

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-050292

08/31/2006

HONORABLE PETER SWANN

CLERK OF THE COURT
S. Brown
Deputy

CIBOLA VISTA SPA AND RESORT LLC

K LAYNE MORRILL

v.

CITY OF PEORIA

STEPHEN M KEMP

UNDER ADVISEMENT RULING

Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment have been under advisement.

The arguments

Plaintiff sells timeshares. Defendant assessed the Peoria city tax on real property sales by speculative builders, pursuant to PCC § 12-416, based on the full gross income Plaintiff derived from its sale of timeshares. This levy was upheld by the municipal hearing officer, who further ordered that Plaintiff be credited for excess taxes paid to the contractor and that late penalties be removed.

Plaintiff argues that the selling price of its timeshares includes not only the price of the improved real property, but numerous amenities for its clients such as furnishings and access to recreational facilities. Relying heavily on *London Bridge Resort, Inc. v. Mohave County*, 200 Ariz. 462 (App. 2001), it concludes that a substantial portion of the purchase price (not naming any particular figure) must be subtracted before calculating the tax on improved real property. Defendant argues that, because this case involves a sales tax rather than a property tax, assessment of the tax on the entire selling price is proper, and further that affidavits signed by the purchasers of the timeshares attest that essentially all of the sales price is for the real property, rather than the personal property, aspect of the timeshare purchase.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-050292

08/31/2006

Application of the speculative builder tax

In principle, Defendant is correct that a sales tax can be based on whatever criterion the taxing authority deems appropriate. To that extent, then, *London Bridge* is inapposite. Here, however, the application of the statutory language favors Plaintiff. The language of PCC § 12-416(a)(1) defines the taxable gross income of a speculative builder as “the total selling price of the sale of improved real property,” and subsection (2) makes clear that the term “improved real property” is limited to real property, not personal property. While the ordinance does not bind the City to the statutory formula imposed on county assessors by A.R.S. § 42-13452 to separate real and non-real property elements of timeshare values, some allocation is required by the limitation of statutory taxing authority to the sales price of the improved real property. Therefore, the finding of the hearing officer that none of the sales price is to be attributed to non-real property is arbitrary and capricious. Plaintiff provides timeshare purchasers with furnishings for their use in each bedroom unit and access to extensive recreational facilities. These appear to be of more than nominal value, and indeed it is hard to imagine anyone renting a unit for a week expecting nothing more than a bare floor. Yet Defendant asserts, apparently based only on the sales affidavits signed by buyers, that they believed these were provided purely gratis. Rather than supposing that the buyers thought they were getting something (use of the furnishings and the recreational facilities) for nothing, it is much easier for the Court to believe that people unlikely for the most part to be familiar with the specialized vocabulary of property law simply did not understand that in the affidavits, personal property was used not with its ordinary meaning, but in contradistinction to real property. Absent a more convincing showing of what buyers in fact believed, the question cannot be resolved in the City’s favor.

Tucson Electric Power v. Department of Revenue, 170 Ariz. 145 (App. 1991), in which the Court of Appeals dealt with taxation of “gross income” from a business in which taxable and non-taxable activities are intertwined, is not relevant here. Unlike the statute in that case, the Peoria ordinance expressly limits the tax to the selling price of the improved real property, not the gross price of intertwined transactions. Thus, it is immaterial how interwoven the real and non-real property aspects of Plaintiff’s business are. It is not sufficient to say that Plaintiff could have avoided the difficulty by separating its sales price into real property and personal property portions. It was under no obligation to do so, and the Court cannot punish it by arbitrarily resolving the resultant ambiguity against it.

On this count, IT IS ORDERED granting summary judgment to Plaintiff, subject to further proceedings to determine the proper allocation of real and personal property elements in the sales price, and denying summary judgment to Defendant.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2005-050292

08/31/2006

Credit for overpayment

The language of PCC § 12-416(c)(3)(b), which is specifically applicable to speculative builders, and not the general language of PCC § 12-250, applies here. That ordinance limits the tax credit to “the amount of privilege taxes paid to this City.” An excess payment not turned over to the City is not a “tax” by the meaning of this ordinance. Plaintiff’s argument would shift the burden of recovering the improperly collected excess away from it onto the City. It was Plaintiff’s obligation, not Defendant’s, to monitor the contractor’s performance and make sure its charges were proper.

IT IS ORDERED granting summary judgment to Defendant, and denying summary judgment to Plaintiff.

Allocation of income and taxes

PCC § 12-416(c)(3)(b) ties the credit for privilege taxes paid by the contractor to the gross income realized and reported from the construction, not to the date of payment of the taxes. The taxes paid by Cibola Vista on its construction are to be offset against the income resulting from the construction for as long as it takes Cibola Vista to fully realize that income. The schedule on which the contractor pays the tax and whether the City thereby enjoys a temporary windfall or suffers a temporary shortage, has no bearing.

IT IS ORDERED granting summary judgment to Defendant, and denying summary judgment to Plaintiff.

Use tax

Timeshare purchasers have the right to use the furnishings provided by Cibola Vista during their stay, but they have no right to modify them, remove them, or replace them. Despite Cibola Vista’s argument that buyers have a $\frac{1}{52}$ interest in fee simple of everything included in the purchase price, including the furnishings, they do not in fact have ownership of the furnishings. The owner will at some point be the CV Condominium Owners Association, but for the purposes of this action, Cibola Vista is the owner that is liable for the use tax.

IT IS ORDERED granting summary judgment to Defendant, and denying summary judgment to Plaintiff.