

FILED

JUN - 1 2004

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP G. URRY, CLERK
By Philip G. Urry

TONY M. COURY BUICK, INC.,)	1 CA-TX 03-0014
)	
Plaintiff-Appellant,)	DEPARTMENT T
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
CITY OF MESA, a municipal corporation)	Rule 28, Arizona Rules
of the State of Arizona,)	of Civil Appellate
)	Procedure)
Defendant-Appellee.)	
)	

Appeal from the Arizona Tax Court

Cause No. TX 99-00312

The Honorable Paul A. Katz, Judge

AFFIRMED

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by Patrick Derdenger	
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Randal T. Evans	
Attorneys for Plaintiff-Appellant	

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by Alfred J. Smith, Assistant City Attorney	
Attorneys for Defendant-Appellee	

W E I S B E R G, Judge

¶1 Tony M. Coury Buick ("Coury") appeals from the denial of its motion for summary judgment and the grant of summary judgment to the City of Mesa. For the reasons that follow, we affirm.

BACKGROUND

¶2 Coury is a dealer in new and used automobiles. After Mesa conducted a tax audit for the period July 1992 through December 1995, Mesa assessed \$34,843.18 in unpaid tax and \$11,034.92 in interest for the time period through March 1997. In February 1998, Mesa amended the assessment to \$33,110.30 in tax, \$7,930.47 in interest, and \$146.24 in penalties.

¶3 The assessments were for unpaid taxes on manufacturer rebates from General Motors ("GM") to vehicle buyers who assigned their rebates to Coury; on allowances from GM either paid to or turned over to Coury by Coury employees who bought GM vehicles; and on vehicle sales to ARISE, a non-profit organization, that Coury claimed were exempt from city taxes.

¶4 Coury protested the tax, interest, and penalties associated with each of the above items. A hearing officer rejected the protests but found that the collection of some of the tax was barred by the statute of limitations. Mesa issued a revised assessment for February 1993 through December 1995 consistent with the hearing officer's decision.

¶5 Coury unsuccessfully appealed to the tax court. It now challenges the tax court's grant of summary judgment to Mesa and the denial of its own motion for summary judgment. In granting

judgment to Mesa, the court ordered Coury to pay \$27,202.59 in privilege license tax, \$1,234.90 in use tax, and interest.

DISCUSSION

¶6 In an appeal from summary judgment, we view the facts in the light most favorable to the non-prevailing party. *Citadel Care Ctr. v. State Dep't of Rev.*, 200 Ariz. 286, 288, ¶ 7, 25 P.3d 1158, 1160 (App. 2001). We independently determine questions of law, however, such as the proper interpretation of a statute. *Id.* In construing a statute, our primary goal is to determine and implement the intent of the legislative body. *Ariz. Dep't of Rev. v. Raby*, 204 Ariz. 509, 511, ¶ 14, 65 P.3d 458, 460 (App. 2003). Municipal laws or ordinances are construed in the same manner as state statutes. *Abbott v. City of Tempe*, 129 Ariz. 273, 275, 630 P.2d 569, 571 (App. 1981).

A. TAXATION OF MANUFACTURER REBATES

¶7 Coury contends that Mesa cannot legally assess privilege license taxes on manufacturer rebates, citing Arizona Revised Statutes ("A.R.S.") section 42-6004(E)(1) (1999). That statute provides in relevant part:

In computing the tax base, any city, town or other taxing jurisdiction shall not include in the gross proceeds of sales or gross income:

1. A manufacturer's cash rebate on the sales price of a motor vehicle if the buyer assigns the buyer's right in the rebate to the retailer.

¶8 Both parties agree that this statute became effective July 20, 1996, and that the sales transactions and associated cash rebates subject to assessment occurred before July 20, 1996. However, Coury argues that because Mesa issued the assessment on March 11, 1997, the assessment violated the statute. Thus, Coury reasons, the tax court erred by focusing on the date of the taxable transactions rather than the date on which Mesa computed the tax.

¶9 Mesa's assessment covered February 1993 through December 1995, a period before the statute's effective date. It argues that if a statute is not explicitly made retroactive, the statute cannot reach back and invalidate assessments that were valid before July 20, 1996. Moreover, Mesa contends its tax code requires that taxes that accrue in one month be paid by the twentieth day of the following month so that tax on the rebates was due long before July 20, 1996.

