2007 WL 5517458
Only the Westlaw citation is currently available.
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24.
Court of Appeals of Arizona,
Division 1, Department T.

BUCKEYE POLLUTION CONTROL CORPORATION, an Arizona municipal corporation, Plaintiff/Appellant,
v.
MARICOPA COUNTY, a political subdivision of the State of Arizona, Defendant/Appellee.

No. 1 CA–TX 05–0011.
|
July 31, 2007.

Appeal from the Arizona Tax Court; Cause No. TX2004–000408; The Honorable Mark W. Armstrong, Judge. AFFIRMED.

Attorneys and Law Firms

Fennemore Craig, P.C. By Paul J. Mooney, Jim L. Wright, Phoenix, Attorneys for Plaintiff/Appellant.

Andrew P. Thomas, Maricopa County Attorney By Michelle N. D'Andrea, Jean W. Rice, Phoenix, Attorneys for Defendant/Appellee.

MEMORANDUM DECISION

HALL, Judge.

***1** ¶ 1 Buckeye Pollution Control Corporation (Taxpayer) appeals from the tax court's grant of summary judgment in favor of Maricopa County (County). The tax court ruled that real property Taxpayer leases to Allied Waste Industries (Arizona), Inc. (Allied Waste) is subject to ad valorem taxes pursuant to Arizona Revised Statutes (A.R.S.) section 35–831 (2000). Taxpayer contends that the real property is municipal property that is exempt from taxation pursuant to Article 9, Section 2(1) of the Arizona Constitution. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 The Town of Buckeye (Buckeye) organized and created Taxpayer on September 2, 1989 as a pollution control corporation pursuant to A.R.S. § 35–801 *et seq.* Taxpayer owns real property located in Maricopa County, specifically tax parcel numbers 401–64–006C, 401–64–008F, 401–64–008G, and 401–64–012C (subject property). It leases the subject property to Allied Waste for use as a landfill serving the southwestern United States.

¶ 3 In 2004, the County assessed and levied $52,242.79 in real property taxes on the subject property for the tax year 2004. Taxpayer sought a declaration under A.R.S. § 42–11005 (2006) to recover the tax paid, asserting that its property was exempt from taxation under Article 9, Section 2(1) of the Arizona Constitution and A.R.S. § 42–11102(A) (Supp.2006). After the County answered Taxpayer's complaint, the parties filed cross-motions for summary judgment.

¶ 4 The tax court ruled that Taxpayer was not a municipal corporation and thus the subject property was not tax-exempt municipal property. This appeal timely followed. We have jurisdiction pursuant to A.R.S. § 12–2101(B) and –120.21(A) (2003).

DISCUSSION

¶ 5 We review the tax court's grant of summary judgment de novo. *Wilderness World, Inc. v. Ariz. Dep't of Revenue,* 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). Likewise, we review de novo interpretations of the Arizona Constitution and statutes. *Univ. Med. Ctr. Corp. v. Ariz. Dep't of Revenue,* 201 Ariz. 447, 450, ¶ 14, 36 P.3d 1217, 1220 (App.2001).

¶ 6 The County contends that Taxpayer's real property is taxable under A.R.S. § 35–831, which provides:

> The [pollution control] corporation and its income and all bonds issued by it and the income therefrom shall be exempt from all taxation in this state, except that property of the corporation shall be subject to all applicable ad valorem taxes. If such property is

> leased, such ad valorem taxes shall be charged to the lessee as fully as if the lessee were the owner of such leased property.

The purpose of the statute is "to provide a means of financing air pollution control facilities in order to meet air quality standards." Hearing on H.B. 2339 Before the Senate Comm. on County & Municipal Affairs, 30th Leg., 2d Reg. Sess. (Ariz.1972) (statement of Mr. James Bush).

¶ 7 Taxpayer contends that, notwithstanding A.R.S. § 35–831, the subject property is constitutionally exempt from taxation pursuant to Article 9, Section 2(1) of the Arizona Constitution, a self-executing provision [1] exempting from taxation "all federal, state, county and municipal property." Therefore, the issue on appeal is whether the subject property qualifies as "municipal property" such that its taxation under A.R.S. § 35–831 violates Article 9, Section 2(1). [2]

***2** ¶ 8 "[A] tax is presumed to be constitutional, and [we] must be satisfied beyond a reasonable doubt that it is unconstitutional in order to so hold." *J.C. Penney Co. v. Ariz. Dep't of Revenue,* 125 Ariz. 469, 474, 610 P.2d 471, 476 (App.1980). The same presumption of constitutionality applies to statutes. *See Chevron Chem. Co. v. Superior Ct.,* 131 Ariz. 431, 438, 641 P.2d 1275, 1282 (1982). Whether property qualifies as tax exempt is a question of law. *Granville Twp. v. Bd. of Assessment Appeals,* 900 A.2d 1012, 1014 (Pa.Commw.Ct.2006).

