DIVISION ONE
FILED: 12/18/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MT GERMANN AND ELLIS, LLC, an Arizona limited liability company,	)	1 CA-TX 12-0002
	)	DEPARTMENT T
Plaintiff/Appellant,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
CITY OF CHANDLER, an Arizona municipality,	)	
Defendant/Appellee.	)	

Appeal from the Arizona Tax Court

Cause No. TX2009-000409

The Honorable Dean M. Fink, Judge

AFFIRMED

The Newmark Law Firm, P.L.L.C. Phoenix
By Stephen C. Newmark
Attorneys for Plaintiff/Appellant

Mary Wade, Chandler City Attorney Chandler
By Sandra Karen McGee, Assistant City Attorney
Attorneys for Defendant/Appellee

W I N T H R O P, Chief Judge

¶1 This is a transaction privilege tax case. Mt. Germann and Ellis, L.L.C. ("Taxpayer") appeals from a summary judgment

upholding a municipal tax assessment on sale proceeds Taxpayer earned as a speculative builder. Finding no genuine dispute of material fact or legal error, we affirm the judgment.

BACKGROUND

¶2 Taxpayer is an Arizona limited liability company that engages in speculative building. After purchasing a parcel of real property in the City of Chandler ("the City"), Taxpayer constructed thirty-six apartment buildings, along with other structures, for the San Palacio development. Taxpayer completed these improvements at different times, and sold the entire parcel with improvements for $58,000,000 on May 24, 2007.

¶3 Taxpayer's municipal tax return for May 2007 reported $108,729.08 in tax for the sale under the speculative builder classification. *See* Chandler City Code ("City Code") § 62-416(a). Taxpayer's calculation accounted for proceeds from fifteen buildings that were substantially completed within twenty-four months before the sale date. Consistent with what its counsel claims is the practice of other municipalities, Taxpayer did not pay tax to the City on the earnings from the other twenty-one buildings that were substantially completed more than twenty-four months before the sale date.

¶4 The City notified Taxpayer that it owed $257,962.36 - representing the tax due on the remaining proceeds from the entire improved property - plus interest. Taxpayer petitioned

for a redetermination, and advocated an allocation approach for the proceeds before a municipal hearing officer. The hearing officer rejected Taxpayer's argument and upheld the City's interpretation, but disallowed penalties. The City issued an adjusted assessment.

¶5 Taxpayer appealed this assessment to the Arizona Tax Court. *See* City Code § 62-575(A), (C). The parties filed cross-motions for summary judgment regarding whether the City Code allowed for incremental allocation of improvement income. The City prevailed. We have jurisdiction over Taxpayer's timely appeal. *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(1) (West 2012).[1]

ANALYSIS

¶6 We review *de novo* the tax court's grant of summary judgment. *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). We also apply the *de novo* standard to the tax court's interpretation of the City Code. *See Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, 383, ¶ 15, 166 P.3d 934, 938 (App. 2007).

I. Applicable City Code Provisions

¶7 Title 62 of the City Code imposes a transaction privilege tax "upon persons on account of their business

[1] We cite the current version of the statutes and code provisions because no changes material to our decision have occurred after the relevant date.

activities." City Code § 62-400(A)(1). Section 62-416(a)(1) extends this tax to persons "engaging or continuing in business as a speculative builder within the City," and applies such tax to "the total selling price from the sale of improved real property at the time of closing of escrow or transfer of title." One definition of a speculative builder is "[a]n owner-builder who sells or contracts to sell improved real property . . . : (A) Prior to completion; or (B) Before the expiration of twenty-four (24) months after the improvements of the real property sold are substantially complete." City Code § 62-100 (quoting definition (2) of the term "speculative builder").

¶8 In contrast to the tax treatment of income derived from speculative building, an owner-builder who does not complete a sale within twenty-four months after improvement to the property is substantially complete is not liable for tax based on the total selling price applicable. Rather, under City Code § 62-417(a), that taxpayer's liability is based on (1) the gross income realized by construction contractors to whom the owner-builder has provided a written declaration that they are not responsible for city construction-related transaction privilege taxes, and (2) tangible personal property purchased for incorporation into any real property improvement, computed on the selling price.