¶10 Mesa also points out that § 42-6004(E)(1) prohibits including rebates in the tax base used to calculate gross income but does not prohibit a city from assessing taxes on rebates after the July 20, 1996 date. Therefore, because the tax base used to calculate the assessments included only transactions occurring between July 1992 and December 1995 (and no transactions after July 20, 1996), Mesa asserts that the assessment did not violate the statute. We agree with Mesa.

¶11 First, Coury's tax obligation was not forgiven simply because it failed to make tax payments as they came due, which Mesa later discovered in its audit. Interpreting § 42-6004(E)(1) in the manner advocated by Coury would expose similarly situated taxpayers to different tax liability based on when the city computed their respective taxes. Unlike those dealers who timely paid tax on manufacturer rebates, Coury would be rewarded for its failure to pay. We will not presume the legislature intended such a construction. *State v. Gonzales*, 206 Ariz. 469, 471, ¶ 12, 80 P.3d 276, 278 (App. 2003) (noting statutes must be given a sensible construction that accomplishes the legislative intent and avoids absurd results).

¶12 Second, the legislature failed to direct that this statute have retroactive effect, although it had the ability to do so. On several occasions, it has made § 42-6004 and other tax statutes retroactive. See, e.g., Historical and Statutory Notes to A.R.S. §§ 42-6004, -5067, and -1104 (1999). Unambiguous statutory language should be interpreted to mean what it says unless that interpretation produces an absurd result. *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989). In this case, we "cannot read into a statute something which is not within the manifest intention of the legislature as gathered from

the statute itself." *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 209, 349 P.2d 774, 776 (1960).

¶13 Finally, we reject Coury's argument that Mesa has no vested right to tax the rebates because it had not yet assessed the tax before § 42-6004(E)(1) became effective.¹ Here, Coury's obligation to pay the subject tax accrued before 1996 and, as the hearing officer stated, that obligation "was not dependent upon the City's conducting an audit or issuing an assessment. In other words, the City had an assertable or vested right to tax manufacturer rebates before the new law was enacted." For all the above reasons, Mesa's post-July 1996 assessment does not alter its entitlement to taxes on manufacturer rebates that accrued before 1996, as long as the statute of limitations has not run on its ability to collect those taxes.

B. GM EMPLOYEE DISCOUNTS

¶14 Coury next challenges the inclusion in gross income of amounts it received in connection with the sales of GM vehicles to employees. Coury explains that GM offered a rebate to employees who bought a GM vehicle from a dealer. Pursuant to the rebate, the employee received an allowance against the price and could assign that amount to the dealer as a partial payment. Coury argued

¹Coury's opening brief also stated that "this case raised estoppel-like issues" but Coury failed to argue or support this contention. Likewise, Coury has failed to demonstrate that Mesa has waived its right to collect the tax.

below, as here, that these payments are manufacturer rebates prohibited by § 42-6004(E)(1) from being included in its tax base. Of course, we have already decided that any rebates not barred by the statute of limitations and assigned to Coury are subject to tax and are not exempted by § 42-6004(E)(1).

¶15 GM also offered a second sort of incentive to facilitate employee purchases. An employee could order a vehicle directly from GM and take delivery from a local dealer after paying the dealer's net price. GM then gave the dealer a handling allowance. Coury argues that this allowance should not factor into its gross income because it was not received from the purchaser of the vehicle but from GM. Mesa counters, and we agree, that even if the payments came from GM, they constitute additional consideration to Coury from the sale. As the Tax Court reasoned, monetary payments made to encourage Coury's employees to buy GM products "must be treated as gross income for [Coury] as nothing in the Mesa Tax Code or the Arizona Revised Statutes exempts such payments from Mesa City sales tax."

¶16 Section 5-10-400(C) of the Mesa Tax Code states that "it shall be presumed that all gross income is subject to the tax until the contrary is established by the taxpayer." Further, gross income includes "the total amount of the sale . . . and all receipts, cash, credits, barter, exchange, reduction of or forgiveness of indebtedness . . . derived from a sale . . . or

other taxable activity." § 5-10-200(A). We therefore conclude that these handling allowances received in connection with sales were part of "receipts, cash, credits . . . derived from a sale."

C. TAX ASSESSMENTS ON SALES TO ARISE

¶17 Between October 1992 and February 1994, Coury sold some vehicles to ARISE, a non-profit health care organization. Coury points out that ARISE gave it an Arizona Department of Revenue Transaction Privilege Exemption Certificate for each sale making the sales exempt from state and city tax. The Certificate of Exemption, however, reflected only that "these purchases are exempt from Arizona transaction privilege tax," not from city tax. (Emphasis added.) Accordingly, Mesa determined that the sales were exempt only from state tax and that Coury owed city sales tax in the amount of, \$2,401.90.

