

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

US WEST COMMUNICATIONS, INC., a ) 1 CA-TX 01-0006  
Colorado corporation, nka QWEST )  
COMMUNICATIONS, )  
 )  
Plaintiff-Appellant, ) DEPARTMENT T  
 )  
v. ) **MEMORANDUM DECISION**  
 ) (Not for Publication -  
CITY OF TUCSON, a municipal ) Rule 28, Arizona Rules  
corporation, ) of Civil Appellate  
 ) Procedure)  
Defendant-Appellee. )  
 ) **FILED 04-23-02**

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Appeal from the Arizona Tax Court

Cause No. TX99-000360

The Honorable Jeffrey S. Cates, Judge

**AFFIRMED**

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Fennemore Craig, P.C. Phoenix  
By Paul J. Mooney  
Kendis K. Muscheid  
Attorney for Plaintiff-Appellant

Ulrich & Anger, P.C. Phoenix  
By Paul G. Ulrich  
and  
Michael D. House, Tucson City Attorney Tucson  
By Elisabeth Sotelo, Principal  
Assistant City Attorney  
Attorneys for Defendant-Appellee

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**S U L T**, Judge

¶1 Qwest Communications appeals from summary judgment for the City of Tucson on Qwest's claim for a refund of public utility taxes paid pursuant to Tucson City Code § 19-1070(a)(1) imposing a two percent tax "on the business of providing telecommunication

services to consumers within this city . . . ." The appeal presents these issues:

1. Whether the City's public utility tax under Code § 19-1070(a) is illegal "double taxation" as compared to the City's two percent transaction privilege tax on the gross income of persons "engaging or continuing in the business of providing telecommunication services to consumers within this city" under Code § 19-470(a);
2. Whether this court's decision in *US West Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 11 P.3d 1054 (App. 2000) erred in holding that the City's public utility tax does not violate Arizona Revised Statutes § 9-582(A) (Supp. 2001); and
3. Whether the City's public utility tax is invalid under Tucson City Charter Chapter IV, § 2, because it imposes transaction privilege taxes at a cumulative rate in excess of two percent.

#### **BACKGROUND**

¶2 Our opinion in *US West* provides a portion of the legal and factual background from which this litigation arises. 198 Ariz. at 518-19, ¶¶ 2-7, 11 P.3d at 1057-58. We supplement it hereafter as necessary.

¶3 After Qwest exhausted its administrative remedies, it brought this action in the tax court for a refund of \$3.35 million paid as public utility taxes over the period November 1, 1997, through April 30, 1999. Before this court rendered its decision in *US West*, the parties filed and argued cross-motions for summary judgment in the tax court.

¶4 This court filed its decision in *US West* on October 24, 2000. On stipulation of the parties, the tax court continued the case on the inactive calendar, and in February 2001 the court denied Qwest's motion for summary judgment and granted the City's. The court later denied Qwest's motion for reconsideration and entered final judgment for the City. Qwest timely appealed.

#### ANALYSIS

##### Double Taxation

¶5 On this appeal where the material facts are not in dispute, we review whether the lower court correctly applied the law. *Blum v. State*, 171 Ariz. 201, 203-04, 829 P.2d 1247, 1249-50 (App. 1992). This type of review is an independent one with no deference to the trial court's conclusions of law. *Id.*

¶6 Qwest correctly points out that the question whether the City's public utility tax under Code § 19-1070(a) constituted double taxation when coupled with the City's transaction privilege tax under Code § 19-470 was not before this court in *US West*. The *US West* court considered and resolved only the question whether the additional 1.5% public utility tax that Code § 19-1070(a)(2)(i) imposes on telecommunication services providers who use any city right-of-way constituted double taxation as compared to the City's public utility tax of 2% on the gross income of telecommunication services providers in general. 198 Ariz. at 524-25, ¶¶31-35, 11 P.3d at 1063-64. Our analytical framework in *US West* nevertheless

controls our resolution of the double taxation contention that Qwest now raises.

¶7 We first address the effect of A.R.S. § 42-11003 (1999), which provides: “[Title 42 of the Arizona Revised Statutes] shall not be construed to require or permit double taxation.” Qwest points out that the City’s transaction privilege tax on the telecommunication services business is part of the City’s version of the Model City Tax Code adopted pursuant to A.R.S. §§ 42-6051 through 42-6055 (1999 and Supp. 2001) and 1988 Ariz. Sess. Laws Ch. 107, § 2(A). Qwest argues that A.R.S. § 42-11003 therefore forbids the court to interpret Code §§ 19-470 and 19-1070(a) in a way that permits them to apply to the same telecommunication services transactions at the same time. We disagree.

