

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

TX 2022-000105

06/17/2024

HONORABLE SARA J. AGNE

CLERK OF THE COURT
J. Holguin
Deputy

SCOTT GOULD

PAUL J MOONEY

v.

ARIZONA DEPARTMENT OF REVENUE

BENJAMIN H UPDIKE

JUDGE AGNE

MINUTE ENTRY

The Court held oral argument on April 19, 2024, regarding Arizona Department of Revenue’s Motion for Summary Judgment, filed August 31, 2023 (“ADOR’s Motion”), and Plaintiff’s Cross-Motion for Summary Judgment on Legal Issues, filed October 19, 2023 (“Gould’s 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 Motions.

ADOR contends that Gould purchased the following 22 properties, built new residences after demolishing the prior residence or starting with a vacant lot, and then sold the 22 properties. (ADOR’s Mot., at 2; Department’s Statement of Facts, filed August 31, 2023 (“DSOF”), at ¶¶3, 7–72.)

	Address	Purchase Date	Sale Date
1	3016 North 47 th Pl.	May 2012	January 2013
2	4442 North 59 th Pl.	February 2012	June 2013
3	4613 East Devonshire Ave.	March 2013	July 2013
4	4227 East Indianola Ave.	February 2013	September 2013

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5	3819 North 41 st Pl.	March 2013	September 2013
6	3922 North 42 nd Pl.	April 2014	October 2014
7	4024 East Indianola Ave.	September 2013	June 2015
8	4216 North 42 nd St.	August 2014	July 2015
9	4215 North 41 st St.	December 2014	November 2015
10	4047 East Minnezona Ave.	June 2015	February 2016
11	3921 North 43 rd St.	April 2015	October 2016
12	4122 East Mitchell Dr.	May 2015	April 2017
13	4044 East Weldon Ave.	October 2016	July 2017
14	3924 East Roma Ave.	August 2016	August 2017
15	4208 East Sells Dr.	September 2016	September 2017
16	3415 North 34 th Pl.	August 2017	May 2018
17	4028 East Mitchell Dr.	January 2014	October 2018
18	3739 East Hazelwood St.	August 2018	June 2019
19	4445 East Exeter Blvd.	May 2019	July 2019
20	3717 East Hazelwood St.	December 2016	September 2019
21	5342 East Lafayette Blvd.	February 2018	September 2019
22	3230 East Mitchell Dr.	June 2019	October 2019

The 22 properties fall into three categories: (1) the two properties Gould lived in (one for 22 months and one for over three years) (Property Nos. 7 and 17); (2) the two properties Gould acquired through deeds in lieu of foreclosure after the borrowers defaulted on loans secured by deeds of trust (Property Nos. 19 and 22); and (3) the 18 properties where Gould was named on the title to secure loans to buyer or builders (one of which he moved into for less than one year after the borrower’s default—Property No. 20). (Gould’s Mot, at 4.)

In January 2021, the Department issued an assessment for \$333,469.26 in taxes, \$50,173.40 in interest as of February 2021, and \$83,367.34 in penalties. (DSOF ¶5, *not materially disputed*.) The Department seeks summary judgment finding that Gould is a speculative builder subject to tax on the properties at issue and upholding the assessment. (ADOR’s Mot., at 8.) Gould seeks summary judgment in his favor and contends that the speculative builder tax does not apply to him. (Gould’s Mot., at 1.)

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). “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

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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 privilege 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 Motion, as: “any real property . . . upon which a new structure has been substantially completed” or “where improvements have been made to land containing no structure (such as paving or landscaping).” City Code § 14-416(a)(2)(A) and (B).

“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).

The Parties do not dispute that Gould’s name was on the title of all the 22 properties. (Compl., filed March 28, 2022, at ¶¶5, 18; ADOR’s Reply, filed November 27, 2023, at 3.) At issue for the majority of the properties is whether listing Gould’s name on the title for security for his lending activities makes him an “owner-builder” 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 ¶24 (App. 2014) (citations omitted).

An “Owner-Builder” is “an owner or lessor of real property who, by himself or by or through others, constructs or has constructed or reconstructs or has reconstructed any improvement to real property.” City Code § 14-100. “There is a rebuttable presumption that record title accurately reflects the ownership interest in real property.” *Boone v. Grier*, 142 Ariz. 178, 182 (App. 1984).

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Gould's name was on the title of 18 of the properties at issue in order to secure loans made to buyers or builders. (Gould's Mot., at 4.) Gould's name is on building permits as the owner and on Affidavits of Property Value as the seller. (DSOF, Exh. A at its Exhs. 4–25.)

While Gould admits his name was on the title as an owner, Gould contends that he was only acting as a lender. (Gould's Mot., at 5–6.) Gould contends that he did not make money like a speculative builder would but only received the loan fee and interest related to the repaid loans. (Gould's Mot., at 5.) Gould contends that the sales of the properties memorialized the repayment of the loans. (Gould's Mot., at 6.) As the Department points out, the statute does not reference the gains or characterization of such gains from the sales of properties. (ADOR's Reply, at 11.)

