

THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN THE ARIZONA TAX COURT

TX 2021-000347

09/22/2023

HONORABLE SARA J. AGNE

CLERK OF THE COURT  
J. Holguin  
Deputy

H N T HOLDINGS L L C

DAWN R GABEL

v.

ARIZONA DEPARTMENT OF REVENUE

BENJAMIN H UPDIKE

JOHN C SHAFER III  
JUDGE AGNE

UNDER ADVISEMENT RULING

The Court held oral argument on July 24, 2023, regarding Defendant Arizona Department of Revenue’s Motion for Summary Judgment, filed February 28, 2023 (“ADOR’s Motion”), and Plaintiff HNT Holdings, LLC’s Cross-Motion for Summary Judgment, filed April 28, 2023 (“Cross-Motion), as well as subsequent filings related thereto.

The Court has considered the filings and arguments of the Parties, the relevant authorities and applicable law, as well as the entire record of the case, and—considering all facts and reasonable inferences therefrom in the light most favorable to the non-movants, respectively—hereby finds as follows regarding the Motion and Cross-Motion.

HNT Holdings, LLC (“HNT”) purchased the property located at 3238 E. Mitchell Drive in Phoenix in February 2017 for \$323,000. (Defendant’s Statement of Facts, filed February 28, 2023 (“DSOF”), at ¶¶2, 10, *undisputed*.) The 1,472-square-foot residence on the property was demolished down to the foundation and slab. (DSOF ¶¶3, 11, *materially undisputed*.) HNT constructed a 4,163-square-foot residence on the property which was sold in August 2018 for \$920,000. (DSOF ¶¶5, 9–10, *undisputed*.)

On August 9, 2019, the Department issued a proposed assessment under A.R.S. § 42-1109(B) for the speculative builder tax in the amount of \$17,656.07. (Plaintiff’s Statement of

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Facts, filed April 28, 2023 (“PSOF”), at ¶19, *undisputed*.) On December 18, 2019, the Department withheld \$17,706.07 from a refund due to Plaintiff. (PSOF ¶26, *undisputed*.) HNT subsequently filed this action to recover a refund.

The Department seeks summary judgment that HNT is a speculative builder subject to tax on the sale of the property. (ADOR’s Mot., at 8.) HNT seeks summary judgment in its favor and contends that the Department misapplied the speculative builder tax. (Cross-Mot., at 1.) Alternatively, HNT argues that if the Court finds in favor of the Department, there are disputed issues of material fact regarding the tax calculation. (Cross-Mot., at 2.)

Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a); *General Motors Corp. v. Maricopa Cty.*, 237 Ariz. 337, 339 ¶7 (App. 2015). Moreover, in “the tax field, we liberally construe statutes imposing taxes in favor of taxpayers and against the government, . . . but strictly construe tax exemptions because they violate the policy that all taxpayers should share the common burden of taxation.” *State ex rel. Ariz. Dep’t of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447 ¶10 (2004) (internal citations omitted).

The City of Phoenix imposes a tax “equal to two and three-tenths percent (2.3%) of the gross income from the business activity upon every person engaging or continuing in business as a speculative builder within the City.” Phoenix City Code (“City Code”) § 14-416(a). “[I]t shall be presumed that all gross income . . . is subject to the tax until the contrary is established by the taxpayer.” City Code § 14-400(c). The Court looks to the definitions in the City Code relevant to the facts at issue here.

“Speculative Builder” is defined, for purposes of the Motions, as: “an owner-builder who sells or contracts to sell, at any time, improved real property (as provided in Section 14-416) consisting of . . . custom, model, or inventory homes, regardless of the stage of completion of such homes.” City Code § 14-100. “Improved Real Property” is defined, for purposes of the Motions, as: “any real property . . . upon which a new structure has been substantially completed.” City Code § 14-416(a)(2)(A).

