

**Jerry Rudibaugh**  
**Municipal Tax Hearing Officer**

**DECISION OF MUNICIPAL TAX HEARING OFFICER**

Decision Date: January 28, 2003

Decision: MTHO #68

Tax Collector: City of Mesa

Hearing Date: December 19, 2002

**DISCUSSION**

**Introduction**

On September 3, 2002, "Taxpayer" filed a protest of a tax assessment made by the City of Mesa ("City"). After review, the City concluded on September 16, 2002, that the protest was timely and in proper form. On September 23, 2002, the Municipal Tax Hearing Officer ("Hearing Officer") ordered the City to file a response to the protest on or before November 7, 2002. On October 30, 2002, the City filed its response. On November 4, 2002, the Hearing Officer ordered the Taxpayer to file any reply on or before November 25, 2002. The matter was scheduled for hearing commencing on December 19, 2002. The Taxpayer and City both appeared and presented evidence at the December 19, 2002 hearing.

The Taxpayer sold twenty (20) improved residential lots in the *Taxpayer* subdivision ("Subdivision") during the audit period of May 1, 1999 through May 31, 2002. The Taxpayer was not licensed with the City. The City assessed the Taxpayer for City tax in the amount of \$15,346.50 on the sale of improved lots. The City also assessed the Taxpayer \$5,451.25 for excess tax collected. Additionally, the City assessed the Taxpayer for penalties totaling \$5,199.46 for late filing and late payment pursuant to City Code Section 5-10-540 (b) ("Section 540 (b)").

**City Position**

The City asserted that the Taxpayer is a speculative builder pursuant to City Tax Code Section 5-10-416 (a) ("Section 416 (a)") and is taxable on the sale of improved lots in the Subdivision. City Tax Code Section 5-10-416 (h)(4) ("Section 416 (b)(4)") excludes sales made to other speculative builders. As a result, the City excluded those lots, which the Taxpayer sold to other speculative builders that provided valid Prime Contractors Certificates ("Certificates"). According to the City, the Taxpayer actually collected taxes on the sale of Lot Nos. 4, 9, 10, 13, 15, and 18. The City indicated that Lot No. 4 was sold to an exempt buyer and should not have been assessed taxes. On the other five lots, the City asserted the Taxpayer overcharged for sales tax because the Taxpayer made no adjustment for the standard deduction allowed by the City. As a result, the City concluded that the Taxpayer collected excess taxes on Lot Nos. 4, 9, 10, 13, 15, and 18. The City argued that the excess taxes must be remitted to the City pursuant to City Code Section 5-10-250 (a)(1) ("Section 250 (a)(1)").

The City opposed the Taxpayer's request to waive penalties assessed for late filing and late payment. According to the City, the Taxpayer was aware that the tax applied to the sale of the improved lots based on the language of paragraphs two and three in the Lot Purchase Contract. In spite of that language, the Taxpayer didn't even obtain a City Privilege License Tax. As a result, the City recommended the assessed penalties not be waived.

### **Taxpayer Position**

The Taxpayer did not dispute the tax on the sale of lots and has paid the tax and related interest. However, the Taxpayer protested the City's assessment for "excess tax collected" in the amount of \$5,451.25, related interest, and penalties in the amount of \$5,199.46. The Taxpayer disputes the City's interpretation of language in Paragraph three of the contracts which provided that an additional 1.4 percent be added to the sale price if "a valid exemption certificate is not provided by the purchaser." The Taxpayer argued that the additional 1.4 percent was an increase in the sales price and not intended to be a calculation of the sales tax that is subsequently passed on to the purchaser. The Taxpayer requested that the penalties be waived. The Taxpayer asserted that penalties are not warranted since this is the first tax assessment by the City and the Taxpayer has no previous delinquencies.

### **ANALYSIS**

The primary dispute in this case revolves around the language in paragraphs two and three of the purchase contracts. Paragraph two makes it clear that the purchase price listed does not include taxes. The following was extracted from paragraph three:

Sales Tax: Buyer acknowledges and agrees to provide Seller with a valid Arizona Department of Revenue Transaction Privilege Tax Prime Contractors Certificate and certifying that Seller is not subject to sales tax on the transaction. Otherwise Buyer will pay an additional 1.40% of the sales price to Seller.

Of the six lots for which the City concluded excess taxes were collected, five were as a result of the taxes being assessed on the gross sales without applying a standard deduction. The other lot assessed was sold to an exempt buyer but the sales price included the additional 1.4 percent. The Taxpayer argued that the additional 1.4 percent included on these six lots was an adjustment to the sales price while the City has argued that the additional 1.4 percent was a sales tax.