¶8 First, contrary to Qwest’s assertion, the City of Tucson does not “derive[] its authority to levy the Transaction Privilege Tax from the Model City Tax Code . . . .” Opening Brief at 14, n. 7. The City’s authority to impose such a tax derives instead from Chapter IV, Section 2 of the Tucson City Charter. *See McCarthy v. City of Tucson*, 26 Ariz. 311, 313-15, 225 P. 329, 330 (1924). *Cf. Buntman v. City of Phoenix*, 32 Ariz. 18, 26, 255 P. 490, 492-93 (1927) (charter adopted by municipal voters is as much a law as one enacted by the legislature, and is the entire organic law of the city).

¶9 More importantly, the restriction in A.R.S. § 42-11003 against statutory constructions that “require or permit double

taxation" applies only to the provisions of Title 42 of the Arizona Revised Statutes. Neither Tucson City Code § 19-470 nor Code § 19-1070(a) forms part of Title 42, and neither section's scope or application depends on any mandate or authorization contained in Title 42. The fact that the City now imposes its transaction privilege tax through language in Code § 19-470 adopted from the Model City Tax Code does not change this. Code § 19-470 remains wholly independent from Title 42.

¶10 Apart from A.R.S. § 42-11003, Qwest reiterates its contention, made and supported at length before the court in *US West*, that "double taxation" is simply "impermissible." *US West* rejected that contention as follows:

¶32 We grant that double taxation is presumed not to be within the intent of a legislative body. *Indus. Comm'n v. Hartford Accident & Indem. Co.*, 61 Ariz. 86, 90, 144 P.2d 548, 550 (1943); *SDC Mgmt. Inc. v. Dep't of Revenue*, 167 Ariz. 491, 500, 808 P.2d 1243, 1252 (App. 1991). We also acknowledge that A.R.S. section 42-11003 (1999), formerly section 42-202, directs the courts not to construe statutes in A.R.S Title 42 "to require or permit double taxation." Contrary to *US West's* analysis, however, neither the cases nor the statute constitutes authority for its underlying thesis that "double taxation" is otherwise fundamentally "impermissible."

. . . .

¶35 The "rule" against "double taxation" is a principle of statutory interpretation. As such, it may be overcome by clear, express statutory language. Here, regardless of whether Tucson Code subsections 19-1070(a)(1) and (2) impose a species of "double taxation," the language of those provisions makes it unmistakably clear that the City intended that

US West and any others who might provide telecommunication services to Tucson consumers using public rights-of-way would pay a full 3.5% public utility tax under the telecommunication services classification. Because that is so, the question of "double taxation" is of no further significance in this litigation.

198 Ariz. at 524-25, 11 P.3d 1063-64 (footnote omitted).

¶11 The Tucson electorate's and its City Council's intent to impose both the transaction privilege tax under Code § 19-470 and the public utility tax under Code § 19-1070(a) on providers of telecommunication services is equally unmistakable. Tucson City Charter Chapter XVII, Section 16, authorizes the City to impose public utility taxes with no upper limit "[n]otwithstanding any other provisions of the Charter of the City of Tucson, and notwithstanding the limitation of the transaction privilege tax to one (1) percent [now two percent] in Chapter IV, § 2 . . . ." Accordingly, as in *US West*, the presumption against "double taxation" is overcome, and the public utility tax does not constitute "impermissible" double taxation.

#### **Violation of A.R.S. § 9-582(A)**

¶12 Before the *US West* court, Qwest contended that Code § 19-1070(a)(2) violated A.R.S. § 9-582(A) because it levied a prohibited "tax . . . on a telecommunications corporation for the use of a public highway to provide telecommunications services" and did not qualify as a "transaction privilege tax . . . on the business of providing telecommunications services" within the exception provided by subsection (A)(1) of § 9-582. In an extensive

analysis, the *US West* court rejected that contention. 198 Ariz. at 520-24, ¶¶ 9-30, 11 P.3d at 1059-63. Qwest now re-urges the arguments it made on that point in *US West*. It also emphasizes certain facts that the *US West* court did not discuss in its opinion, "in order to preserve these issues for further review should the Court not be persuaded that its prior decision was erroneous due to these additional facts." Opening Brief at 19.

