

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

INDIAN TRAILS MINI STORAGE, an Arizona) 1 CA-TX 02-0023
limited partnership,) 1 CA-TX 02-0024
) 1 CA-TX 02-0025
Plaintiff-Appellant,) 1 CA-TX 02-0026
) (Consolidated)
v.)
)
MARICOPA COUNTY, a political) DEPARTMENT T
subdivision of the State of Arizona,)
)
Defendant-Appellee.)

RYOBI OUTDOOR PRODUCTS, INC.,)
Plaintiff-Appellant,)
v.)
)
MARICOPA COUNTY, a political)
subdivision of the State of Arizona,)
)
Defendant-Appellee.)

SMITH'S FOOD AND DRUG CENTERS dba FRY'S)
FOOD AND DRUG STORES, INC., a Delaware)
corporation,)
)
Plaintiff-Appellant,)
v.)
)
MARICOPA COUNTY, a political)
subdivision of the State of Arizona,)
)
Defendant-Appellee.)

PLEASANT HARBOR MARINA, INC.,)
Plaintiff-Appellant,)
v.)
)
MARICOPA COUNTY, a political)
subdivision of the State of Arizona,)
)
Defendant-Appellee.)

MEMORANDUM DECISION
(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

FILED 6-12-03

Appeal from the Arizona Tax Court

Cause Nos. TX 01-000108, TX 01-000109, TX 01-000110, TX 01-000111

The Honorable Paul A. Katz, Judge

AFFIRMED

The Cavanagh Law Firm Phoenix
by Jeffrey B. Smith
Attorneys for Plaintiffs-Appellants

Helm & Kyle, Ltd. Tempe
by Robert S. Livesay
Kara A. Ricupero
Attorneys for Defendant-Appellee

W I N T H R O P, Judge

¶1 Indian Trails Mini Storage ("Indian Trails"), Ryobi Outdoor Products, Inc. ("Ryobi"), Smith's Food and Drug Centers d/b/a Fry's Food and Drug Stores, Inc., and Pleasant Harbor Marina, Inc. (collectively "Taxpayers") challenge the tax court's orders granting summary judgment for Maricopa County ("the County") on Taxpayers' claims under Arizona Revised Statutes ("A.R.S.") section 42-16251 (1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is a consolidated appeal from four separate judgments entered by the Arizona State Tax Court. Taxpayers are lessees of land owned by Native American or government lessors. Taxpayers contend that the County erred in taxing them as owners of

improvements on the respective leased real properties they were occupying during the 1997 tax year; Ryobi also asserts errors for the 1998 and 1999 tax years. Taxpayers claim refunds, along with attorneys' fees, costs, and interest.

¶3 The claims arise out of the repeal of the tax on possessory interests in 1995. Enacted in 1985, the relevant statutes subjected possessory interests -- rights to possess and actual possession of land or improvements under non-freehold rights -- to ad valorem taxation. *Airport Props. v. Maricopa County*, 195 Ariz. 89, 91, ¶ 3, 985 P.2d 574, 576 (App. 1999) (citing former A.R.S. §§ 42-681 to -686 (1991) (repealed effective retroactively to January 1, 1995)). As we explained in *Airport Properties*, these statutes applied to private possessory rights in certain government real property. *Id.* Some types of possessory interests were exempt from tax or benefitted from valuation reduction formulae. *Id.* The possessory interests subject to tax were assessed at one percent of full cash value. *Id.* The statutes distinguished improvements on possessory rights ("IPRs") from possessory interests themselves. *See id.* at ¶ 1.

¶4 In 1995, the Arizona legislature repealed A.R.S. §§ 42-681 to -687, effective retroactively to January 1, 1995. 1995 Ariz. Sess. Laws, ch. 294, § 8, cited in *Airport Props.*, 195 Ariz. at 92, ¶ 7, 985 P.2d at 577; see also 1995 Ariz. Sess. Laws, ch. 241, § 43. The legislature explained:

Notwithstanding any other provisions of law, it is the intent of the legislature that by repealing sections 42-681 through 42-685 and section 42-687, Arizona Revised Statutes, and amending sections 42-162 and 42-227, Arizona Revised Statutes, that possessory interest will not be subject to any type of ad valorem tax until the legislature enacts a new taxing mechanism.

1995 Ariz. Sess. Laws, ch. 294, § 1(A), *quoted in Airport Props.*, 195 Ariz. at 104, ¶ 57, 985 P.2d at 589. The repeal did not explicitly affect the taxation of IPRs. *Airport Props.*, 195 Ariz. at 92, ¶ 7, 985 P.2d at 577.

¶5 Notwithstanding the repeal, the County argued in *Airport Properties* that IPRs “remain fully taxable under the remaining provisions of Title 42 and are properly classified as Class 3 commercial property subject to a 25% assessment ratio.” *Id.* at 99, ¶ 33, 985 P.2d at 584. This court rejected the County’s argument on January 19, 1999, and ruled that the legislature did not intend to continue to impose ad valorem property taxes on possessory interests at all after the repeal. *Id.* at 104, ¶ 57, 985 P.2d at 589.