Based on the evidence presented, the Hearing Officer agrees with the position of the City. Clearly, paragraph three is entitled sales tax. Further, it refers to the sales price not being subject to a sales tax if the buyer demonstrates they are exempt from sales tax. It follows directly in the next sentence of paragraph three that if the buyer cannot demonstrate they are exempt from sales tax then the buyer will pay an additional 1.4 percent of the sales price. The Hearing Officer concludes that a reasonable buyer reading a section entitled "sales tax" in which an additional 1.4 percent is added to the sales price if you cannot demonstrate you are exempt from taxes would conclude the 1.4 percent was a sales tax. This is further corroborated by the fact that on at least

three of the settlement statements the 1.4 percent is called a sales tax. While the other three lots did not include the term “sales tax”, each of them had the identical 1.4 percent add-on included in the same itemized no. 409 of the settlement statement. Further, the Taxpayer had control over the purchase contract and the settlement statements and could have made it clear that this was to be a sales adjustment and not a tax. However, that was not done. Based on the above, the Hearing Officer concludes the 1.4 percent was a City Transaction Privilege Tax added on to the sales price for the six lots resulting in excess taxes collected in the amount of \$5,451.25.

There was no dispute that the Taxpayer failed to file or pay his taxes in a timely manner. As a result, the Hearing Officer concurs that the City was authorized to impose late filing and late payment penalties pursuant to Section 540 (b). The only issue on the penalties is whether or not the Taxpayer has demonstrated reasonable cause for failing to timely file tax returns and for failing to timely pay taxes such that the penalties should be waived. The Hearing Officer concludes the Taxpayer has failed to demonstrate reasonable cause. The Taxpayer has requested a waiver because this is the first tax assessment by the City and the Taxpayer has no previous delinquencies. While normally the Taxpayer’s arguments would indicate that the Taxpayer may have failed to file tax returns and pay the taxes timely because they didn’t know about the tax, that is not the case here. The Taxpayer’s inclusion of the sales tax exemption language in the sales contract leads the Hearing Officer to conclude the Taxpayer was aware of the speculative builder tax. Even with that awareness, the Taxpayer never even obtained a license with the City. As a result, the Hearing Officer concludes that the Taxpayer has not demonstrated reasonable cause for waiver of the penalties. Based on all the above, the Taxpayer’s protest should be denied.

### **FINDINGS OF FACT**

1. On September 3, 2002, the Taxpayer filed a protest of a tax assessment made by the City.
2. After review, the City concluded on September 16, 2002 that the protest was timely and in proper form.
3. On September 23, 2002, the Hearing Officer ordered the City to file a response to the protest on or before November 7, 2002.
4. On October 30, 2002, the City filed its response.
5. On November 4, 2002, the Hearing Officer ordered the Taxpayer to file any reply on or before November 25, 2002.
6. The matter was scheduled for hearing commencing on December 19, 2002.
7. The Taxpayer and City both appeared and presented evidence at the December 19, 2002 hearing.
8. The Taxpayer sold twenty improved residential lots in the Subdivision during the audit

period of May 1, 1999 through May 31, 2002.

9. The Taxpayer was not licensed with the City.
10. The City assessed the Taxpayer for City tax in the amount of \$15,346.50 on the sale of the improved lots.
11. The City also assessed the Taxpayer \$5,451.25 for excess tax collected.
12. The City assessed the Taxpayer for penalties totaling \$5,199.46 for late filing and late payment.
13. The Taxpayer collected taxes on the sale of Lot Nos. 4, 9, 10, 13, 15, and 18.
14. Lot No. 4 was sold to an exempt buyer and should not have been assessed taxes.
15. The Taxpayer over collected taxes on the sale of Lot Nos. 9, 10, 13, 15, and 18 because the Taxpayer made no adjustment for the standard deduction allowed by the City.
16. Paragraph two of the purchase contracts makes it clear that the purchase price listed does not include taxes.
17. Paragraph three of the purchase contracts provides that 1.4 percent will be added to the sales price if a buyer can not demonstrate they are exempt from sales tax.
18. The Title of Paragraph three is "Sales Tax".
19. In the settlement statements for the sale of Lot Nos. 9, 13, and 15, there is an itemized reference to an additional 1.4 percent of the sales price for sales tax.
20. In the settlement statements for the sale of Lot Nos. 4, 10, and 18 there is an itemized reference to an additional 1.4 percent of the sales price.
21. Lot Nos. 4, 9, 10, 13, 15, and 18 all had an additional 1.4 percent of the sales price added on line item no. 409 of the settlement statement.

### **CONCLUSIONS OF LAW**

1. Pursuant to ARS Section 42-605 6, 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 taxes the gross income of speculative builders within the City.
3. Excess taxes must be remitted to the City pursuant to Section 250 (a)(1).

4. Section 540 (b) imposes a penalty for failure to file a timely return and for failure to timely pay taxes unless the Taxpayer shows the failure is due to reasonable cause and not willful neglect.
5. The Taxpayer was aware of the speculative builder tax at the time they sold the improved lots in the subdivision.
6. The Taxpayer has failed to demonstrate reasonable cause for failing to timely file tax returns and for failing to timely pay taxes.
7. The Taxpayer's protest should be denied.

ORDER

It is therefore ordered that the September 3, 2002 protest of *Taxpayer* of a tax assessment by the City of Mesa is hereby denied.

It is further ordered that this decision shall be effective immediately.

Jerry Rudibaugh  
Municipal Tax Hearing Officer