II. Taxpayer's Sale Proceeds Derived From The Business Of Contracting As A Speculative Builder

¶9 Taxpayer concedes it is an owner-builder and "is subject to tax as a speculative builder" if it "sells or contracts to sell improved real property prior to completion or before the expiration of twenty-four months after the improvements are substantially complete" under City Code § 62-100. Taxpayer contends, however, that City Code § 62-100 not only defines who is a "speculative builder," but it also serves to limit through allocation the amount of tax a speculative builder will pay. According to Taxpayer, this allocation approach accords with the customary practice of other municipalities and limits taxable gains in this case to receipts from the fifteen buildings that were substantially complete within twenty-four months of the sale date. Taxes due on the sale of the buildings that were substantially complete more than twenty-four months before the project sale would be calculated pursuant to § 62-417(a), as previously described.

¶10 Section 62-416 contains no express allocation formula. Based on "counsel's personal knowledge and experience," however, Taxpayer contends other municipalities have adopted the allocation approach. Counsel's assertion about this practice, however, is not evidence, nor is there any documentation in the record concerning same. Further, counsel has not directed us to

any information in this regard of which we could take judicial notice.

¶11 Moreover, Taxpayer's interpretation is inconsistent with the City Code. As the tax court recognized, Taxpayer's twenty-four-month argument misconstrues the phrase "the improvements" in the § 62-100(2)(B) definition of a speculative builder. This phrase applies the twenty-four-month period for selling or contracting to sell to "the improvements," referring to the improvements as a whole, and not to "some improvements," "certain improvements," or improvements as a separately identified component. *See generally* A.R.S. § 1-213 (mandating that "[w]ords and phrases shall be construed according to the common and approved use of the language"); *SFPP, L.P. v. Ariz. Dep't of Revenue*, 210 Ariz. 151, 155, ¶ 19, 108 P.3d 930, 934 (App. 2005) (recognizing that Arizona courts "look to the specific language used – and not used – by the legislat[ive body]"). In this case, all of "the" improvements – undeniably part of the entire completed project - were substantially complete within twenty-four months of the sale date, and therefore all receipts from that sale are taxable. *See* City Code § 62-100(2)(B).

¶12 In ascertaining the meaning of these provisions, we may "look to [provisions] on the same subject matter to determine legislative intent and to maintain statutory harmony."

In re Robert A., 199 Ariz. 485, 487, ¶ 8, 19 P.3d 626, 628 (App. 2001). We cannot reconcile Taxpayer's interpretation of taxable and non-taxable units with § 62-416(a)(1), which provides: "The gross income of a speculative builder considered taxable shall include *the total selling price* from the sale of improved real property at the time of closing of escrow or transfer of title." (Emphasis added.) Section 62-416(a)(3) likewise specifies that "[i]n the case of multiple unit projects, 'sale' refers to *the sale of the entire project* or to the sale of any individual parcel or unit." (Emphasis added.) It is undisputed that all the units here were sold at the same time, and therefore the total selling price is taxable. *See* City Code § 62-416(a)(1), (3).

¶13 Construing the City Code provisions as a whole, we hold that Taxpayer is liable for transaction privilege tax as a speculative builder on the total sale. Accordingly, the tax court properly held that Taxpayer owed tax on that amount irrespective of whether some units were substantially complete more than twenty-four months before sale.[2]

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[2] Taxpayer relies on three authorities that are irrelevant to the issues. In *Wilderness World*, our supreme court held that former A.R.S. § 42-1314(A)(1) was inapplicable to river rafting because, under the doctrine of *ejusdem generis*, that activity was not of the same kind or nature as the other activities listed in the statute. 182 Ariz. at 198-200, 895 P.2d at 110-12. Equally unavailing is Taxpayer's reliance on *Copper Hills Enterprises, Ltd. v. Arizona Department of Revenue*, 214 Ariz.

CONCLUSION

¶14 We affirm the tax court's grant of summary judgment, and deny Taxpayer's request for attorneys' fees pursuant to A.R.S. § 12-348.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
JOHN C. GEMMILL, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge

386, 153 P.3d 407 (App. 2007). In that case, this court held that an annexation was null and void for taxation purposes. *Id*. at 389-92, ¶¶ 10-20, 153 P.3d at 410-13. Finally, in *Pittsburgh & Midway Coal Mining Co. v. Arizona Department of Revenue*, our supreme court analyzed whether the Arizona Department of Revenue was obligated to refund a tax that had not been paid under protest because the taxpayer was unaware of the illegality at the time of payment. 161 Ariz. 135, 137, 776 P.2d 1061, 1063 (1989).