¶13 The "additional facts" on which Qwest now relies were before this court when it rendered its decision in *US West*. One such fact consisted of a 1967 article in *The Arizona Daily Star* which related an assistant city attorney's statement that the purpose of the charter change that authorized the public utility tax was "clearly to differentiate the new utility tax from the sales tax and thus uphold the city's right to levy a utility tax in excess of the one percent sales tax." The other "additional fact" was a report of the Tucson City Manager recommending the proposed two percent public utilities tax as part of the funding for the City's 1966-67 budget and stating that the tax was "justified because of the utilities' use of the City's streets and alleys."

¶14 In *US West*, Qwest offered these facts to support its view that the City's public utilities tax was not a permissible "transaction privilege tax" within A.R.S. § 9-582(A)(1). Their probative force on that point was and is so minor that the *US West* court evidently found them unworthy of mention. This is not surprising. The newspaper statement on which Qwest relies

differentiates between the transaction privilege and public utilities taxes only on the basis that the latter was to be excepted from the transaction privilege tax rate limitation to which it would otherwise have been subject. The statement in the Tucson City Manager's report expressed a lay value judgment concerning the justification for the public utilities tax, not a legal opinion concerning its classification within the universe of excise taxes.

¶15 This court concluded that the public utilities tax constituted a "transaction privilege tax" within A.R.S. § 9-582(A)(1) based on considerations expressed at paragraphs 17 through 28 of its opinion. *US West*, 198 Ariz. at 521-23, 11 P.3d at 1060-62. Among these were the language of the statute, charter provisions, and ordinances, and the Arizona case law defining a "transaction privilege tax" as an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction. Central to the court's holding was the following:

¶25 US West nevertheless argues at some length that the City's separate Charter authorizations for its business privilege and public utility taxes belie the view that the public utility taxes imposed under Tucson Code section 19-1070(a) qualify as "transaction privilege taxes." We disagree. Tucson Charter Chapter XVII, Section 16, which authorizes the public utility tax, expressly excepts it from the percentage rate cap by which Chapter IV, Section 2, of the Charter limits the business privilege tax. There would have been no need for that exception if the public utility tax had not been understood as authorizing new and additional transaction privilege taxes on public utility business activi-

ties that would otherwise have fallen within the Charter's Chapter IV, Section 2, percentage rate cap. Unlike *US West*, we find nothing "disingenuous" about the City's position that its business privilege and public utility taxes are both "transaction privilege taxes."

198 Ariz. at 523, 11 P.3d at 1062.

¶16 Qwest nevertheless contends that this construction of A.R.S. § 9-582 would render meaningless the prohibition in subsection (A) against municipal taxes "upon the privilege of engaging in the business of providing telecommunications services," because it would expand the "transaction privilege tax" exemption under subsection (A)(1) to encompass any tax whatsoever on the telecommunications services business. We disagree. Although our opinion in *US West* recognized the common definition of a "transaction privilege tax" as "an excise on the privilege or right to engage in particular businesses within the taxing jurisdiction," 198 Ariz. at 523, ¶24, 11 P.3d at 1062, in Arizona law and practice an excise that qualifies as a true "transaction privilege tax" is one that is imposed on a tax base consisting of the gross income from the taxed business. *Cf. Tower Plaza Invs. Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973), *app. disp.* 414 U.S. 1118 (1974). There is no question that the City's public utilities tax qualifies under that narrower concept of transaction privilege tax.

¶17 Thus understood, our interpretation of A.R.S. § 9-582(A) in *US West* renders no part of that statute meaningless or inoperative. Subsection (A) still prohibits municipal imposition of any tax on the telecommunications services business that does not

constitute a transaction privilege tax. Such prohibited taxes could include net income taxes, excises assessed at fixed amounts per customer or according to the value or extent of telecommunications facilities, and business capitation taxes.

¶18 In its reply brief, Qwest argues for the first time that an uncodified enactment in 1988 Ariz. Sess. Laws Ch. 107, § 2(A) compels the view that either the City's public utilities tax is not a "transaction privilege tax," or it is wholly invalid. The City moved to strike Qwest's references to this enactment from the brief. We denied the motion and permitted the City to file "a supplemental brief addressing the effect of 1988 Ariz. Sess. Laws Ch. 107, § 2(A) and the Model City Tax Code." Order filed February 1, 2002.

¶19 Subsection 2(A) of the enactment in 1988 Ariz. Sess. Laws Ch. 107 provided in relevant part:

Before January 1, 1989 each city and town imposing a transaction privilege tax shall adopt the model city tax code with its choice of model and local options contained in the code.

The enactment provided for its own automatic repeal on July 1, 1992. 1988 Ariz. Sess. Laws Ch. 107, § 3.