¶ 9 Initially, we note that Arizona's Constitution and statutes dispel any argument that Taxpayer is a municipal corporation or a municipality. The Arizona Constitution provides that municipal corporations shall be created by the legislature which, by general laws, "shall provide for the incorporation and organization of cities and towns and for the classification of such cities and towns in proportion to population, subject to the provisions of this Article." Ariz. Const. art. 13, § 1; *see generally* William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 60, 801 (rev. ed. 1999) ("Municipal corporations are public corporations created by the legislature for political purposes, with political powers, to be exercised for purposes connected with the public good."). To implement this section, the Arizona Legislature enacted Title 9 procedures for incorporating cities and towns. *See* A.R.S. §§ 9–101, –101.02, and –101.03.

¶ 10 In this case, the Town organized and created Taxpayer, not under Title 9, but pursuant to the procedures in Title 35, which defines a "corporation" as

> any pollution control corporation incorporated by a municipality or county pursuant to the provisions of this chapter. Any such corporation when formed shall be a political subdivision of the state and have only such governmental powers as are set forth in this chapter.

A.R.S. § 35–801(1); *see generally* A.R.S. §§ 35–802 to –810. Moreover, Title 35 defines "municipality" as "any incorporated city or town, including charter cities, in this state in which a corporation may be organized and in which it is contemplated the corporation will function." A.R.S. § 35–801(4). Accordingly, Taxpayer is not a municipal corporation.

¶ 11 Taxpayer nonetheless contends that its property is "municipal property." We disagree. The Arizona Supreme Court rejected a similar contention in *Tucson Transit Authority, Inc. v. Nelson,* in which it determined that the Tucson Transit Authority, established as a corporation by the City of Tucson, was a "public service corporation" rather than a "municipal" or "municipally owned corporation" and was therefore not exempt from taxation pursuant to Article 9, Section 2(1). 107 Ariz. 246, 251–52, 485 P.2d 816, 821–22 (1971). The court held that the transit authority could not be considered a municipally owned corporation in light of the statutory provisions requiring the transit authority be responsible for its debts, vesting title to all property acquired by the transit authority in the authority, and delegating full regulating power to the transit authority's board of directors. *Id.*

***3** ¶ 12 The supreme court's observations regarding the statutory scheme in *Tucson Transit Authority* are equally applicable to pollution control corporations created under § 35–801 *et seq.* A municipality creating a pollution control corporation assumes no liability for the pollution control corporation's debts, A.R.S. § 35–832, the corporation's Board of Directors has full power to regulate the corporation, A.R.S. § 35–805, and title to property purchased by the pollution control corporation vests in that body, A .R.S. §§ 35–806(A)(7), –808, and –822. Only after the pollution control

corporation dissolves does title to the property transfer to the municipality. A.R.S. § 35–808.

¶ 13 The circumstance that Taxpayer is a political subdivision of the state does not alter our analysis. In *Industrial Development Authority of Pima County v. Maricopa County,* 189 Ariz. 558, 944 P.2d 73 (App.1997), the Industrial Development Authority (IDA), a non-profit corporation authorized by Pima County, claimed that it was exempt from the taxation imposed by A.R.S. § 35–741 (1990), a statute whose terms parallel those of A.R.S. § 35–831, because, as a political subdivision of the state, its property was "state" property. Therefore, according to the IDA, § 35–831 was superseded by the constitutional tax exemption granted to state property by Article 9, Section 2(1). *Id.* at 559, 944 P.2d at 74. The court rejected this argument, applying the principle of *expression unius est exlusio alterrius* and reasoning that encompassing all political subdivisions within the scope of Article 9, Section 2(1) would thwart the intent of the constitutional framers to "exclude [ ] from that exemption the property of all other political subdivisions of the state." *Id.* at 559–60, 944 P.2d at 74–75. Likewise, a pollution control corporation is not constitutionally exempt from taxation simply because its existence is statutorily authorized by a county or municipality and it is a political subdivision of the state.

