Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/12/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 07/28/2015

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
A. Quintana
Deputy

SABAN RENT-A-CAR L L C, et al. SHAWN K AIKEN

v.

ARIZONA DEPARTMENT OF REVENUE, et al. KIMBERLY J CYGAN

TIMOTHY BERG

UNDER ADVISEMENT RULING

The Court has the three motions pending:

(1) Defendant Arizona Department of Revenue's (AZDOR) Motion for Partial Summary Judgment Re: Lack of Liability for the Payment of Any Refunds filed April 24, 2015.

(2) AZDOR's Motion for Partial Summary Judgment Re: Prospective Relief filed April 24, 2015, and

(3) Defendant AzSTA's Motion for Partial Summary Judgment filed April 24, 2015.

All three motions are fully briefed. As mentioned during the oral argument, all the briefs related to these motions were extremely well written, concise and persuasive. In addition, the Court benefited from excellent oral argument on the motions on July 24, 2015.

Two issues are raised in the motions: (1) should Judge Fink's order be applied prospectively or retroactively, and (2) if it should be applied retroactively, who is responsible for paying the refund.

Retroactive Application of Judge Fink's Order (Refund)

The United States Supreme Court addressed the issue of retroactive application in *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). It held that if the government requires a taxpayer to pay a tax which is subsequently determined to be illegal, it must provide meaningful backward-looking relief to rectify any unconstitutional deprivation. In discussing the reasons for its ruling, the Court seemed to focus, at least in part, on the fact that prospectively enforcing the ruling would not make the taxpayer whole. Specifically, it rejected the lower Court's finding that a retroactive application would result in a windfall to the taxpayer, as the illegal tax was likely passed on to its customers. Such a conclusion, the Supreme Court held, was not supported by the record.

The record in this case, however, does support a conclusion that a retroactive application will result in a windfall to the taxpayer, as it is undisputed that the taxpayer here has passed this illegally collected tax on to its customers. This distinction seems to leave open the possibility that prospective only relief is appropriate in a case where a tax is illegally collected, but the taxpayer is otherwise made whole by having passed the illegal tax on to its customers.

The Arizona Court of Appeals, however, has twice interpreted *McKesson* in such a definitive manner, that this possibility seems foreclosed. In *Tucson Electric Power Co. v. Apache County*, 185 Ariz. 5 (App. 1995)("retroactive application [of a tax decision], as a matter of federal constitutional law, is required in this case where the taxes at issue were paid under protest, regardless of our non-tax cases that consider retroactivity a policy question within the court's discretion") and *Scottsdale Princess v. ADOR*, 191 Ariz. 499 (App. 1997), two different panels of the Arizona Court of Appeals both interpreted *McKesson* to require retroactive application of a holding that a tax is illegal. Those interpretations of *McKesson* control.

Who is Responsible for Paying the Refund

Having determined that the taxpayer here is entitled to final judgment in its favor, the legislature has made clear how a tax refund should be refunded to the taxpayer.

A.R.S. § 42-1254(D)(5) states, "If a final judgment is rendered in favor of the taxpayer,… the amount of the balance remaining due to the taxpayer shall be certified by the department of revenue to the department of administration [which] shall draw a warrant payable to the taxpayer in an amount equal to the amount of the tax found by the judgment to be illegal."

"The ordinary meaning of 'shall' in a statute is to impose a mandatory provision. However, it may be deemed directory when the legislative purpose can best be carried out by such construction." *HCZ Const., Inc. v. First Franklin Financial Corp*., 199 Ariz. 361, 364 (App. 2001) (citations omitted). There is no indication that the use of the word "shall" in A.R.S. § 42-1254(D)(5) was intended by the legislature to be directive.

As between the Defendant and the Defendant-In-Intervention in this case, the legislature has further described the mechanism for responsibility for the refund. A.R.S. § 42-5069(G) provides, "if a court of competent jurisdiction finally determines that tax monies distributed under this section were illegally collected …, the department shall compute the amount of such monies that was distributed to each town, city and county.… Each month the state treasurer shall reduce the amount otherwise distributable to the city, town and county under this section by one thirty-sixth of the total amount to be recovered from the city, town or county until the total amount has been recovered, but the monthly reduction for any city, town or county shall not exceed ten percent of the full monthly distribution to that entity."

A.R.S. § 5-802 created Defendant-In-Intervention AzSTA as a tax levying public improvement district with all the rights, powers and immunities of municipal corporations. It is therefore covered as a "town, city and county" would be by § 42-5069(G).

While ultimate liability rests on the receiving entity, the statutory language plainly envisions that the department, having collected and distributed the illegal taxes, is responsible for their repayment, and recovers that amount from the receiving entity as provided by A.R.S. § 42-5069(G).

Copper Hills Enterprises, Inc. v. Arizona Dept. of Revenue, 214 Ariz. 386 (App. 2007), is not to the contrary. It stands for the proposition that reliance on A.R.S. §42-5069(G) is not the exclusive avenue for relief, if the ultimate recipient of the illegal tax can afford complete relief by disgorging that amount.

Conclusion

Plaintiffs are entitled to judgment which must be retroactively applied, resulting in a refund to the taxpayers. The Defendant is responsible for paying this refund, with the right to reduce the amount otherwise distributable to Defendant-In-Intervention as provided for in A.R.S. § 42-5069(G).

Plaintiffs shall provide a proposed form of judgment by August 28, 2015.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 07/28/2015

Arizona Tax Court - ATTENTION: eFiling Notice

Beginning September 29, 2011, the Clerk of the Superior Court will be accepting post-initiation electronic filings in the tax (TX) case type. eFiling will be available only to TX cases at this time and is optional. The current paper filing method remains available. All ST cases must continue to be filed on paper. Tax cases must be initiated using the traditional paper filing method. Once the case has been initiated and assigned a TX case number, subsequent filings can be submitted electronically through the Clerk's eFiling Online website at http://www.clerkofcourt.maricopa.gov/

NOTE: Counsel who choose eFiling are strongly encouraged to upload and e-file all proposed orders in Word format to allow for possible modifications by the Court. Orders submitted in .pdf format cannot be easily modified and may result in a delay in ruling.