

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2008-000412

01/30/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

TOWN OF GILBERT

ANJA K WENDEL

v.

PEDERSON/ B V T GLIBERT ASSOCIATES, et al. SCOTT H ZWILLINGER

UNDER ADVISEMENT RULING

(Defendants' Motion To Dismiss)

The only issue raised by the parties is whether A.R.S. § 29-706(D) is a statute of limitations or a statute of repose. The section reads, "If a member receives a distribution with respect to his interest in a limited liability company in violation of this chapter [i.e., § 29-601 *et seq.*] or an operating agreement, he is liable to the limited liability company for a period of six years thereafter for the amount of the wrongful distribution." Statutes of limitations do not run against the government, absent express language to the contrary. *In re Diamond Benefits Life Ins. Co.*, 184 Ariz. 94, 96 (1995). While no state appellate decision has addressed the question, a federal district court decision indicates that statutes of repose do apply to the government. *Warfield v. Alaniz*, 453 F.Supp.2d 1118, 1130-31 (D.Ariz. 2006). As to this particular statute, this is a matter of first impression, and turns not only on whether it is a statute of limitations or a statute of repose, but on its specific language.

"Because the divestiture of jurisdiction is a serious matter, before a party can claim that an act or statute has the effect of divesting jurisdiction which has regularly and fully vested, the law in favor of such divestment must be clear and unambiguous.' Any doubt is resolved in favor of retention of jurisdiction." *Daou v. Harris*, 139 Ariz. 353, 356 (1984) (quoting *State v. Villados*, 520 P.2d 427, 430 (Haw. 1974)). The common law principle of *nullum tempus occurrit*

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regi (“time does not run against the king”) prevails in Arizona. *Diamond Benefits Life, supra* (citing *City of Bisbee v. Cochise County*, 52 Ariz. 1, 18 (1938)). Thus, once having vested, jurisdiction in cases brought by the government is not divested by the passage of time, unless the legislature has clearly and unambiguously so decreed. Importantly, A.R.S. § 29-706(D) does not contain express language of extinguishment or general prohibition, as do the statute at issue in *Warfield, supra* at 1129-30 (A.R.S. § 44-1009: “A claim for relief with respect to a fraudulent transfer or obligation under this article **is extinguished**”, bold type added by the District Court), and the statutes interpreted by the Illinois Court of Appeals in *Freeman v. Williamson*, 890 N.E.2d 1127, 1134 (Ill. App. 2008) (6 Del.C. § 17-607(c): “Unless otherwise agreed, a limited partner who receives a distribution from a limited partnership shall have no liability ... after the expiration of three years”) and the Oregon Supreme Court in *Shasta View Irrigation Dist. v. Amoco Chemicals Corp.*, 986 P.2d 536, 542-43 (Or. 1993) (O.R.S. § 30.905(1): “a product liability civil action may not be brought for any death, personal injury or property damage ... that occurs more than eight years after the date on which the product was first purchased,” which the court interpreted as an extinguishment clause, *supra* at 542). Rather, it imposes an affirmative liability for six years, but is silent about what happens once the six years have elapsed. Silence is not extinguishment or prohibition.

The power to tax is one of the most fundamental powers of the government, and the duty of the government to insure that all citizens contribute their fair share of taxes is “imperative.” *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 576 ¶ 34 (1998). In the absence of legislative intent expressed as clearly and unambiguously as in Section 44-1009 that A.R.S. § 29-706(D) is to limit the power of the government to recover unpaid taxes, the Court declines to so construe it, regardless of how it is characterized.

The argument raised exclusively in the Reply that to allow this action disturbs constitutionally protected vested property rights is fundamentally flawed. If A.R.S. § 29-706(D) is a statute of limitations, or if it is a statute of repose but does not bar claims by the government, then the property could only vest subject to such claims. As Defendants have no vested right to the former J&R Holdings assets free of claims for unpaid taxes, the constitutional guarantee is not infringed.

Therefore, IT IS ORDERED Defendants’ Motion To Dismiss is denied.