While it is unclear why Gould did not secure the loans through alternatives without taking title to the properties, what is clear is that legally Gould was an owner of the 18 properties. Through Gould's financing and ownership of the properties, the properties were improved.

THE COURT FINDS that Gould was an “owner-builder” for purposes of the speculative builder tax. *See* City Code § 14-100.

Gould acquired title to two of the properties at issue through deeds in lieu of foreclosure. (Gould's Mot., at 4.) Gould contends he acted how a lender would act in order to recoup the money loaned. (Gould's Mot., at 5.)

Gould cites Municipal Tax Hearing Office decision #655, 656, and 657.¹ (Gould's Mot, at 9–10.) In this decision, two banks had loaned money to the owners of the properties at issue. (MTHO Decision, at 2.) The banks obtained title to the properties through a deed of trust or deed in lieu of foreclosure after default on the loans. (MTHO Decision, at 2.) The banks were not part of the construction activity. (MTHO Decision, at 2.) The banks were assessed under Model City Tax Code Section 595c for the speculative builder tax. (MTHO Decision, at 2.)

The assessing cities acknowledged that the banks were not speculative builders but asserted the banks were vicariously liable for the conduct of the speculative builders. (MTHO Decision, at 2.) The hearing officer concluded that proper assessments under Model City Tax Code § 595 would require the successor banks to be speculative builders (which the cities had acknowledged they were not). (MTHO Decision at 4–5.)

The Department contends that the MTHO decision is distinguishable because the Department did not assess Gould based on successor liability under City Code § 595 but instead

¹ https://azdor.gov/sites/default/files/2023-03/mtho655_656_657.pdf

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as the speculative builder. (ADOR's Reply, at 9–10.) The Court agrees. The MTHO decision is distinguishable from the facts here, where the Court has found that Gould is a speculative builder. In addition, Gould acknowledges that he was involved in some of the construction work to complete the properties, whereas the banks in the MTHO were not part of the construction. (Plaintiff's Controverting Statement of Facts, filed October 19, 2023 ("PCSOF"), at ¶¶ 61, 70.) Therefore, the properties obtained through deeds in lieu of foreclosure are subject to the speculative builder tax.

As for the two properties that Gould owned and occupied, Gould does not deny that he is a speculative builder for the property he owned and occupied for 22 months but disputes the amount of the tax (Property No. 7). (Gould's Mot., 4–5.) Gould contends that he does not owe speculative builder tax on the property he owned and occupied for more than two years (Property No. 17). (Gould's Mot., 4–5.)

A sale of a home is not subject to the speculative builder tax if the following requirements are met:

1. the property was actually used as the principal place of family residence or vacation residence by the immediate family of the seller for the six (6) months next prior to the offer for sale; and
2. the seller has not sold more than two (2) such residences (or, if the residence is a vacation residence, two (2) such vacation residences) within the thirty-six (36) months immediately prior to the offer for sale; and
3. the seller has not licensed, leased, or rented the sold premises for any period within twenty-four (24) months prior to the offer for sale.

City Code § 14-416.1(a). The Department contends that Gould sold too many homes to qualify for the safe harbor. (ADOR's Reply, at 12–13.) Gould did not specifically respond to that argument. *See Castillo v. Lazo*, 241 Ariz. 295, 298 ¶9 (App. 2016) (court could consider failure to respond to an argument "a concession of the issue").

THE COURT FINDS that Gould does not meet the requirements for the safe harbor and is subject to the speculative builder tax on the sales of the two homes he owned and occupied.

Gould contends that the tax was not calculated correctly. (Gould's Mot., at 8.) Gould contends that the Department failed to allow for deductions and credits for sales or prime contracting taxes. (Gould's Mot., at 8–9.) The Department contends that Gould has not provided the Department with documentation to establish any deductions or credits. (ADOR's Reply, at 13–14.)

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THE COURT FINDS that disputed facts remain as to the calculation of the tax and any deductions and exemptions to be included.

Gould also contends that the speculative builder tax should not apply because all 22 properties involved demolishing the existing homes with prior Certificates of Occupancy. (Gould's Mot., at 9.) Gould states that this argument is not being pursued in the cross-motion but is not being waived. (Gould's Mot., at 9.) Therefore, the Court need not address this issue as addressed in prior rulings in *Rebuild the Block, LLC v. Ariz. Dep't of Revenue* (TX2021-000388) and *HNT Holdings, LLC v. Ariz. Dep't of Revenue* (TX2021-000347). (See Minute Entries, filed in those causes, September 25, 2023.)

IT IS ORDERED granting in part Arizona Department of Revenue's Motion for Summary Judgment, filed August 31, 2023, as to the applicability of the speculative builder tax.

IT IS FURTHER ORDERED denying in part Arizona Department of Revenue's Motion for Summary Judgment, filed August 31, 2023, as to the calculation of the tax.

IT IS FURTHER ORDERED denying Plaintiff's Cross-Motion for Summary Judgment on Legal Issues, filed October 19, 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 **July 12, 2024**.