer as well as the previous taxpayer. Further, we do not find a prudent businessman would have simply executed a stack of documents without being familiar with what they were signing. Based on all the above, we conclude the Taxpayer either knew or should have known of the speculative builder tax and has not demonstrated reasonable cause for waiver of the penalties. Accordingly, the Taxpayer's protest is denied.

## **FINDINGS OF FACT**

1. On July 15, 2004, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on July 26, 2004, that the protest was timely and in proper form.
3. On July 28, 2004, the Hearing Officer classified this matter as a redetermination and ordered the City to file a response to the protest on or before September 13, 2004.
4. On September 3, 2004, the City filed a response to the protest.

5. On September 13, 2004, the Hearing Officer ordered the Taxpayer to file any reply on or before October 13, 2004.
6. On September 29, 2004, the Taxpayer filed a reply.
7. On October 22, 2004, the Hearing Officer closed the record and indicated a written decision would be issued on or before December 6, 2004.
8. The City conducted an audit of the Taxpayer for the period October 2002 through February 2004.
9. The City had discovered the Taxpayer improved and sold real property which is taxable pursuant to Section 416 as a speculative builder.
10. The Taxpayer was not licensed with the City and failed to file any City sales tax returns or pay any City sales tax during the audit periods.
11. The City estimated the amount of taxable revenues and assessed the Taxpayer for taxes due in the amount of \$73,869.42 plus interest up through May 2004 in the amount of \$8,148.50.
12. The City assessed the Taxpayer for failure to timely file and failure to timely pay penalties in the amount of \$17,514.57 pursuant to Sections 540 (b)(1) and (b)(2).
13. Mr. *A*, Member, was also a member of another entity that was licensed as a speculative builder that had been previously audited by the City.
14. Mr. *B*, Managing Member, was also the Managing Member of another entity that was licensed as a speculative builder that had been previously audited by the City.
15. Mr. *A* completed an exemption certificate on behalf of the Taxpayer that exempted the contractor and placed the tax liability on the Taxpayer.

### **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. During the audit period, the Taxpayer had unreported gross speculative builder revenue.
3. During the audit period, the Taxpayer failed to timely file sales tax returns and failed to timely pay taxes due.
4. The City was authorized pursuant to Section 540 (b) (1) and (b) (2) to assess penalties.

5. The Taxpayer either knew or should have known of the speculative builder tax.
6. The Taxpayer has failed to demonstrate reasonable cause for failing to timely file returns and failing to timely pay taxes due.
7. The Taxpayer's protest should be denied.

**ORDER**

It is therefore ordered that the July 15, 2004 protest filed by *Taxpayer* of a tax assessment made by the City of Phoenix is hereby denied.

It is further ordered that this Decision is effective immediately.

Jerry Rudibaugh  
Municipal Tax Hearing Officer