¶6 Based upon this history, Taxpayers filed notices of claim challenging taxation of the improvements in accordance with A.R.S. § 42-179.03 (current A.R.S. § 42-16254 (1999)), which the County disputed. Taxpayers unsuccessfully appealed to the Arizona State Board of Equalization, and then filed appeals in the tax court. According to Taxpayers, the assessments were erroneous because the legislature repealed the possessory interest tax in 1995.

Taxpayers claimed entitlement to relief under the error correction statutes on the basis that the error is "objectively verifiable without the exercise of discretion, opinion or judgment." A.R.S. § 42-16251(3)(e).

¶7 The County, however, moved for summary judgment on the basis that Taxpayers were in reality contending that these taxes had been illegally collected, and that Taxpayers' remedy was to bring an action, pursuant to A.R.S. § 42-11005(A) (1999) (former A.R.S. § 42-204), within one year of payment. The County further argued that these claims did not fall within the correction statutes. Because the method for determining tax liability for improvements consisted of reviewing and interpreting the applicable leases, the County argued that such decisions required the exercise of discretion, opinion, or judgment, and A.R.S. § 42-16251(3)(e) could not apply. The tax court agreed that the Maricopa County Assessor's determination of ownership did not constitute an "error" within the meaning of § 42-16251, and the court granted summary judgment for the County. These appeals followed. Upon motion by Indian Trails, we consolidated the appeals into one action.

ANALYSIS

I. The Applicable Standards

¶8 On appeal from a grant of summary judgment, this court reviews the tax court's ruling *de novo*. *Wilderness World, Inc. v. Dep't of Revenue*, 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). We

view the facts and inferences therefrom in the light most favorable to the party against whom summary judgment was granted. See *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 568, ¶ 2, 959 P.2d 1256, 1259 (1998). We will affirm the judgment if it is correct for any reason. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995).

¶9 The property tax error correction statutes provide a limited remedy for the retroactive correction of factual errors in the assessment and collection of property taxes. Section 42-16251(3) defines an "error":

"Error" means any mistake in assessing or collecting property taxes resulting from:

. . . .

(e) Subject to the requirements of § 42-16255, subsection B, a valuation that is based on an error that is *exclusively factual in nature or due to a specific legal restriction that affects the subject property and that is objectively verifiable without the exercise of discretion, opinion or judgment* and that is demonstrated by clear and convincing evidence, such as:

(i) A mistake in the description of the size, use or ownership of land, improvements or personal property.

(ii) Clerical or typographical errors in reporting or entering data that was used directly to establish valuation.

(iii) A failure to timely capture on the tax roll a change in value caused by new construction, destruction, demolition or splitting or consolidating interests in real property existing on the valuation date.

(iv) The existence or nonexistence of the property on the valuation date.

(v) *Any other objectively verifiable error that does not require the exercise of discretion, opinion or judgment.*

(Emphasis added.) For purposes of the statute, an error "does not include a correction that results from a change in the law as a result of a final nonappealable ruling by a court of competent jurisdiction in a case that does not involve the property for which a correction is claimed." A.R.S. § 42-16251(4).

II. *The Proper Vehicle for Taxpayers' Assertion of Error*

¶10 The crux of this appeal is whether the error correction statutes provide a remedy for taxation following repeal of the possessory interest tax. We have explained: "This construction of the statutory scheme presupposes that the error . . . will be one plainly and indisputably revealed by the County's own records or the taxpayer's claim." *Abrams Airborne Mfg., Inc. v. State Dep't of Revenue*, 185 Ariz. 589, 592, 917 P.2d 1236, 1239 (App. 1996) (quoting *S & R Props. v. Maricopa County*, 178 Ariz. 491, 501-02, 875 P.2d 150, 160-61 (App. 1993)). *Abrams* involved an indisputable factual mistake by the taxpayer in categorizing its computer equipment. *Id.* at 591-93, 917 P.2d at 1238-40. The County argued that the claim did not fall within the ambit of the error correction statute because it required investigation. *Id.* at 592, 917 P.2d at 1239. This court held that, although a taxpayer could not request a refund under the statute when the tax court would have to resolve "disputed factual and legal issues" to decide

whether the assessment was erroneous, *id.* (quoting *Ringier Am. v. State Dep't of Revenue*, 184 Ariz. 250, 253, 908 P.2d 64, 67 (App. 1995)), "routine verification" nonetheless did not bring a claim outside the scope of the statute. *Id.* at 592-93, 917 P.2d at 1239-40.

