

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

TX 2021-000388

09/22/2023

HONORABLE SARA J. AGNE

CLERK OF THE COURT  
J. Holguin  
Deputy

REBUILD THE BLOCK L L C

PAUL J MOONEY

v.

ARIZONA DEPARTMENT OF REVENUE

BENJAMIN H UPDIKE

MARK INGLE  
JUDGE AGNE

UNDER ADVISEMENT RULING

The Court held oral argument on July 24, 2023, regarding Plaintiff Rebuild the Block, LLC's Motion for Partial Summary Judgment, filed April 21, 2023 ("RTB's Motion"), and Defendant Arizona Department of Revenue's Motion for Summary Judgment, filed April 21, 2023 ("ADOR'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.

Rebuild the Block, LLC ("RTB") purchased the nine properties at issue and sold them for more than two to three times their original purchase price between May 2016 and March 2019. (Defendant's Statement of Facts, filed April 21, 2023 ("DSOF"), at ¶¶3, 6–7, *materially undisputed*.) Six of the nine properties were demolished down to the foundation and slab. (Plaintiff's Statement of Facts, filed April 21, 2023 ("PSOF"), at ¶9, *undisputed*.) All of the above-ground improvements were removed on the other three properties. (PSOF ¶11, *undisputed*.) RTB constructed residences on the nine properties increasing the square footage by amounts between 128% to 323%. (DSOF ¶14, *materially undisputed*.) A portion of the existing

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improvements for all nine of the properties were re-used in the construction. (PSOF ¶2, *undisputed.*)

In January 2020, the Department issued an assessment under A.R.S. § 42-1109 for the speculative builder tax in the amount of \$115,768.79. (DSOF ¶19, *undisputed.*) The assessment was later amended to \$114,538.85. (DSOF ¶23, *undisputed.*)

The Department seeks summary judgment that RTB is a speculative builder subject to tax on the nine properties at issue. (ADOR's Mot., at 10.) RTB seeks summary judgment in its favor and contends that the speculative builder tax does not apply. (RTB's Mot., at 14.) Alternatively, RTB argues that the tax does not apply to any of the lots that retained the slab or other surface improvements. (RTB's Mot., at 14.) RTB also contends that if the speculative builder tax does apply, RTB is entitled to a deduction for contracting taxes and is entitled to present evidence regarding expenditures and deductions. (RTB's Mot., at 15.)

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 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 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

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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 RTB is an owner-builder. (*See* DSOF ¶6, *materially undisputed*.) At issue is whether the larger residences constructed on the properties constitute “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).

RTB demolished the smaller residences down to the foundation and slab for six of the properties and removed all of the above-ground improvements for the other three properties. (PSOF ¶¶9, 11, *undisputed*.) The Department contends that the new residences constructed on the properties are “improvements to real property.” (ADOR’s Mot., at 8–9.) RTB contends that the tax does not apply to sales of properties built on land that was previously developed. (RTB’s Resp., filed June 26, 2023, at 2, 8.)

Although the new residences used some of the existing improvements on the properties and even the foundation and slab for six of them, **THE COURT FINDS that** the new constructed residences constitute “improved real property” for purposes of the speculative builder tax. *See* City Code § 14-416(a)(2)(A).

RTB contends that ADOR is attempting to tax the value of the improvements a second time—in addition to the tax at the time the properties were developed and sold. (RTB’s Mot., at 11.) The Department contends that the speculative builder tax does not contain a provision that the tax applies only once to the initial construction of improvements made to real property. (ADOR’s Resp., filed June 26, 2023, at 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.

The Department does recognize a credit for taxes previously paid by a speculative builder under City Code § 14-416(c)(3)(C). (ADOR’s Resp., at 3.) Here, the Department is taxing the new structures built after RTB demolished the prior residences. (*See* ADOR’s Resp., at 7–8.) **THE COURT FINDS that** RTB is a speculative builder subject to the speculative builder tax on the sales of the nine properties.

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RTB argues that the Department's interpretation should only be applied prospectively. (RTB's Reply, filed July 17, 2023, at 9.) The Court disagrees. **THE COURT FINDS that** the tax should not be imposed prospectively only, given the plain language of the City Code. RTB has not demonstrated that the Department's interpretation is a new interpretation. *See* City Code § 14-542; *cf. City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 246 (2019).

Lastly, RTB contends that the tax was not calculated correctly. (RTB's Mot., at 3–4.) For example, RTB asserts that the Department failed to allow for deductions and credits for sales or prime contracting taxes and included amounts in the taxable gross receipts that are not taxable. (RTB's Mot., at 3–4.) The Department contends that RTB has not provided the Department with documentation to establish any deductions or credits. (ADOR's Resp., at 8–9.) **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 April 21, 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 April 21, 2023, as to the calculation of the tax.

**IT IS FURTHER ORDERED denying** Plaintiff Rebuild the Block, LLC's Motion for Partial Summary Judgment, filed April 21, 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**.