“The administration of this chapter is vested in the Tax Collector, except as otherwise specifically provided, and all payments shall be made to the City Treasurer.” City Code § 14-500(a). The City Code defines “Tax Collector” as “the Finance Director or his designee or agent for all purposes under this Chapter.” City Code § 14-100. Although the speculative builder tax is a tax under the City Code, the Department is tasked with collecting and administering the tax pursuant to A.R.S. § 42-6001(A).

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The Parties do not dispute that HNT is an owner-builder. (ADOR’s Mot., at 4; DSOF ¶2, *undisputed.*) At issue is whether the 4,163-square-foot residence constitutes “improvements to real property” under the City Code.

“In construing a statute, [the Court] look[s] to the plain language of the statute, giving effect to every word and phrase, and assigning to each word its plain and common meaning.” *Ponderosa Fire Dist. v. Coconino Cty.*, 235 Ariz. 597, 602 (App. 2014) (citations omitted).

HNT demolished a 1,472-square-foot residence down to the foundation and slab and removed the trees from the property. (DSOF ¶¶3–4, *materially undisputed.*) The Department contends that the 4,163-square-foot residence built in its place is “improved real property.” (ADOR’s Mot., at 6.) HNT contends that the slab and foundation are structures and that any additional improvements, remodeling, or expansion, are not taxable. (Cross-Mot., at 6.)

Although the 4,163-square-foot residence HNT constructed used the slab and foundation from the 1,472-square-foot residence that was demolished, **THE COURT FINDS that** the newly constructed residence constitutes “improved real property” for purposes of the speculative builder tax. *See* City Code § 14-416(a)(2)(A).

HNT contends that the property was subject to the speculative builder tax upon its first sale after it was substantially completed. (Cross-Mot., at 8.) Yet nothing in the code references taxing only the first sale of the property if the property is later improved or a new structure is built. (*See* ADOR’s Resp. and Reply, filed June 5, 2023, at 2–3.) In fact, the definition of Improved Real Property includes “*any* real property . . . upon which *a* new structure has been substantially completed.” City Code § 14-416(a)(2)(A) (emphasis added). Thus, it is not limited to real property sold for the first time after the first new structure was built on it.

HNT looks to the language of City Code § 14-416(a)(2): “For the purpose of paragraph (A), once a structure has been deemed ‘substantially complete’, subsequent improvements to the structure shall not be considered for the purpose of determining the date on which a sale transaction would be taxable under this Section.” (Cross-Mot., at 7–8.)

The Department contends that this paragraph relates to the timing of the date of the first sale and does not state that a future sale cannot be subject to the speculative builder tax if a new structure is constructed on the property. (ADOR’s Resp. and Reply 5–6.) Here, one structure was demolished, and a new 4,163-square-foot structure was constructed on the property—the 4,163-square-foot structure was not a subsequent improvement on the original demolished structure. **THE COURT FINDS that** HNT is a speculative builder subject to the speculative builder tax on the sale of the Property.

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Lastly, HNT contends that the tax was not calculated correctly. (Cross-Mot., at 10–12.) For example, HNT asserts that the incorrect starting gross income was used in its calculation and that the Department refused to allow deductions for which HNT provided receipts. (Cross-Mot., at 11–12.) The Department contends that HNT has not provided the Department with documentation to establish any deductions. (ADOR’s Mot., at 6–7.) **THE COURT FINDS that** disputed facts remain as to the calculation of the tax and any deductions and exemptions to be included.

**IT IS ORDERED granting in part** Defendant Arizona Department of Revenue’s Motion for Summary Judgment, filed February 28, 2023, as to the applicability of the speculative builder tax.

**IT IS FURTHER ORDERED denying in part** Defendant Arizona Department of Revenue’s Motion for Summary Judgment, filed February 28, 2023, as to the calculation of the tax.

**IT IS FURTHER ORDERED denying** Plaintiff HNT Holdings, LLC’s Cross-Motion for Summary Judgment, filed April 28, 2023.

**IT IS FURTHER ORDERED** that the Parties file a new Joint Report and lodge with it a Word-format proposed Scheduling Order regarding remaining issues in the case no later than **October 27, 2023**.