¶ 14 Moreover, Taxpayer's reliance on *Maricopa County v. Fox Riverside Theatre Corp.,* 60 Ariz. 260, 135 P.2d 513 (1943), for the proposition that its property is constitutionally exempt from taxation is misplaced. The defendants in that case were the City of Phoenix and the Fox Riverside Theatre Corporation (Fox), to whom the City leased land for a period of fifty years and on which Fox erected a building that became the property of the City upon completion. Maricopa County instituted an action against the City and Fox to determine whether the building and the leasehold interest were taxable. The supreme court held that the building was tax exempt pursuant to Article 9, Section 2(1) because it was municipal property upon completion. *Id.* at 265, 135 P.2d at 515. However, the court further held that Fox's leasehold interest was not constitutionally exempt from taxation because "the state has the power under our constitution to provide for the assessment and taxation of leasehold interests in municipal property which have been granted to private individuals or corporations." *Id.* at 264–65, 135 P.2d at 514–15 (quoting *Maricopa County v. Fox Riverside Theatre Corp.,* 57 Ariz. 407, 411–12, 114 P.2d 245, 247 (1941)). Unlike the building erected in *Maricopa County v. Fox Riverside Theatre Corp.,* Taxpayer's property is not owned by a municipality. If anything, Taxpayer's argument that its property is constitutionally tax-exempt is weaker than the similar argument by Fox that was rejected by the supreme court.

*4 ¶ 15 We find further support for our holding in the decisions by courts in other states that have upheld statutes imposing ad valorem real property taxes against claims that they violated their respective state constitutions. For example, in *Jardon v. Industrial Development Authority,* the Missouri Supreme Court held that taxation of the industrial development authority's real property did not violate Missouri's constitutional exemption for the property of state, county, and other political subdivisions. 570 S.W.2d 666, 673, 677 (Mo.1978). The court found that the authority was a separate entity from any city, county, or the state based upon the authority's liability for its own debt, its ownership of the property, and the independence of its operations. *Id.* at 670–73. The fact that a county or city must approve the authority's formation did not deprive it of separate entity status or preclude ad valorem taxation. *Id. See generally Opinion of Justices,* 49 So.2d 175, 179–80 (Ala.1950) (finding that industrial development authority was distinct from the city in operations and incurring of debt); *Indus. Dev. Auth. v. Suthers,* 155 S.E.2d 326, 331–32 (Va.1967) (finding that industrial development authority was distinct from the city in operations, incurring of debt, and property ownership).

¶ 16 Taxpayer also asserts that, because A.R.S. § 35–831 shifts the incidence of the tax to the lessee, the tax is invalid because Arizona no longer has a generally applicable possessory interest tax. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. Maricopa County,* 196 Ariz. 173, 177, ¶ 14, 993 P.2d 1137, 1141 (App.1999) (noting that the legislature repealed the statutory scheme imposing a tax on possessory interests effective January 1, 1995). We disagree. The tax imposed pursuant to the statute subjects the property of the corporation to all applicable ad valorem taxes and charges the tax to the lessee of the property. Even though the practical effect of § 35–831 is to impose a possessory interest tax on lessees of pollution control corporations, we perceive no reason why the legislature is not empowered to enact a statute requiring that ad valorem taxes imposed on corporate property be charged to the lessee of that property.[3]

¶ 17 In sum, we conclude that the disputed tax does not violate Article 9, Section 2(1) of the Arizona Constitution

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

because it is not a tax on municipal property. The County thus did not violate the Arizona Constitution in taxing the subject property, and A.R.S. § 35–831 is not unconstitutional as applied to Taxpayer.

CONCLUSION

¶ 18 For the foregoing reasons, we affirm the grant of summary judgment to the County and deny Taxpayer's request for attorneys' fees on appeal.

CONCURRING: SHELDON H. WEISBERG, Presiding Judge and PATRICIA A. OROZCO, Judge.

All Citations

Not Reported in P.3d, 2007 WL 5517458

Footnotes

1 Ariz. Const. art. 9, § 2(12); *see also* Ariz. Const. art. 2, § 32 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.").

2 Because A.R.S. § 35–831 specifically applies to pollution control corporations, we also summarily reject Taxpayer's apparent additional claim that it is *statutorily* exempt from taxation pursuant to A.R.S. § 42–11102(A)(1), which provides:

A. Federal, state, county and municipal property is exempt from taxation, including:

1. Property that is owned by a nonprofit organization but is used by this state or a political subdivision during the entire tax year exclusively for a governmental activity.

3 We also note that Taxpayer asserts in its reply brief that this requirement violates the Uniformity Clause (Ariz. Const. art. 9, § 1) because the tax is not uniformly applied to all lessees of government-owned property. Taxpayer raised this argument for the first time in the tax court during oral argument on the cross-motions for summary judgment. This argument is therefore waived and we will not address it. *Cf. Westin Tucson Hotel Co. v. State Dep't of Revenue,* 188 Ariz. 360, 364, 936 P.2d 183, 187 (App .1997) (a claim raised for the first time in a reply to motion for summary judgment is waived); *see also Valley Nat'l Bank v. Ins. Co. of N. Am.,* 172 Ariz. 212, 218, 836 P.2d 425, 431 (App.1992) (issues raised for first time in reply brief on appeal are waived).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works