¶18 Coury argues that assessing tax against it violates § 5-10-360(B) of the Mesa Tax Code, which provides:

Any person who claims and receives an exemption . . . to which he is not entitled under this Chapter, shall be subject to, liable for, and pay the tax on the transaction as if the vendor . . . had passed the burden of the payment of the tax to the person wrongfully claiming the exemption.

From this, Coury contends that only ARISE is liable for the tax and that Coury may not be held jointly and severally liable. However, the tax court concluded, and we agree, that "[w]hile the City of

Mesa has the option of collecting these taxes from either Coury or ARISE, § 5-10-556(C)(3) of the Mesa Tax Code does not prohibit Mesa from assessing these taxes as against Coury."²

¶19 Clearly, Mesa could have tried to collect the unpaid sales tax from ARISE. But, as the seller of vehicles, Coury failed to collect a tax it should have, and when that omission was discovered in the audit, nothing in the tax code provision prevented Mesa from assessing the unpaid tax against Coury, which was the party who should have collected the tax at the time of the sale. Coury had no legal authority to forgive the city tax just because ARISE presented a certificate of exemption from state tax, and Coury's failure to collect the tax does not absolve it from its obligation to pay the assessment.

¶20 Coury's argument that only ARISE can be liable for the unpaid tax also overlooks the presumption in § 5-10-400(C) that "all gross income . . . is subject to the tax until the contrary is established by the taxpayer." If Coury claimed that income from sales to ARISE was tax exempt, it was obliged to prove that exemption or be liable for the unpaid tax. In addition, § 5-10-460(B) states that "[t]he burden of proving that a sale of tangible personal property is not a taxable retail sale shall be upon the person who made the sale." Because Coury could not prove that the

²The tax court correctly observed that Coury may have a remedy against ARISE for the nonpayment of city tax.

sales to ARISE were exempt from city tax, Coury was liable for such unpaid tax.³

D. MESA'S AMENDED ASSESSMENT

¶21 In the administrative hearing, Coury also argued that Mesa could not issue an amended assessment for additional taxes due on vehicle sales to ARISE. Coury cited § 5-10-556(C) of Mesa's Tax Code, which states:

If the Tax Collector issues a notice of deficiency . . . the Tax Collector may not increase the proposed deficiency except in one or more of the following circumstances: . . .
(3) the Tax Collector submitted a written request for information and the taxpayer, despite possessing or having access to such information, failed to provide it within 60 days as required by section 5-10-555(C).

¶22 Mesa responded that exception (3) applied because it had requested information from Coury and the latter failed to timely comply. The hearing officer agreed that a March 1996 letter from Mesa's auditor, Doug Curtis, to Coury's comptroller, Gene Peters, was such an unanswered request.

¶23 Curtis' letter indicated that Mesa had taken a sample of completed car sales for four months in each year under audit, that the sampling revealed several errors, and that Mesa had calculated an error rate as a percentage of sales. The letter offered several

³We also note that Coury could have avoided tax liability by contacting Mesa to ascertain whether any city taxes would be imposed under the exemption certificates, and then collecting such taxes from ARISE.

options for determining the total assessment in each area of error: acceptance of the percentages, expansion of the sample, or reconstruction of the records. The letter then stated, "Due to the fact each area of liability deals with revenues which should be reflected in the accounting records but are not summarized as such, the record reconstruction would yield the most accurate results." The letter concluded that "[s]ince the ultimate assessment will reflect the areas cited, a consensus as to the computation methodology at this point would be in the best interest of all concerned. Please advise me of your decisions." Curtis' affidavit states more explicitly that he asked Coury to reconstruct its records and despite promises to do so, Coury never did the reconstruction. Coury did not controvert these asserted facts.

¶24

The hearing officer's order noted that:

[b]ecause Tony Coury lacked certain documentation, Mr. Curtis was forced to conduct his audit based on statistical sampling and extrapolation. Upon learning that Tony Coury objected to this methodology, Mr. Curtis sent Mr. Peters a letter dated March 28, 1996, suggesting that "record reconstruction would yield the most accurate results." Tony Coury did not provide such records to Mr. Curtis within 60 days, despite admittedly possessing or having access to such information. Accordingly, the amended assessment for additional taxes relating to disallowed ARISE sales is appropriate, subject, however, to the reduced audit period

The tax court did not address inclusion of the ARISE sales in the revised assessment but simply found that Mesa could collect the tax from either ARISE or Coury.

