

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2005-050292

04/09/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
S. Brown  
Deputy

CIBOLA VISTA SPA AND RESORT LLC

K LAYNE MORRILL

v.

CITY OF PEORIA

STEPHEN M KEMP

ELLEN M VAN RIPER

MINUTE ENTRY

10:00 a.m. This is the time set for oral argument on City Of Peoria's Motion For Summary Judgment Re Proper Calculation Of Tax Due and Plaintiff's Motion For Summary Judgment On Amount Of Gross Income Subject To Speculative Builder Tax. Plaintiff is represented by counsel, K. Layne Morrill. Defendant is represented by counsel, Ellen Van Riper.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

Said Motions are argued to the Court.

IT IS ORDERED taking this matter under advisement.

10:30 a.m. Matter concludes.

**LATER:**

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**UNDER ADVISEMENT RULING**

(Plaintiff's Motion For Summary Judgment On Amount Of Gross Income Subject To  
Speculative Builder Tax and Defendant's Motion For Summary Judgment Re Proper  
Calculation Of Tax Due)

The City takes the position that the value of the personal property elements is not to be factored into the calculation because it is a non-deductible cost of doing business rather than an element of what is sold. Cibola Vista excludes the value of the personal property, and also aggregates the value of the one-week interests in each timeshare unit and calculates the selling price of the real property based on the aggregated value.

The Court is of the opinion that Cibola Vista's calculation is flawed because the tax is based on the *selling price* of the real property elements, not on the assessed valuation of the real property.

The fundamental arithmetic involved is as follows:

$$\begin{array}{r} \text{(selling price of real property elements)} \\ + \text{(selling price of personal property elements)} \\ \hline \text{(total selling price of property).} \end{array}$$

Put equivalently,

$$\begin{array}{r} \text{(total selling price of property)} \\ - \text{(selling price of personal property elements)} \\ \hline \text{(selling price of real property elements)} \end{array}$$

Purchasers in the market for a timeshare do not purchase the right to use the property year-round; they purchase it for one week. The revenue Cibola Vista derives from the sale per week of its real property is greater than  $\frac{1}{52}$  the price it could receive from selling the property on an annual basis. In this case, Mr. Loper, Cibola's expert, deducted from the value of the realty a number of costs applicable to the entire selling price. While the proportion of those costs attributable to the personal property elements must be excluded from the calculation of tax, that proportion attributable to the real property elements is included. There is no provision in the statute to exclude from the value of the real property costs attributable to the real property (the City's citation of *Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm'n*, 111 Ariz. 169 (1974), while the case is not truly apposite, at least makes that point). For example, to use purely

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hypothetical numbers, if sixty percent of the selling price is attributable to the realty and forty percent to the personal property, only forty percent of those costs may be deducted, unless a more precise allocation of costs belonging to each of the two elements can be made.

The City's calculation is also flawed. The Court's minute entry of August 31, 2006 makes it clear that the personal property has some non-nominal value that must be subtracted from the total price to calculate the amount subject to the speculative builder tax. The City's argument that the costs borne by Plaintiff in providing comfortable furnishings and access to recreational facilities are no different than the costs borne by a builder of luxury homes with access gates and swimming pools does not address the question. The furnishings and the recreational amenities have value, not only in the abstract sense, but real value to the purchasers. They buy the complete package, real and personal property alike. The amenities offered by Cibola Vista are personal services designed to provide the customer with value added over and above the value of the bare real property.

The personal property received by the purchaser is conceptually distinguishable from those costs, such as marketing and overhead, incurred by the seller in making the timeshares available for purchase without conferring a direct benefit upon the purchaser. It is also distinguishable from incentives such as free airline tickets used to attract customers to a sales presentation rather than as another personal property element of the package the purchaser is buying. The Court reiterates, under the terms of the speculative builder tax ordinance, the City must exclude those elements of personal property received by the purchaser of the timeshare as part of the selling price of the timeshare.

It appears that Cibola Vista may believe it is not obligated to cooperate with the City to determine the proper breakdown of the total sales revenue based upon the Court's August 31, 2006 minute entry. This is incorrect. The City has the right to tax the real property portion of the total price; it follows that the City must be able to determine the personal property portion in order to perform the subtraction, and that Cibola Vista must provide it with the data necessary to do so. While the Court concluded that Cibola Vista is not obligated to separate the price charged to the purchaser into real and personal portions, it is obligated to do so at this stage of the litigation to permit computation of the tax. If Cibola either cannot do so or maintains its position that it is not so obligated to do so, the Court may then revisit whether any reasonable estimate made by the City should be considered.

Therefore, IT IS ORDERED denying both Plaintiff's Motion For Summary Judgment On Amount Of Gross Income Subject To Speculative Builder Tax and Defendant's Motion For Summary Judgment Re Proper Calculation Of Tax Due.