¶20 Qwest argues that under this enactment no city or town could exercise its authority to impose or maintain a municipal transaction privilege tax without adopting a version of the Model City Tax Code to accomplish this. It contends that the enactment required cities to repeal all their existing transaction privilege

tax provisions and replace them with Model Code options. Qwest urges that the City's failure to repeal its public utility tax in response to the enactment indicates that it did not regard that tax as a "transaction privilege tax," and that the public utility tax was therefore invalid under § 9-582(A).

¶21 We cannot agree with Qwest's analysis. Contrary to Qwest's implicit thesis, the 1988 enactment contained no language that purported to invalidate pre-existing municipal transaction privilege taxing provisions or require cities or towns to repeal them. Moreover, subsection 2(F) of the enactment provided: "The failure of the [Municipal Tax Code Commission] to approve any amendment or modification [to the municipality's version of the Model Code] shall not be construed to prohibit taxation or exemption of a category, item or activity by any city or town, or changes in administrative procedures or regulations . . . ." <sup>1</sup>

¶22 Qwest cites no authority for the view that 1988 Ariz. Sess. Laws Ch. 107, § 2(A) must be construed to have preempted or invalidated the City's public utility tax. Arizona case law supports the opposite conclusion. In *Jett v. City of Tucson*, 180

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<sup>1</sup> Effective January 1, 1999, the legislature adopted language virtually identical to that of subsection 2(F) as former A.R.S. § 42-6053(D). 1997 Ariz. Sess. Laws Ch. 150, § 144. The law again changed effective July 1, 1999, when the legislature significantly revised A.R.S. § 42-6053 (Supp. 2001). Subsection B of that statute newly provided: "The city or town shall not adopt a modification or amendment of any provision of the model city tax code unless it has been approved by the commission." This amendment does not by its terms apply to pre-existing municipal taxing provisions like Code § 19-1070(a).

Ariz. 115, 121, 882 P.2d 426, 432 (1994), our supreme court recognized that a court cannot find state law preemption of municipal legislation unless a preempting policy clearly exists and the state and local provisions in question actually conflict. If the provisions are "capable of peaceful coexistence," the local provision is valid. *Id.*

¶23 The enactment in 1988 Ariz. Sess. Laws Ch. 107, § 2(A) does not clearly evidence a policy of preempting existing municipal transaction privilege taxes. Further, the enactment's requirement that a municipality imposing transaction privilege taxes adopt the Model City Tax Code and its choice of model and local options does not conflict with the right of a charter city to maintain in force a pre-existing transaction privilege tax that has no corresponding option in the Model Code.

¶24 We reaffirm our holding in *US West* that Code § 19-1070(a)(2) is a "transaction privilege tax" within the exemption provided by A.R.S. § 9-582(A)(1).

#### **Violation of Tucson City Charter Chapter IV, Section 2**

¶25 As it did before the court in *US West*, Qwest contends that if Code § 19-1070(a) imposes a "transaction privilege tax," it violates the two percent rate limitation on transaction privilege taxes imposed by Tucson City Charter Chapter IV, § 2. We disposed of this contention as follows in *US West*:

¶37 US West is mistaken. Charter Chapter XVII, Section 16, expressly permits the City to impose public utility taxes at rates

with no specified upper limit "[n]otwithstanding any other provisions of the Charter of the City of Tucson, and notwithstanding the limitation of the transaction privilege tax to one (1) percent in Chapter IV, section 2 . . . ." As we have pointed out, there would have been no need for those prefatory provisions if the public utility tax had not been understood as authorizing new and additional "transaction privilege taxes" on public utility business activities. The City's Charter, Chapter XVII, Section 16, authorizes the tax imposed by Tucson Code section 19-1070(a)(2). (footnote omitted).

198 Ariz. at 525, 11 P.3d at 1064. Tucson City Charter Chapter XVII, Section 16, likewise authorizes the tax imposed by Code § 19-1070(a)(1).

#### CONCLUSION

¶26 The City's public utility tax under Tucson City Code § 19-1070 does not amount to illegal "double taxation" when coupled with the City's two percent transaction privilege tax on the telecommunication services business under Code § 19-470(a). The City's public utility tax does not violate A.R.S. § 9-582(A). The public utility tax is valid under Tucson City Charter Chapter IV, Section 2, and Chapter XVII, Section 16. For the foregoing reasons, the judgment of the tax court is affirmed.

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James B. Sult, Judge

CONCURRING:

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John C. Gemmill, Presiding Judge

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Jefferson L. Lankford, Judge