¶25 On appeal, Coury again contends that the 1998 assessment for ARISE sales was improper. It argues that none of § 5-10-556(C)'s exceptions existed here and that no evidence shows that it failed to disclose facts relating to ARISE in response to a written request. We, however, disagree.

¶26 We first observe that the revised 1998 assessment sought a deficiency of \$41,187.01 rather than \$46,024.34 as stated in the 1997 assessment and thus did not result in a monetary increase of the proposed deficiency because the aggregate dollar amount of the revised assessment was less, not more. A definition for the word "deficiency" is not set forth within the Mesa Tax Code.

When terms are not defined by the legislature and "there is no indication that the [l]egislature intended that [those] word[s] be given an extraordinary meaning, reference to an established, widely respected dictionary for the ordinary meaning of these words is acceptable." *State v. Wise*, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983) (citation omitted). In Webster's Collegiate Dictionary 302 (10th ed. 2001), the term "deficiency" is defined as "1. the quality or state of being deficient; 2. an amount that is lacking or inadequate." (Emphasis added.) Thus, pursuant to

common usage, a "deficiency" refers to a monetary amount and the revised 1998 assessment did not increase the proposed deficiency. Because there was no increase, we conclude that § 5-10-556(C) does not afford relief to Coury.

¶27 Next, even if Mesa did "increase" the proposed deficiency to cover items not previously identified as subject to error, we would reject Coury's argument. The Mesa Tax Code does not require a written request for facts related to the particular error discovered in the audit before Mesa can revise and increase the assessment. Section 5-10-556(C) refers simply to a request for "information," which suggests a broad and unspecific meaning, and Coury offers no support for a more restrictive interpretation.

¶28 Further, Mesa gave Coury several choices about the basis for calculating the assessment and informed Coury that reconstruction would produce the most accurate assessment. Coury promised to reconstruct its records but failed to do so. We also note that Curtis' letter informed Coury that its accounting failed to meet Mesa's requirement that taxable and tax-exempt income be clearly shown and thus that Coury's method "fail[ed] to account for transactions which are exempted by the State of Arizona and are taxable by the City of Mesa." The ARISE sales are a type that were exempt from state but not city tax. Although not expressly identified in Curtis' letter as an area of erroneous reporting,

ARISE sales might have been discovered in the initial assessment had Coury kept or provided its accounting data as Mesa required.

¶29 Because Coury declined to respond to Curtis' request that it either accept one of the less accurate sampling methods or provide reconstructed records to increase the likelihood of an accurate assessment, the tax court acted within its discretion to find that Coury had failed to timely respond to "a written request for information." Therefore, for both of the above-explained reasons, the revised assessment did not violate § 5-10-556(C). See *Cimarron Foothills Cmty. Assoc. v. Kippen*, 206 Ariz. 455, 459, ¶ 11, 79 P.3d 1214, 1218 (App. 2003) (noting appellate courts defer to a trial court's factual findings unless they are clearly erroneous or supported by no substantial evidence).

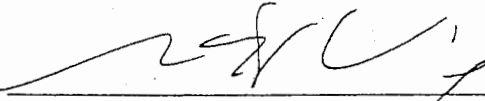
E. ATTORNEYS' FEES

¶30 Finally, Coury has requested an award of attorneys' fees. It has not prevailed, and therefore we deny its request. See A.R.S. § 12-348(B) (2003) (authorizing an award of attorneys' fees to a prevailing taxpayer and against a city in an action brought by the taxpayer challenging the assessment or collection of taxes).

CONCLUSION

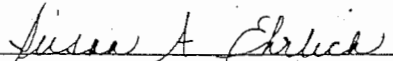
¶31 For the foregoing reasons, we affirm the tax court's award of summary judgment to Mesa and the assessments of \$27,202.59

in unpaid privilege tax and of \$1,234.90 in use tax, as well as the award of interest.

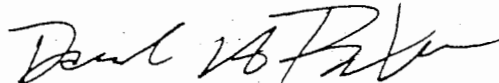


SHELDON H. WEISBERG, Judge

CONCURRING:



SUSAN A. EHRLICH, Presiding Judge



DANIEL A. BARKER, Judge