¶11 In light of this authority, Taxpayers here contend that whether the subject property was taxable in 1997 is objectively verifiable, and thus correctable, under A.R.S. § 42-16251. The problem is that, even in the wake of the repeal, determining whether a taxpayer owns or merely has a possessory interest in an improvement still requires analysis of the lease. For example, in *Havasu Springs Resort Co. v. La Paz County*, 199 Ariz. 349, 18 P.3d 143 (App. 2001), a case decided two years after *Airport Properties*, we engaged in a detailed review of a lease to determine whether its terms overrode the general rule attributing ownership to the lessor by expressly providing that the improvement belonged to the tenant. *See id.* at 350, ¶¶ 3-4, 18 P.3d at 144. The determination of the nature of this interest is a disputed legal issue requiring the exercise of judgment, discretion, or opinion. Such analysis exceeds the "routine verification" of equipment ownership.¹ Simply

¹ Less persuasive is the County's citation to *Widger v. Arizona Department of Revenue*, 183 Ariz. 296, 903 P.2d 604 (App. 1995), for the proposition that an erroneous assessment does not include assessments uniformly made according to Arizona Department of Revenue policy. *See id.* at 298, 903 P.2d at 606. The *Widger* court was quoting the tax court's interpretation of then-existing
(continued...)

stated, § 42-16251 by its very terms is not available to provide the relief requested by Taxpayers in these consolidated actions.

¶12 As the County points out, the proper vehicle for Taxpayers' claims is an action to recover an illegally levied tax under A.R.S. § 42-11005. In *Bank of America National Trust and Savings Ass'n v. Maricopa County*, 196 Ariz. 173, 993 P.2d 1137 (App. 1999), a bank sought refunds for 1995 and 1996 property taxes it alleged were illegally assessed and collected because the statute that had taxed possessory interests had been repealed effective January 1, 1995. See *id.* at 174, ¶ 1, 993 P.2d at 1138. The County countered that the building was misclassified as a class three IPR, resulting in an incorrect tax, but not an illegal one. *Id.* at 177, ¶ 13, 993 P.2d at 1141. It therefore argued that, as a party dissatisfied with a valuation or classification, the bank

¹(...continued)

A.R.S. § 11-506. As of 1991, subsection (B) of the statute provided that "[a]n erroneous assessment does not include an assessment that is uniformly made according to department of revenue guidelines for all similarly classified property." *Id.* at 298 n.4, 903 P.2d at 606 n.4. See also *Rio Rico Props., Inc. v. Santa Cruz County*, 172 Ariz. 80, 93, 834 P.2d 166, 179 (Tax 1992) (holding that an erroneous assessment under A.R.S. § 11-506 did not include "an assessment the incorrectness of which arises from a deliberate misapplication of policy by an agent of a taxing authority"). The legislature, however, repealed A.R.S. § 11-506 effective January 1, 1996, thereby eliminating the provision. 1994 Ariz. Sess. Laws, ch. 323, § 1. Accordingly, the Arizona statutes no longer provide that policy implementation falls outside the definition of error. As a result, the argument is not relevant to assessments for the 1997 tax year and thereafter.

should have filed a direct appeal to the court. *Id.*; see generally A.R.S. § 42-16201 (1999) (former A.R.S. § 42-246).

¶13 This court rejected the County's interpretation. *Bank of Am.*, 196 Ariz. at 177, ¶ 14, 993 P.2d at 1141. We determined that, although in one sense it could be said "that a party challenging a tax as illegally collected must first assert that the County 'misclassified' the property, such a broad reading would transform every tax appeal into an attack on the property's 'valuation or classification.'" *Id.* at ¶ 15. Accordingly, we held that the bank properly brought its claim as a protest of an illegally collected tax. *Id.* at 178, ¶ 17, 993 P.2d at 1142.

¶14 Likewise, we hold that these identical protests of a post-repeal possessory interest tax should have been brought as A.R.S. § 42-11005 claims to recover an illegally collected tax. See *id.* at 174 n.1, ¶ 1, 993 P.2d at 1138 n.1. Public policy generally discourages suits for the refund of taxes, even when the taxes are illegally collected. *S. Pac. Co. v. Cochise County*, 92 Ariz. 395, 406, 377 P.2d 770, 778 (1963). If a taxpayer desires to raise an issue as to his or her taxes, the taxpayer is compelled to scrupulously follow the statutory procedures. *Id.* We thus affirm the tax court's grant of summary judgment to the County. This holding obviates the need to consider whether the County in fact erred in assessing liability for the respective improvements and related issues.

CONCLUSION

¶15 We affirm the trial court's grant of summary judgment to the County in all four cases. In addition, because Taxpayers have not prevailed in this appeal, we deny Taxpayers' request for attorneys' fees on appeal pursuant to A.R.S. § 12-348(B)(1) (2003).

LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

PHILIP HALL, Judge

RAYMOND W. WEAVER, JR., Judge *Pro Tempore**

*NOTE: The Honorable RAYMOND W. WEAVER, JR., Judge *Pro Tempore*, was authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).